DOCKET

No. 07-290
Vide 07-335
Title: District of Columbia, et al., Petitioners
v.
Dick Anthony Heller
Docketed: September 5, 2007
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (04-7041)
Decision Date: March 9, 2007
Rehearing Denied: May 8, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 16 2007	Application (07A51) to extend the time to file a petition for writ of certiorari from August 6, 2007 to September 5, 2007, submitted to The Chief Justice.
Jul 18 2007	Application (07A51) granted by The Chief Justice extending the time to file until September 5, 2007.
Sep 4 2007	Petition for a writ of certiorari filed. (Response due October 5, 2007)
Sep 28 2007	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for petitioners.
Oct 3 2007	Consent to the filing of amicus curiae briefs in support of either party received from counsel for respondents.
Oct 4 2007	Brief of respondent Dick Anthony Heller in opposition filed.
Oct 5 2007	Brief amicus curiae of American Civil Rights Union filed.
Oct 5 2007	Brief amici curiae of American Academy of Pediatrics, et al. filed.
Oct 5 2007	Brief amici curiae of New York, Hawaii, Illinois, and Maryland filed.
Oct 23 2007	Reply of petitioners District of Columbia, et al. filed. (Distributed)
Oct 24 2007	DISTRIBUTED for Conference of November 9, 2007.
Nov 15 2007	DISTRIBUTED for Conference of November 20, 2007.
Nov 20 2007	Petition GRANTED limited to the following question: Whether the following provisions - D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 - violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?
Dec 28 2007	Consent to the filing of amicus briefs in support of either or neither party, conditioned on a seven day written notice to counsel for petitioners, received from counsel for the petitioners.
Jan 3 2008	Consent to the filing of amicus briefs in support of either party only, conditioned on a seven day written notice to counsel for respondent, received from counsel for the respondent.
Jan 4 2008	Brief of petitioners District of Columbia, et al. filed.
Jan 4 2008	Joint appendix filed.
Jan 4 2008	Letter from counsel for the petitioners proposing a Lodging of Council Session Transcripts as legislative history of the laws at issue, and copies of local municipal laws regulating the firing of guns in the 19th Century as history of regulation of firearms in the District of Columbia.
Jan 11 2008	Brief amicus curiae of Members of Congress filed.

Jan 11 2008	Brief amici curiae of Brady Center to Prevent Gun Violence, et al. filed.
Jan 11 2008	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed.
Jan 11 2008	Brief amici curiae of Professors of Linguistics and English Dennis E. Baron, Richard W. Bailey, and Jeffrey P. Kaplan filed.
Jan 11 2008	Brief amici curiae of American Academy of Pediatrics, et al. filed.
Jan 11 2008	Brief amici curiae of Violence Policy Center, et al. filed.
Jan 11 2008	Brief amici curiae of Major American Cities, et al. filed.
Jan 11 2008	Brief amici curiae of Law Professors Erwin Chemerinsky and Adam Winkler filed.
Jan 11 2008	Brief amici curiae of DC Appleseed Center for Law and Justice, et al. filed.
Jan 11 2008	Brief amici curiae of American Jewish Committee, et al. filed.
Jan 11 2008	Brief amici curiae of Former Department of Justice Officials filed.
Jan 11 2008	Brief amicus curiae of American Bar Association filed.
Jan 11 2008	Brief amici curiae of New York, et al. filed.
Jan 11 2008	Brief amicus curiae of Professors of Criminal Justice filed.
Jan 11 2008	Brief amici curiae of National Network to End Domestic Violence, et al. filed.
Jan 11 2008	Brief amici curiae of American Public Health Association, et al. filed.
Jan 11 2008	Brief amicus curiae of United States filed.
Jan 11 2008	Brief amici curiae of District Attorneys filed.
Jan 11 2008	Brief amici curiae of Jack N. Rakove, et al. filed.
Jan 11 2008	Brief amici curiae of City of Chicago, et al. filed.
Jan 22 2008	SET FOR ARGUMENT ON Tuesday, March 18, 2008
Jan 25 2008	Record received from the U.S.C.A. for the D.C. Circuit. (1 box)
Jan 28 2008	CIRCULATED.
Jan 28 2008	Record from the U.S.D.C. for the District of Columbia Circuit is electronically filed.
Feb 4 2008	Brief amicus curiae of American Legislative Exchange Council filed. (Distributed)
Feb 4 2008	Brief of respondent Dick Anthony Heller filed. (Distributed)
Feb 4 2008	Brief amicus curiae of GeorgiaCarry.Org, Inc. filed. (Distributed)
Feb 5 2008	Brief amicus curiae of Congress of Racial Equality filed. (Distributed)
Feb 7 2008	Brief amici curiae of Disabled Veterans for Self-Defense and Kestra Childers filed. (Distributed)
Feb 7 2008	Brief amici curiae of Alaska Outdoor Council, et al. filed. (Distributed)
Feb 7 2008	Brief amicus curiae of Association of American Physicians and Surgeons, Inc. filed. (Distributed)
Feb 7 2008	Brief amici curiae of Buckeye Firearms Foundation LLC, et al. filed. (Distributed)
Feb 7 2008	Brief amici curiae of Criminologists, Social Scientists, Other Distinguished Scholars, et al. filed. (Distributed)
Feb 7 2008	Brief amicus curiae of Foundation for Free Expression filed. (Distributed)
Feb 7 2008	Brief amicus curiae of Libertarian National Committee, Inc. filed. (Distributed)
Feb 7 2008	Brief amici curiae of National Rifle Association, et al. filed. (Distributed)
Feb 7 2008	Brief amicus curiae of Rutherford Institute filed. (Distributed)
Feb 8 2008	Brief amici curiae of 55 Members of United States Senate, et al. filed. (Distributed)
Feb 8 2008	Brief amicus curiae of Virginia1774.org filed. (Distributed)

Feb 8 2008	Brief amicus curiae of Paragon Foundation, Inc. filed. (Distributed)
Feb 8 2008	Brief amicus curiae of Second Amendment Foundation filed. (Distributed)
Feb 8 2008	Brief amici curiae of Dr. Suzanna Gratia Hupp, D.C., et al. filed. (Distributed)
Feb 8 2008	Brief amicus curiae of 126 Women State Legislators and Academics filed. (Distributed)
Feb 8 2008	Brief amici curiae of Pink Pistols and Gays and Lesbians for Individual Liberty filed. (Distributed)
Feb 8 2008	Brief amicus curiae of Grass Roots of South Carolina, Inc. filed. (Distributed)
Feb 8 2008	Brief amici curiae of Major General John D. Altenburg, Jr., et al. filed. (Distributed)
Feb 8 2008	Brief amici curiae of Cato Institute, et al. filed. (Distributed)
Feb 8 2008	Brief amicus curiae of Jews for the Preservation of Firearms Ownership filed. (Distributed)
Feb 11 2008	Brief amicus curiae of American Center for Law and Justice filed. (Distributed)
Feb 11 2008	Brief amici curiae of Maricopa County Attorney's Office, et al. filed. (Distributed)
Feb 11 2008	Brief amici curiae of State Firearm Associations filed. (Distributed)
Feb 11 2008	Brief amici curiae of Bruce L. Benson, et al. filed. (Distributed)
Feb 11 2008	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. (Distributed)
Feb 11 2008	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 11 2008	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument, and, in the alternative, for enlargement of time for oral argument filed.
Feb 11 2008	Brief amici curiae of Texas, et al. filed. (Distributed)
Feb 11 2008	Brief amicus curiae of President Pro Tempore of the Senate of Pennsylvania, Joseph B. Scarnati, III filed. (Distributed)
Feb 11 2008	Brief amici curiae of Former Senior Officials of Department of Justice filed. (Distributed)
Feb 11 2008	Brief amicus curiae of Goldwater Institute filed. (Distributed)
Feb 11 2008	Brief amicus curiae of Academics for the Second Amendent filed. (Distributed)
Feb 11 2008	Brief amicus curiae of Center for Individual Freedom filed. (Distributed)
Feb 11 2008	Brief amicus curiae of Institute for Justice filed. (Distributed)
Feb 11 2008	Brief amici curiae of International Law Enforcement Educators and Trainers Association, et al. filed. (Distributed)
Feb 11 2008	Brief amici curiae of Gun Owners of America, Inc., et al. filed. (Distributed)
Feb 11 2008	Brief amicus curiae of Retired Military Officers filed. (Distributed)
Feb 11 2008	Brief amicus curiae of Heartland Institute filed. (Distributed)
Feb 11 2008	Brief amicus curiae of Foundation for Moral Law filed. (Distributed)
Feb 11 2008	Brief amici curiae of Southeastern Legal Foundation, Inc., et al. filed. (Distributed)
Feb 11 2008	Brief amicus curiae of Mountain States Legal Foundation filed. (Distributed)
Feb 11 2008	Brief amici curiae of Jeanette M. Moll, Ohio Concealed Carry Permitholders, et al. filed. (Distributed)
Feb 11 2008	Brief amicus curiae of American Civil Rights Union filed. (Distributed)
Feb 11 2008	Brief amici curiae of Organizations and Scholars Correcting Myths and Misrepresentations etc. filed. (Distributed)
Feb 11 2008	Brief amicus curiae of National Shooting Sports Foundation, Inc. filed. (Distributed)
Feb 11 2008	Brief amici curiae of International Scholars filed. (Distributed)

Feb 25 2008	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument, and, in the alternative, for enlargement of time for oral argument DENIED.
Feb 25 2008	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 28 2008	Motion for leave to file amicus brief out of time filed by Wisconsin. (Distributed)
Mar 5 2008	Reply of petitioners District of Columbia, et al. filed. (Distributed)
Mar 14 2008	Letter, dated March 12, 2008, received from counsel for the petitioners. (Distributed).
Mar 17 2008	Motion for leave to file amicus brief out of time filed by Wisconsin GRANTED.
Mar 18 2008	Argued. For petitioners: Walter Dellinger, Washington, D.C. For United States as amicus curiae: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. For respondent: Alan Gura, Alexandria, Va.

PETITION
FOR
WRIT OF
CERTIORARI

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Supreme Court, U.S.
FILED

SEP 04 2007

OFFICE OF THE CLERK

No. 07- 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns.

PARTIES TO THE PROCEEDING

Petitioners District of Columbia and Mayor Adrian M. Fenty were defendants-appellees below. Mayor Fenty was substituted automatically for the previous Mayor, Anthony A. Williams, under Federal Rule of Appellate Procedure 43(b)(2).

Respondent Dick Anthony Heller was the only plaintiff-appellant below held by the court of appeals to have standing. The other plaintiffs-appellants were Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 478 F.3d 370 and is reprinted in the Appendix (App.) at 1a. The decision of the United States District Court for the District of Columbia is reported at 311 F. Supp. 2d 103 and reprinted at App. 71a.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2007. The court denied *en banc* review on May 8, 2007. App. 89a. On July 18, 2007, the Chief Justice extended the time for filing this petition to September 5, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Militia Clauses of the Constitution, art. I, § 8, cls. 15-16, empower Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "[t]o provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Relevant provisions of the laws of the District of Columbia are reprinted in the Appendix.

STATEMENT OF THE CASE

This petition seeks review of an extraordinary decision by a divided panel of the D.C. Circuit that the District of Columbia's longstanding law banning handguns but authorizing private possession of rifles and shotguns violates the Second Amendment. This is the first time in the Nation's history that a federal appellate court has invoked the Second Amendment to strike down any gun-control law. Absent review by this Court, the District of Columbia—a densely populated urban locality where the violence caused by handguns is well-documented—will be unable to enforce a law that its elected officials have sensibly concluded saves lives.

This Court's intervention is required because the court below avowedly created a split with nine other federal courts of appeals and the highest local court of the District of Columbia over the central meaning of the Second Amendment. These other courts have held, contrary to the decision below, that the Amendment does not protect a right to own a gun for purely private uses.

The decision below is mistaken in three fundamental respects. First, as the overwhelming majority of circuit decisions conclude, the text and history of the Second Amendment establish that it protects weapons possession and use only in connection with service in state-regulated militias. That conclusion is supported by *United States v. Miller*, 307 U.S. 174 (1939), in which this Court unanimously directed that the Second Amendment "must be interpreted and applied" in view of its "obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces." *Id.* at 178. Second, even if there is a right to possess and use weapons unrelated to militia service, the Second Amendment restricts only federal interference with state-regulated militias and state-recognized gun rights. Legislation enacted by the District does not implicate the Amendment. Third, in any event, the District law at issue in this case does not infringe whatever right the Second Amendment could be read to protect, because it is eminently reasonable to permit private ownership of other types of weapons, including shotguns and rifles, but ban the easily concealed and uniquely dangerous modern handgun.

1. Handguns and other dangerous weapons have long been regulated in the Nation's capital. As early as 1858, the City of Washington made it unlawful "to carry or have concealed about their person any dangerous weapon, such as . . . [a] pis-

tol," and Congress itself so decreed in 1892. Act of Nov. 18, 1858, Laws of the City of Washington 418 (W.B. Webb ed., 1868); Act of July 13, 1892, ch. 159, § 1, 27 Stat. 116. Local legislation that Congress enacted in 1932 and extended in 1943 prohibited possession of machine guns and sawed-off shotguns and required licenses for carrying pistols outside the home or a place of business. Act of July 8, 1932, ch. 465, § 4, 47 Stat. 650, 651; Act of Nov. 4, 1943, ch. 296, 57 Stat. 586. Later police regulations required registration of pistols and other firearms. D.C. Police Regs. art. 50-55 (1968); *see Maryland & District of Columbia Rifle & Pistol Ass'n v. Washington*, 442 F.2d 123, 125 & nn.4-6 (D.C. Cir. 1971).

In 1976, soon after being granted home rule authority, the Council of the District of Columbia concluded that existing laws did not adequately curb gun-related violence. As a consequence, it enacted a comprehensive new law regulating firearms. At issue here is a provision generally prohibiting the registration, and thus the possession, of any pistol—defined as a gun "originally designed to be fired by use of a single hand," D.C. Code § 7-2501.01(12)—that was not registered in the District prior to the effective date of the law. D.C. Code § 7-2502.02; *see* D.C. Code §§ 7-2501.01, 7-2502.01. As Mayor Walter Washington emphasized in signing the law, it "does not bar ownership or possession of shotguns and rifles." Statement of Hon. Walter E. Washington Upon Approving Bill 1-164 (July 23, 1976), App. 116a; *see* D.C. Code §§ 7-2501.02, 7-2502.02.[1]

The Council banned handguns in a targeted effort to prevent needless death and injury from that class of weapons. Among other things, the District responded to the chilling regularity with which handguns were taking the lives of children: of the "[c]lose to 3,000 accidental deaths . . . caused by firearms" annually, the Council found, "1/4 of the victims are under 14 years of age." Comm. on the Judiciary and Criminal Law, Council of the District of Columbia, Report on Bill No. 1-164 (Apr. 21, 1976), App. 101a-02a. Women were also suffering disproportionately from handgun violence: in 1974, every rapist in the District who used a firearm to facilitate his crime used a handgun. Evening Council Sess. Tr., 11:4-5, June 15, 1976.

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[1] Resolutions to disapprove the Council's 1976 act were introduced in the House of Representatives but were unsuccessful. *See McIntosh v. Washington*, 395 A.2d 744, 747 (D.C. 1978).

The Council also found that the handgun is a criminal's weapon of choice. It cited national statistics showing that "handguns are used in roughly 54% of all murders, 60% of robberies, 26% of assaults." App. 102a. Most strikingly, the Council responded to the fact that handguns, to the near exclusion of other weapons, were being used to kill police, accounting for "87% of all murders of law enforcement officials" nationwide. *Id.* Handguns were found to be particularly deadly tools when used by criminals: "A crime committed with a pistol is 7 times more likely to be lethal than a crime committed with any other weapon." *Id.*

These dangers were even more pronounced in the District. Within its "totally urban" environment, handguns were used in a stunning 88% of armed robberies and 91% of armed assaults. App. 102a, 104a. In 1974, handguns were responsible for 155 of the record 285 murders in the District. App. 102a.

Faced with the evidence that handguns pose a particularly serious threat to public safety, the Council chose to ban handguns because it concluded that less restrictive regulation would be ineffective. Since handguns present a singular danger, the solution was to stop the introduction of more handguns into the District. As the handgun ban's principal opponents conceded, *stolen* guns enable criminal gun violence. Afternoon Council Sess. Tr. 35-36, May 3, 1976 (Councilmember Barry). Ready availability also had made handguns "easy for juveniles to obtain." App. 103a. The Council thus decided to ban handguns in an effort to "freez[e] the pistol . . . population within the District of Columbia." App. 104a.

The choice of a ban further reflects the recognition that the threat of handgun violence extends well beyond the premeditated acts of criminals. The Council noted that guns "are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities," and that many "murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion, or intoxication." App. 102a.

The Council concluded that existing regulations imposed on handguns and penalties associated with handgun-related crimes were insufficient to combat handgun violence, because handguns themselves are inherently dangerous. The very premise of the legislation was thus that "the ultimate resolution of the problems of gun created crimes and gun created accidents . . . is the elimination of the availability of handguns." Afternoon Council Sess. Tr. 3:22-24, May 18, 1976. As the Council summed up, "the bill reflects a legislative decision" that handguns "have no legitimate use in the purely urban environment of the District of Columbia." App. 112a.

2. Respondent Dick Anthony Heller and five other District residents challenged the constitutionality of the handgun ban under the Second Amendment. Heller was the only plaintiff to have applied to register a handgun, and his application was denied. Complaint at 2-4. The complaint alleges that he resides in a "high-crime" neighborhood and that the handgun ban prevents him from "possess[ing] a functional handgun . . . for self-defense within his home." *Id.* at 2-3. Heller owns both handguns and long guns already but stores them outside the District. *Id.* at 3. He did not allege an intent to use any firearm for any militia-related purpose.

The district court granted the District's motion to dismiss the complaint. "[I]n concert with the vast majority of circuit courts," the district court concluded that this Court's decision in *Miller* "reject[s] an individual right to bear arms separate and apart from Militia use." App. 75a. The district court also noted that this Court "has twice been presented with the opportunity to re-examine *Miller* and has twice refused to upset its holding." App. 75a (citing *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980), and *Burton v. Sills*, 394 U.S. 812 (1969)).

3. A divided panel of the court of appeals reversed in an opinion written by Senior Judge Silberman and joined by Judge Griffith. After holding that only Heller had standing to bring a pre-enforcement constitutional challenge, App. 12a, the majority turned to the meaning of the Second Amendment.

First, the majority aligned itself with the "camp" of "those who argue that the Second Amendment protects a right of individuals to possess arms for private use." App. 14a. It rejected the contrary view "that the Amendment protects only a right of the various state governments to preserve and arm their militias" or a right of individuals to possess and use weapons in service of such militias. App. 14a-15a. The majority acknowledged that its decision was in direct conflict with the holdings of the First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits and the District of Columbia Court of Appeals. *See* App. 15a-16a & nn.4-6.

Second, the majority rejected the District's argument that the Second Amendment is not implicated by local legislation for a federal district, legislation that has no possible impact on the states or their militias. App. 45a-48a. The majority thought this contention precluded by the fact that District residents enjoy the protections of the Bill of Rights. App. 45a.

Third, the majority held that the handgun ban violates its construction of the Second Amendment. It concluded that, although the "protections of the Second Amendment are subject to . . . reasonable restrictions," the District's handgun ban is not a reasonable restriction. App. 51a. The majority dismissed as "frivolous" the District's contention that its regulatory scheme is reasonable because residents still have access to many other weapons, such as shotguns and rifles. App. 53a. The majority adopted a categorical rule that any prohibition on the possession of any type of protected "Arm" is *per se* unconstitutional, without regard to the reasonableness of the regulatory scheme as a whole: "Once it is determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." App. 53.[2]

Judge Henderson dissented. In her view, *Miller*—"the only twentieth-century United States Supreme Court decision that analyzes the scope of the Second Amendment"—compels the conclusion that "the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States." App. 57a, 60a. She also emphasized that the purpose of the Second Amendment was to guard against a perceived threat to the states from the federal government. App. 65a. She noted that if the District's militia is treated as a state militia, then the Second Amendment would not apply because it "does not apply to gun laws enacted by the States." App. 66a n.13.

4. The court of appeals denied the District's petition for rehearing *en banc*, although four of the ten active judges

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[2] The majority also addressed two other provisions that do not require extensive discussion here. First, D.C. Code § 22-4504(a) requires a license to "carry[]" a pistol. The majority acknowledged that the Second Amendment permits governments to deny firearms to felons and the insane, as well as to test for firearm proficiency and responsibility. App. 53a; *see Lewis*, 445 U.S. at 65 n.8 (felons). The majority, however, read D.C. Code § 22-4504(a) to forbid anyone from moving even a lawfully possessed firearm within the home. App. 54a. The majority held that, to the extent individuals have a constitutional right to possess a firearm, they have the ancillary right to move it about their homes. App. 54a. That holding was a corollary to the majority's holding on the handgun ban and thus does not require separate treatment.

Second, D.C. Code § 7-2507.02 requires firearms in homes to be "unloaded and disassembled or bound by a trigger lock or similar device." The majority read this provision to forbid loading, assembling, and unlocking even a lawfully possessed firearm for use in self-defense. App. 55a. On that reading, it held the provision unconstitutional. The District does not, however, construe this provision to prevent the use of a lawful firearm in self-defense.

(Randolph, Rogers, Tatel, and Garland, JJ.) would have granted it. App. 87a. The court subsequently stayed issuance of the mandate pending review by this Court. App. 84a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF NINE CIRCUITS AND THE HIGHEST COURTS OF THE DISTRICT AND NUMEROUS STATES.

The court of appeals held that the Second Amendment protects a right that extends to private uses of guns unconnected with participation in a well-regulated militia. App. 44a. The court expressly acknowledged that its decision conflicts with those of nearly every other circuit and creates a conflict within the District of Columbia itself. App. 15a-16a & nn.4-6. Every regional federal court of appeals except one has now addressed the question. *See* App. 15a n.4.[3] Out of all those decisions, only the decision below invalidates a gun-control law. Because the decision drastically departs from the mainstream of American jurisprudence, it warrants review.

Since *Miller* was issued in 1939, the settled consensus of the courts of appeals has been that the right to keep and bear arms does not protect those who fail to allege participation in an organized state militia. In *United States v. Parker*, 362 F.3d 1279 (10th Cir. 2004), for example, the Tenth Circuit held that "an individual has a right to bear arms, but only in direct affiliation with a well-organized state-supported militia." *Id.* at 1284. The First, Third, Eighth, and Eleventh Circuits are in accord.[4] Similarly emphasizing that the Second Amendment's purpose is to protect state militias, the Fourth, Sixth, Seventh, and Ninth Circuits have held that only states may enforce the Second Amendment.[5]

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[3] Although it has not described precisely how it construes the Second Amendment, the Second Circuit has held that it creates no "fundamental" right. *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984).

[4] *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992); *United States v. Wright*, 117 F.3d 1265, 1274 (11th Cir. 1997).

The District of Columbia Court of Appeals has also held that the Second Amendment does not protect a private right and, indeed, has upheld the same statutory scheme at issue here. *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987). It refused to reconsider that holding following the decision below. *Andrews v. United States*, 922 A.2d 449, 456-57 (D.C. 2007). As a result, the decision creates an intra-jurisdictional conflict as well as a circuit conflict.

The only federal appellate decision supporting some material aspect of the ruling below is *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). In *Emerson*, the Fifth Circuit in dicta stated that the Second Amendment protects a right to keep and bear arms unrelated to militia service. *Id.* at 260; *see id.* at 272-74 (Parker, J., specially concurring). The court did not, however, strike down the federal gun-control law at issue, upholding it instead as reasonable. *Id.* at 261-62.[6]

State courts seldom construe the right secured by the Second Amendment because of their uniform agreement that the Amendment does not bind the states, as this Court held unanimously more than a century ago in *Presser v. Illinois*, 116 U.S. 252 (1886).[7] The court below nevertheless asserted that at least seven state courts "have held that the Second Amendment protects an individual right." App. 16a n.6. That assertion, however, is seriously exaggerated. Each of the cited decisions simply mentions the Second Amendment in passing, with no analysis.[8] In the main, they discuss *state* constitutional provisions. State courts that have in fact separately addressed the meaning of the Second Amendment have rejected the approach used by the court below.[9]

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[5] *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (*per curiam*); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2002).

[6] Some later dissents have adopted the *Emerson* analysis. *See. e.g. Nordyke v. King*, 319 F.3d 1185, 1192 (9th Cir. 2003) (Gould, J., dissenting); *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing).

[7] *See, e.g., Fife v. State*, 31 Ark. 455 (1876); *In re Application of Rameriz*, 226 P. 914 (Cal. 1924); *Brewer v. State*, 637 S.E.2d 677 (Ga. 2006); *State v. Mendoza*, 920 P.2d 357 (Haw. 1996); *Kellogg v. City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State v. Amos*, 343 So. 2d 166 (La.

Only this Court can resolve these conflicts about the central meaning of the Second Amendment, a question that it has not directly addressed since *Miller* and that is quite literally a matter of life and death. The decision of the court below is a marked departure from the reasoned consensus of other courts, and that departure was the basis for overruling the District's sensible legislative judgment on how best to protect children,

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1977); *State v. Goodno*, 511 A.2d 456 (Me. 1986); *Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137 (Md. Ct. Spec. App. 2005); *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976); *State v. Keet*, 190 S.W. 573 (Mo. 1916); *Harris v. State*, 432 P.2d 929 (Nev. 1967); *State v. Sanne*, 364 A.2d 630 (N.H. 1976); *Burton v. Sills*, 248 A.2d 521 (N.J. 1968); *People v. Morrill*, 475 N.Y.S.2d 648 (N.Y. App. Div. 1984); *State v. Kerner*, 107 S.E. 222 (N.C. 1921); *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993); *Ex parte Thomas*, 97 P. 260 (Okla. 1908); *State v. Kessler*, 614 P.2d 94 (Or. 1980); *Mosby v. Devine*, 851 A.2d 1031 (R.I. 2004); *Masters v. Texas*, 685 S.W.2d 654 (Tex. Ct. App. 1985); *Wisconsin v. Hopkins*, 706 N.W.2d 704 (Wis. Ct. App. 2005); *Mecikalski v. Office of the Atty. Gen.*, 2 P.3d 1039 (Wyo. 2000).

[8] *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. App. 1988); *Brewer v. Commonwealth*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *State v. Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *State v. Nickerson*, 247 P.2d 188, 192 (Mont. 1952); *Stillwell v. Stillwell*, 2001 WL 862620, at *4 (Tenn. Ct. App. July 30, 2001); *State v. Anderson*, 2000 WL 122218, at *7 n.3 (Tenn. Crim. App. Jan. 26, 2000); *State v. Williams*, 148 P.3d 993, 998 (Wash. 2006); *Rohrbaugh v. State*, 607 S.E.2d 404, 412 (W. Va. 2004).

[9] *See, e.g.*, *Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905); *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980).

police officers, and other potential victims of gun violence in an urban environment.

II. THE DECISION BELOW IS WRONG IN THREE RESPECTS.

Review is also warranted because the ruling below is wrong on the merits. The court of appeals erred in (A) its characterization of the nature of the Second Amendment right (which is linked to state militias), (B) its understanding of the scope of the right (which protects against federal interference with state militias and state gun laws), and (C) its conclusion that the right, however it might be construed, is infringed by the District's law (which is targeted at the special dangers created by handguns and allows the possession of rifles and shotguns). Each error independently requires reversal.

A. The Right Protected by the Second Amendment Is Limited to Weapons Possession and Use in Connection With Service in State-Regulated Militias.

The court below erred in rejecting the longstanding and nearly unanimous view of other courts that any right guaranteed by the Second Amendment may be exercised only in connection with service in a state-regulated militia.

1. The Amendment's text compels this interpretation. The opening clause expressly relates the right to keep and bear arms to the need for a "well regulated Militia." Such a force is said to be "necessary to the security of a free State." The word "Militia" naturally refers to the state-regulated military forces envisioned in the Militia Clauses of the Constitution, art. I, § 8, cls. 15-16. A militia that is "well regulated" is properly disciplined. *See Miller*, 307 U.S. at 179 (citizens enrolled for military discipline).

Contrary to the view of the court of appeals, which considered the second clause of the Second Amendment in isolation, the first clause is not precatory surplusage merely "announcing the desirability of a well regulated militia." App. 34a. The Framers gave this language careful attention, revising it several times, and considered it essential to the Amendment as a whole. *See The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 169-81 (Neil H. Cogan ed., Oxford Univ. Press 1997).

Further, the phrase that defines the "right of the people"—"to keep and bear Arms"—was widely defined with a specifically military connotation. *See, e.g.*, The Declaration of Independence para. 28 (U.S. 1776) ("He has constrained our fellow citizens taken captive on the high seas to bear arms against their country . . . ."); Mass. Const., Pt. I, Art. XVII ("The people have a right to keep and to bear arms for the common defense."); N.C. Decl. of Rights, Art. XVII ("The People have a Right to Bear Arms, for the Defense of the State . . . ."). *See generally* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 618-21 (2000) (finding "overwhelmingly dominant" contemporaneous uses of "bear arms" to imply military use).

Thus, using the common language of the time, "[t]he whole sentence looks to military matters." Garry Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995, at 63. All the words of the short text are interrelated; none should be considered extraneous. *See* David T. Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Keep and Bear Arms,"* 22 Law & Hist. Rev. 119, 154-57 (2004) (discussing eighteenth century modes of legislative drafting).

In *Miller*, this Court recognized the Amendment's military cast. The Court saw the "obvious purpose" to be to ensure the effectiveness and continuation of the state militias. It held that, absent proof that "possession or use" of a firearm "could contribute to the common defense" or have a reasonable relationship to the preservation or efficiency of the militias, a firearm—there, a short-barreled shotgun—is not an "Arm" protected by the Second Amendment. 307 U.S. at 178.

That same analysis logically applies to every term in the Amendment. If the "Arms" it protects must relate to the preservation and efficiency of a well regulated militia, then it follows that those "Arms" must be kept and borne for those purposes in order for the Amendment to afford protection. Indeed, far from focusing on the word "Arms" alone, the *Miller* Court emphasized that the Amendment in its entirety—the "declaration *and* guarantee"—must be interpreted with these purposes in view. *Id.* (emphasis added).

The court of appeals, by contrast, erred when it stripped "keep and bear Arms" of its obvious military character, for example, by defining "bear" in isolation, then turning to the word "keep" to justify its conclusion that the Second Amendment protects more than a right to "Arms" for militia purposes. App. 23a. Especially given the text of the Amendment as a whole, the more sensible conclusion is that the right "to keep . . . Arms" is a right to keep the firearms one "bears" in connection with service in the militia.

The court also emphasized that guns were used near the time of the Founding for private purposes. App. 23a-27a. That is true, but a non sequitur. There is no persuasive textual reason to believe that the Amendment protects such uses.

2. Nor is there a basis in history, as the reasons for the Second Amendment's adoption and the debates of the Founders also confirm that the court of appeals erred.[10] Before the Constitution was adopted, the various state militias had proven to be an ineffective national fighting force. *See* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309, 337-44 (1998). The new nation's vulnerability to

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[10] *See generally* Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford Univ. Press 2006); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22 (1984); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 126-46 (2000).

internal military strife was realized in 1786, when an uprising of disgruntled farmers led by Captain Daniel Shays "threatened a full-scale civil war" in Massachusetts, with some state militia units taking the side of the rebels against the state before the uprising was finally put down. *See* Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 Chi.-Kent L. Rev. 195, 211 (2000). By the time the constitutional convention began the following spring, "Shays's Rebellion helped convince many of the need for a new constitution with a strong national military." *Id.* at 212. Accordingly, the Framers provided that the national government would have a professional army and also gave Congress important powers over state militias. U.S. Const. art. I, § 8, cls. 15-16; *see Perpich v. Dep't of Defense*, 496 U.S. 334, 340 (1990).

The Militia Clauses were denounced by Anti-Federalist delegates and produced a "storm of violent opposition" at state ratifying conventions. Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 185 (1940); *see* 3 *Records of the Federal Convention of 1787*, at 330-31, 385, 387, 388 (Max Farrand ed., Yale Univ. Press 1937) (1911). Anti-Federalists feared that the Constitution would enable the federal government, whether by design or neglect, to disarm or do away with the militias, which had been exclusively creatures of state law prior to the Constitution. *See* 3 John Elliot, *Debates in the Several State Conventions on the Adoption of the Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 378-88 (2d ed., 1836); *see also* Articles of Confederation art. VI ("every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered"); R. Don Higginbotham, *The Federalized Militia: A Neglected Aspect of Second Amendment Scholarship*, 55 Wm. & Mary Q. 39, 40 (1998). The Anti-Federalists' concern was to eliminate the possibility that "the authority to arm and to discipline the militia was exclusively federal." *Wright*, 117 F.3d at 1273.

James Madison actively participated in the Virginia ratifying convention, trying to reassure the delegates that state militias would not be disarmed by Congress acting under the new Constitution's Militia Clauses. *See* 3 Elliot, *supra*, at 378-88. Soon after, in drafting the first version of the Second Amendment, Madison closely tracked language adopted by that convention to address this concern. *Compare id.* at 659 ("17th" and "19th" paragraphs of Virginia's proposed amendments), *with* Cogan, *supra*, at 169 (Madison's draft). He did not use language proffered by the New Hampshire ratifying convention and by dissenters in the Pennsylvania and Massachusetts conventions that would have explicitly recognized a right to arms for personal uses, unrelated to participation in the militia and to the security of the states. *See id.* at 181-83.[11]

Significantly, all remarks recorded in Congress's debate on the Amendment related to military service; none pertained to any private use of weapons. *Id.* at 185-91; *see* Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 961, 995 (1975). In particular, members of the House debated a conscientious-objector clause, contained in Madison's draft, providing that "no person religiously scrupulous of bearing arms, shall be compelled to render military service." Cogan, *supra*, at 170, 185-91. Although this clause did not survive, its initial inclusion supports the conclusion that the drafters understood the Amendment as a whole to relate to military service. Indeed, the clause's use of "bear[] arms" in a clearly military sense shows that the same sense was meant for those words in the Amendment as enacted.

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[11] The Pennsylvania dissenters, for instance, opposed the new Constitution in part because it failed to guarantee that "the people have a right to bear arms for the defence *of themselves* and their own state, or the United States, *or for the purpose of killing game*; and no law shall be passed for disarming the people *or any of them*, unless for crimes committed, or real danger of public injury from individuals." The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents (Dec. 18, 1787) (emphasis added). The court of appeals construed the language of the Second Amendment as if the dissenters' language had been selected.

3. The court of appeals' construction of the Second Amendment is, moreover, inconsistent with the greater context in which it was adopted and the Nation's subsequent experience. Although the common law has long protected the right to self-defense, the use of guns has always been subject to broad regulation. The most significant regulation of firearms in the eighteenth century, at a time of high concern about military preparedness, more often required than prohibited the possession of firearms—the states in the exercise of their military authority required members of their militias to own and present arms. *See* Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 508-09 (2004); *Miller*, 307 U.S. at 179-82; *see also* Act of May 2, 1792, ch. XXVIII, 1 Stat. 264 (second federal Militia Act). But that obligation and any concomitant right to own a gun were frequently conditioned on an oath of loyalty, as the states commonly forbade possession of arms by those unwilling to swear their allegiance. *See* Cornell & DeDino, *supra*, at 506-07 (citing Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31; Act of Apr. 1, 1778, ch. LXI, § 5, 1777-1778 Pa. Laws 123, 126).

Despite the need for a readily armed citizenry evidenced by the militia laws, state laws regulated gun possession and uses. *See id.* at 510-12. For example, Massachusetts prohibited Boston citizens from keeping loaded firearms in their homes. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218 (providing for fine and forfeiture for anyone keeping a loaded firearm in "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building"). Pennsylvania and Delaware passed acts prohibiting the firing of guns in cities and towns. Act of Feb. 9, 1750, ch. CCCLXXXVIII, 1750-1751 Pa. Laws 108; Act of Feb. 2, 1812, ch. CXCV, 1812 Del. Laws 522.

In the next century, as concerns about military preparedness waned and fears of violent crime grew, state legislatures began to regulate weapons more heavily. By the time of the Civil War, the City of Washington and the states of Alabama, Indiana, Ohio, and Virginia had banned concealed weapons. *See* Act of Nov. 18, 1858, Laws of the City of Washington 418; Act of Feb. 1, 1839, no. 77, 1839 Ala. Laws 67; Act of Feb. 10, 1831, ch. XXVI, § 58, 1831 Rev'd Laws of Ind. 180, 192; Cornell & DeDino, *supra*, at 513-14 (citing Act of Mar. 18, 1859, 1859 Ohio Laws 56; Act of Feb. 2, 1838, 1838 Va. Acts ch. 101, 76). Several states, like Tennessee, went further, banning entirely the sale of any concealable weapon, including all pistols "except such as are used in the army and navy of the United States, and known as the navy pistol." Act of Jan. 27, 1838, ch. 137, 1837-1838 Tenn. Pub. Acts 200; *see* Act of Apr. 1, 1881, no. XCVI, 1881 Acts of Ark. 191; Act of Dec. 25, 1837, 1837 Ga. Laws 90.

Federal regulation of gun possession and use was added in the twentieth century. High-profile gang killings led to the perception of an epidemic of gun violence. In 1934, Congress passed the National Firearms Act, the statute at issue in *Miller*, which required gun owners to register their firearms with the federal government, and required licensing for machine guns, sawed-off shotguns, silencers, and concealable weapons other than pistols or revolvers. Act of June 26, 1934, ch. 757, 48 Stat. 1236 (amended version at 26 U.S.C. §§ 5801-5872 (1994)). Congress continued to regulate firearms throughout a century that witnessed the political assassinations of the 1960s and the violence of later decades, passing the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (current version at 18 U.S.C. §§ 921-928 (1994)), the Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536, and the (now expired) assault-weapons ban of 1994, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110101, 108 Stat. 1796, 1996.

The debate over the proper extent and limits of gun control legislation has thus for the most part remained where it belongs—in state and federal legislatures and city council chambers. The courts occasionally have stepped in—*see Nunn v. State*, 1 Ga. (1 Kel.) 243 (1846); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822)—but in the main the debate has been understood to involve not a protected right in the constitutional sense but an interest for legislatures to weigh against countervailing interests.

Not until 2001, in *Emerson*, did any federal appellate court endorse the view that the Second Amendment protects a right to firearms unrelated to militia service. And it was not until 2007, well past the Amendment's bicentennial anniversary, that any of the courts of appeals used that view of the Second Amendment to strike down a statute. Judicial understandings had long been settled, and for good reason. The court below set out a view that wears the trappings of a bona fide legal theory, but it distorts both the words of the Amendment and the plain intent of the Founders. It should be rejected.

Contrary to the view of the court below, the Amendment under the proper interpretation is not a "dead letter." App. 13a. It remains, as the Framers intended, a bulwark for state militias against undue federal interference. *See* Carl T. Bogus, *What Does the Second Amendment Restrict? A Collective Rights Analysis*, 18 Const. Comment. 485, 493-94 (Winter 2001) (discussing how Second Amendment was raised in opposition to post-Civil War attempt to prohibit militias in former Confederate states). To be sure, the Amendment rarely need be invoked today, but that is because, as is true with the neighboring Third Amendment, the government rarely takes action that may violate it.

B. Laws Limited to the District of Columbia Do Not Violate the Second Amendment.

Even if the Second Amendment were read to protect a right to possess and use guns for private purposes, the court of appeals independently erred in concluding that the Second Amendment limits legislation enacted exclusively for the District of Columbia. The fact that the Second Amendment was particularly designed to limit federal interference with state authority explains why its principles do not apply to state and local restrictions on guns. It similarly explains why the purposes of the Second Amendment are not implicated by laws limited to the District.

In 1886, this Court in *Presser* held that the Second Amendment "is a limitation only upon the power of Congress and the National government." 116 U.S. at 265. That holding is consistent with what the *Miller* Court later recognized as the "obvious purpose" underlying this particular Amendment, and it remains valid today.[12] States remain free to regulate arms within their boundaries so long as they do not thereby deprive the United States of the ability to obtain the assistance of an armed citizenry in time of need. *Id.*

The same conclusion applies to local laws passed by the District government or even to federal laws that apply only to the federal seat. Legislation limited to the District can pose no threat to the interests the Second Amendment was enacted to protect. The District is the very "seat of the Government of the United States," U.S. Const. art. I, § 8, cl. 17, and one of the few places where Congress and the District government as its delegate may exercise "all the legislative powers which a state may exercise over its affairs." *District of Columbia v. Carter*, 409 U.S. 418, 429 (1973) (quoting *Berman v. Parker*, 348 U.S.

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[12] *See, e.g.*, *Bach v. Pataki*, 408 F.3d 75, 84 & n.22 (2d Cir. 2005) (joining "five . . . sister circuits" in holding that the Second Amendment "imposes a limitation on only federal, not state, legislative efforts"); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-70 (7th Cir. 1982) (rejecting argument that "*Presser* is no longer good law"). Although this Court after *Presser* has invoked the Fourteenth Amendment to apply various provisions of the Bill of Rights against the states, it has refused to endorse a wholesale and mechanical application of the entire Bill of Rights. *See Adamson v. California*, 332 U.S. 46, 67 (1947).

26, 31 (1954)); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953); *see* D.C. Code §§ 1-201.01 *et seq.*

There is no evidence that those in the state ratifying conventions who expressed a desire for an amendment limiting the national government's authority to regulate the keeping and bearing of arms were the least bit concerned with any gun regulations that Congress might enact to carry out its responsibilities over the federal enclave that was to serve as the seat of the new national government. Nor is there evidence that the first Congress intended to limit its ability to restrict weapons in that area. Indeed, the decision to establish a seat for the federal government was precipitated by an incident in 1783 in which disgruntled, armed soldiers surrounded the State House in Philadelphia, leading the Continental Congress to flee. Kenneth R. Bowling, *The Creation of Washington D.C.: The Idea and Location of the American Capital* 30-34, 76 (1991); *see* The Federalist No. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961) ("complete authority over the seat of government" necessary because without it "the public authority might be insulted and its proceedings be interrupted"). Having looked to the District as a safe haven from armed insurrectionists, the Framers had no reason to limit local legislative authority to control weapons within the District to less than the authority a state would have.

It is no answer that, as the court of appeals noted, this Court has held that certain constitutional provisions apply directly to the District as if it were effectively an extension of the national government. App. 37a n.13. The court of appeals erred in its assumption that decisions from distinguishable contexts apply equally to the Second Amendment. This Court has considered, for instance, how the Seventh Amendment right to trial by jury in civil suits and the guarantee in Article III against diminishment of judicial compensation apply to the District. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974); *O'Donoghue v. United States*, 289 U.S. 516 (1933). There is no suggestion, however, that such provisions were, like the

Second Amendment, designed to limit federal interference with state authority. Because the Second Amendment was animated by concerns peculiar to the exercise by Congress of national rather than local power, it does not constrain local legislative authority in the District. Accordingly, the court erred even if the Second Amendment protects a right to possess and use weapons for private purposes.

C. Under Any View of the Second Amendment, the District's Law, Which Permits Ownership of Rifles and Shotguns But Bans Handguns, Does Not Infringe the Right to Keep and Bear Arms.

Finally, even if the court of appeals were correct about the nature of the right protected by the Second Amendment, the District's law would not infringe that right. A law that bans handguns but permits private ownership of rifles and shotguns does not deprive anyone of the right to keep and bear Arms, however that right is construed. The court below rejected this conclusion as "frivolous" and held categorically that a ban on any type of "Arm" is necessarily invalid under the Second Amendment. App. 53a. That holding is insupportable.

1. Over a century ago this Court explained that the Bill of Rights "embod[ies] certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising *from the necessities of the case*." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (emphasis added). "Thus . . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Id.* at 281-82. Because the District allows its residents to own other types of firearms and because easily concealed handguns are involved in a substantially and demonstrably disproportionate number of murders, accidents, and suicides, the District's handgun ban, well-founded on "the necessities of the case," does not infringe any right to own firearms for non-militia-related use.

The court of appeals nominally recognized that gun-control laws are constitutional if they constitute "reasonable restrictions" on the exercise of the right. App. 51a. But the court never inquired into the justifications for the handgun ban, instead flatly declaring that *any* ban of *any* type of "Arm" can never amount to a "reasonable restriction," regardless of the circumstances. App. 53a. The conclusion that a handgun ban is *per se* invalid is unsupported by the jurisprudence of this Court or state courts that have considered similar questions.[13]

2. Whatever the outer limits of "reasonable regulation" under the Second Amendment, the District's laws are well within the core of permitted regulation and come nowhere close to disarmament of residents. The District's overwhelming interest in reducing death and injury caused by handguns outweighs respondent's asserted need to own a particular *type* of weapon that presents unique dangers to innocent persons—a handgun—rather than other weapons such as rifles and shotguns. The District's Council recognized that murders, robberies, and assaults are all more likely to be committed with the handgun than with any other weapon. App. 102a. It found that a "crime committed with a pistol is 7 times more likely to be lethal than a crime committed with any other weapon." App. 102a. During 1974 alone, handguns were responsible for 155 of the record 285 murders and all rapes involving firearms in the District. *Id.*; Evening Council Sess. Tr., 11:4-5, June 15,

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[13] State courts construing their respective constitutions "overwhelmingly have recognized that the right is not infringed by reasonable regulation by the state." *Benjamin v. Bailey*, 662 A.2d 1226, 1233 (Conn. 1995); *see also* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683 (2007) (analyzing state cases and concluding that challenges to laws on Second Amendment grounds should be subject to a "reasonableness" standard). Those courts have sustained similar restrictions as reasonable. *See, e.g.*, *Benjamin*, 662 A.2d at 1226; *Arnold*, 616 N.E.2d at 173; *Robertson v. City & County of Denver*, 874 P.2d 325, 328 & nn.15-16 (Colo. 1994); *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 273 (Ill. 1984); *State v. LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990).

1976. The Council had a manifestly reasonable basis to conclude that handguns are uniquely dangerous weapons, and nothing in the Second Amendment gives courts authority to override the judgment of the legislature simply because they may disagree with it.

The District is hardly alone in its assessment of handguns. Alongside Washington, the country's three largest cities all have local laws banning handguns or tightly regulating their possession and use.[14] Given their jurisdiction-specific needs and policy preferences, states have adopted a variety of means to address the particular dangers that handguns pose. For instance, some states have waiting periods for handgun purchases and limit the number that can be purchased per month; require background checks or permits for those purchasing handguns; have design safety standards for handguns; and have concealed-carry laws most obviously applicable to handguns.[15]

Other nations have reached the same considered conclusion as the District. "[M]ost industrialized countries strictly control civilian access to handguns and allow the carrying of handguns for personal protection only under very restrictive conditions . . . ." Wendy Cukier & Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47s* 144 (2006). Great Britain has banned possession of handguns since 1997. Firearms (Amendment) Acts, 1997, chs. 5, 64. Other countries like Australia, Canada, Denmark, Finland, Japan, Luxembourg, New Zealand, and Sweden similarly ban handguns or grant permits in only exceptional cases. *See*

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[14] *E.g.*, Chicago Mun. Code §§ 8-20-040, 8-20-050(c); L.A. Mun. Code ch. V, art. 5, §§ 55.14, 55.16, 55.18; N.Y.C. Admin. Code § 10-131; N.Y.C. Rules tit. 38, ch. 5; N.Y.C. Local Laws No. 30, 31 (July 27, 2006).

[15] *See* Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* (2006), *available at* http://www.lcav.org/library/reports_analyses/National_Audit_Total_8.16.06.pdf.

David Hemenway, *The Public Health Approach to Reducing Firearm Injury and Violence*, 17 Stan. L. & Pol'y Rev. 635, 638 (2006) (citing United Nations, *International Study on Firearm Regulation* (1998)).

3. The Council's legislative judgment that a handgun ban was necessary and appropriate to ensure public safety was amply supported and is entitled to deference. That judgment remains valid today, as the most credible social science research confirms. Substantial evidence of the special risks posed by handguns makes banning them reasonable, even if there is a Second Amendment right to own guns. Significantly, every one of the demonstrable harms caused by handguns exists even when the gun owner is generally law-abiding and responsible.

First, handguns are particularly vulnerable to theft and thus to falling into the hands of criminals. Far more handguns than other firearms are stolen annually, at a rate in the hundreds of thousands per year. Caroline W. Harlow, U.S. Dep't of Justice, Bureau of Justice Statistics, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders* 1-3 (Special Rep. Nov. 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fuo.pdf; Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearms, Crime, and Justice: Guns Used in Crime* 3 (July 1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf. It is also clear that increased lawful ownership of handguns increases the incidence of theft. *See* Philip J. Cook *et al.*, *Regulating Gun Markets*, 86 J. Crim. L. & Criminology 59, 81 (1995).

Inmates report and statistics demonstrate that the handgun is their "preferred firearm." Harlow, *supra*, at 1-3. Handguns are the weapon most likely to be used in a street crime. Although only a third of the Nation's firearms are handguns, they are responsible for far more killings, woundings, and crimes than all other types of firearms combined. Zawitz, *supra*, at 2. Eighty-seven percent of all crime guns are handguns. Craig Perkins, U.S. Dep't of Justice, Bureau of Justice Statistics, *Na-*

tional Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime 3 (Special Rep. Sept. 2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf.

Handguns pose particular dangers to police officers performing their duties, including executing warrants and pursuing felons. Of the 55 police officers feloniously killed in 2005, 42 were killed by handguns. *See* Federal Bureau of Investigation, *Uniform Crime Report—Law Enforcement Officers Killed and Assaulted* at Table 28 (2005), *available at* http://www.fbi.gov/ucr/killed/2005/table28.htm. In short, handguns are a widely available means of wreaking death and destruction in a civilian population with tragic efficiency.

Second, all too often, handguns in the heat of anger turn domestic violence into murder. Seventy-two percent of females killed in firearm homicides in 2004 were killed by handguns. Violence Policy Center, *When Men Murder Women: An Analysis of 2004 Homicide Data* at 3 (Sept. 2006), *available at* http://www.vpc.org/studies/wmmw2006.pdf. People who live in houses with firearms, particularly handguns, are 2.7 times more likely to die in a homicide, and much more likely to die at the hands of a family member or intimate acquaintance than people who do not. *See* Arthur L. Kellermann *et al.*, *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993); *see also* Linda E. Saltzman *et al.*, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043 (1992) (finding that firearms frequently escalate domestic violence to lethal violence).

Third, handguns cause accidents, frequently involving children. The smaller the weapon, the more likely a child can use it, and children as young as three years old are strong enough to fire today's handguns. David Hemenway, *Private Guns, Public Health* 32 (2004). Every year, the majority of people killed in handgun accidents are under the age of 24, including dozens of children under the age of 14. *See* National Center for Health Statistics, *Trend C Table 292: Deaths for*

282 Selected Causes at 1888 (2006), *available at* http://www.cdc.gov/nchs/data/statab/gm292_3.pdf.

Fourth, handguns are easy to bring to schools, where their concealability and capacity to fire multiple rounds in quick succession make them especially dangerous. In urban areas, as many as 25% of junior high school boys carry or have carried a gun. Jack M. Bergstein *et al.*, *Guns in Young Hands: A Survey of Urban Teenagers' Attitudes and Behaviors Related to Handgun Violence*, 41 J. Trauma 794 (1996). In the recent Virginia Tech shooting, a single student with two handguns discharged over 170 rounds in nine minutes, killing 32 people and wounding 25 more. Reed Williams & Shawna Morrison, *Police: No Motive Found*, Roanoke Times, April 26, 2007, at A1.

Fifth, handguns enable suicide. The District's handgun ban was associated with a sharp decline in suicides, and the District's overall, youth, and firearms-related suicide rates have been the lowest in the Nation. Colin Loftin *et al.*, *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991); *see* National Center for Injury Prevention and Control, WISQARS Injury Mortality Reports, 1999-2004, *available at* http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (interactive database). Handguns pose a higher suicide risk than other firearms; indeed, purchasing a handgun correlates to a doubled risk that the buyer will die in a homicide or a suicide. *See* Hemenway, *Private Guns*, *supra*, at 41; Peter Cummings *et al.*, *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 Am. J. Pub. Health, 974, 976–77 (1997).

4. The District's decision to address these handgun-specific problems by banning the private possession of handguns was more than reasonable, because handgun bans work. Controlled research demonstrates a significant relationship between handgun ownership in particular and violent crime. A study of the District's handgun ban concluded that it coincided

with an abrupt decline in firearm-caused homicides in the District but no comparable decline elsewhere in the metropolitan area. Loftin, *supra*. More recently, researchers found that a 10% increase in handgun ownership increases the homicide rate by 2%. *See* Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1095-98 (2001). Indeed, other countries have had success with handgun bans and near-bans. Cukier & Sidel, *supra*, at 178-205; *cf.* Franklin E. Zimring & Gordon Hawkins, *Crime Is Not the Problem: A Reply*, 69 U. Colo. L. Rev. 1177, 1198 (1998) ("We know of no way for the United States to move toward a homicide rate even fifty percent higher than that of Australia or Canada without serious attempts to restrict the availability and use of handguns.").

The Council had good reason to conclude that less restrictive measures were insufficient and would continue to be so. App. 104a. Safety mechanisms, while helpful, can prove technically inadequate, and compliance rates with mandatory safety measures are spotty. *See* Cynthia Leonardatos *et al.*, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 Conn. L. Rev. 157, 169-70, 178-80 (2001).

Furthermore, there is no doubt that the handgun ban saves lives in the home where safe-storage policies and trigger locks would not alone prevent misuse, either because an enraged gun user is determined to circumvent the safeguards or because of a technical failure or accident. Studies also demonstrate that many "serious criminals often buy rather than steal their guns," and most guns are used close to where they are purchased, which means that regulating the local market for guns is a vital first step in reducing gun deaths in the District.[16] *See*

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[16] As Mayor Washington recognized, "no system of firearms control can be fully effective without appropriate controls at the regional and national level." App. 116a. But just as "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical of Oklahoma, Inc*, 348 U.S.

Garen J. Wintemute, *Where the Guns Come from: The Gun Industry and Gun Commerce*, 12 Future of Children 54, 62-64 (2002); *see also* Philip J. Cook & James A. Leitzel, *"Perversity, Futility, Jeopardy": An Economic Analysis of the Attack on Gun Control*, 59 Law & Contemp. Probs. 91, 94, 107-08 (1996) (explaining why *ex ante* regulation of handguns in particular is a qualitatively superior approach to *ex post* penalties for deviant gun use).

Respondent Heller wants to keep a handgun for self-defense. Complaint at 3. The straightforward answer is that he may lawfully possess a rifle or shotgun to protect himself. Although the handgun ban limits the choice of gun owners, "the barriers thereby created do not significantly interfere with th[e] right [to bear arms]." *Robertson*, 874 P.2d at 333. Indeed, Heller himself owns long guns but chooses to keep them outside the District. Complaint at 3. At least some in the gun community recognize that the portability and concealability of handguns suit them for carrying outside the home, but that other weapons are better suited to self-defense in the home. *E.g.*, Dave Spaulding, *Shotguns for Home Defense: Here's How to Choose and Use the Most Effective Tool for Stopping an Attack*, Guns & Ammo, Sept. 2006, at 42; Clint Smith, *Home Defense*, Guns Magazine, July 2005, at 50.

Handguns, by contrast, are uniquely dangerous, and having a gun in the home actually makes it far *more* likely that its inhabitants will die in a homicide or suicide. Kellermann, *supra*; Arthur L. Kellermann *et al.*, *Suicide in the Home in Relation to Gun Ownership*, 327 New Eng. J. Med. 467 (1992). Criminal gun use is far more common than successful uses of guns in self-defense. Hemenway, *Private Guns*, *supra*, at 58-59, 64-78. The thesis that armed victims deter crime by raising the cost to the rationally calculating criminal (*see, e.g.*, John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-to-*

483, 489 (1955), a local legislature cannot be faulted for addressing only that part of a nationwide problem over which it has power.

Carry Concealed Handguns, 26 J. Legal Stud. 1 (1997)) has been debunked (*see, e.g.*, Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193 (2003); *see also* Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. Legal Stud. 209 (1998)).

5. Without even considering the reasons supporting the Council's legislative judgment—let alone providing appropriate deference—the court of appeals concluded that none of these concerns matters at all. It asserted summarily that "[o]nce it is determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." App. 53a. That holding is insupportable. The court misread *Miller* as standing for the proposition that because a handgun is an "Arm[]," the District could not outlaw it. App. 48a-49a. While holding that it is necessary for the weapon in question to be an "Arm[]" in order for the Second Amendment to be implicated, 307 U.S. at 178, *Miller* nowhere suggested that if a sawed-off shotgun had been such an "Arm[]," that would have been sufficient to render the statute at issue unconstitutional. In confusing the necessary with the sufficient, the court of appeals committed a basic logical error.

The view of the court below is also particularly coldhearted. It holds that despite the fact that District residents can defend themselves and their homes with rifles and shotguns, the District is powerless to fight murder, assault, and rape by banning the one weapon that is overwhelmingly used to commit them. No other provision of the Bill of Rights even arguably requires a government to tolerate serious physical harm on anything like the scale of the devastation worked by handguns. *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (state may regulate speech "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"); *Maryland v. Buie*, 494 U.S. 325 (1990) (Fourth Amendment does not require endangering safety of law enforcement officers); *New York v. Quarles*, 467 U.S. 649 (1984) (same for

Fifth Amendment). "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Having a handgun, whether in the home or outside it, comes at the expense of the safety of those who may be victims. Whatever right the Second Amendment guarantees, it does not require the District to stand by while its citizens die.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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SEPTEMBER 4, 2007

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 7, 2006 Decided March 9, 2007

No. 04-7041

SHELLY PARKER, et al.,
APPELLANTS

v.

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 03cv00213).

Alan Gura argued the cause for appellants. With him on the briefs were *Robert A. Levy* and *Clark M. Neily, III*.

Greg Abbott, Attorney General, Attorney General's Office of State of Texas, *R. Ted Cruz*, Solicitor General, *Troy King*, Attorney General, Attorney General's Office of State of Alabama, *Mike Beebe*, Attorney General, Attorney General's Office of the State of Arkansas, *John W. Suthers*, Attorney General, Attorney General's Office of the State of Colorado, *Charles J. Crist, Jr.*, Attorney General, Attorney General's Office of the State of Florida, *Thurbert E. Baker*, Attorney General, Attorney General's Office of the State of Georgia, *Michael A. Cox*, Attorney General, Attorney General's Office of the State of Michigan, *Mike Hatch*, Attorney General, Attorney General's Office of the State of Minnesota, *Jon Bruning*, Attorney General, Attorney General's Office of the State of Nebraska, *Wayne Stenehjem*, Attorney General, Attorney General's Office of the State of North Dakota, *Jim Petro*, Attorney General, Attorney General's Office of the State of Ohio, *Mark L. Shurtleff*, Attorney General, Attorney General's Office of the State of Utah, and *Patrick J. Crank*, Attorney General, Attorney General's Office of the State of Wyoming, were on the brief for *amici curiae* States of Texas, et. al. in support of appellants.

Don B. Kates and *Daniel D. Polsby* were on the brief for *amici curiae* Professors Frederick Bieber, et al. and organization *amici curiae* Second Amendment Foundation, et al.

Stefan Bijan Tahmassebi was on the brief for amicus curiae Congress of Racial Equality, Inc. in support of appellants seeking reversal.

Peter J. Ferrara was on the brief for *amicus curiae* American Civil Rights Union in support of appellants.

Robert Dowlut was on the brief for *amicus curiae* National Rifle Association Civil Rights Defense Fund in support of appellants seeking reversal.

Todd S. Kim, Solicitor General, Office of Attorney General for the District of Columbia, argued the cause for appellees. With him on the brief were *Robert J. Spagnoletti*, Attorney General, *Edward E. Schwab*, Deputy Solicitor General, and *Lutz Alexander Prager*, Assistant Attorney General.

Ernest McGill, pro se, was on the brief for *amicus curiae* Ernest McGill in support of appellees.

Thomas F. Reilly, Attorney General, Attorney General's Office of Commonwealth of Massachusetts, *Glenn S. Kaplan*, Assistant Attorney General, *J. Joseph Curran, Jr.*, Attorney General, Attorney General's Office of the State of Maryland, *Zulima V. Farber*, Attorney General, Attorney General's Office of the State of New Jersey, were on the brief for *amici curiae* Commonwealth of Massachusetts, et al. in support of appellees. *John Hogrogian*, Attorney, Corporation Counsel's Office of City of New York, and *Benna Ruth Solomon*, Deputy Corporation Counsel, Office of the Corporation Counsel of the City of Chicago, entered appearances.

Andrew L. Frey, *David M. Gossett*, *Danny Y. Chou*, Deputy City Attorney, Office of the City Attorney of the City and County of San Francisco, and *John A. Valentine*, were on the brief for *amici curiae* The Brady Center to Prevent Gun Violence, et al. in support of Appellees. *Eric J. Mogilnicki* entered an appearance.

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

SILBERMAN, *Senior Circuit Judge*: Appellants contest the district court's dismissal of their complaint alleging that the District of Columbia's gun control laws violate their Second Amendment rights. The court held that the Second Amendment ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed") does not bestow any rights on individuals except, perhaps, when an individual serves in an organized militia such as today's National Guard. We reverse.

I

Appellants, six residents of the District, challenge D.C. Code § 7-2502.02(a)(4), which generally bars the registration of handguns (with an exception for retired D.C. police officers); D.C. Code § 22-4504, which prohibits carrying a pistol without a license, insofar as that provision would prevent a registrant from moving a gun from one room to another within his or her home; and D.C. Code § 7-2507.02, requiring that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device. Shelly Parker, Tracey Ambeau, Tom G. Palmer, and George Lyon want to possess handguns in their respective homes for self-defense. Gillian St. Lawrence owns a registered shotgun, but wishes to keep it assembled and unhindered by a trigger lock or similar device. Finally, Dick Heller, who is a District of Columbia special police officer permitted to carry a handgun on duty as a guard at the Federal Judicial Center, wishes to possess one at his home. Heller applied for and was denied a registration certificate to own a handgun. The District, in refusing his request, explicitly relied on D.C. Code § 7-2502.02(a)(4).

Essentially, the Appellants claim a right to possess what they describe as "functional firearms," by which they mean ones that could be "readily accessible to be used effectively when necessary" for self-defense in the home. They are not asserting a right to carry such weapons outside their homes. Nor are they challenging the District's authority *per se* to require the registration of firearms.

Appellants sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. § 1983, but the court below granted the District's motion to dismiss on the grounds that the Second Amendment, at most, protects an individual's right to "*bear* arms for service in the Militia." (The court did not refer to the word "keep" in the Second Amendment.) And, by "Militia," the court concluded the Second Amendment referred to an organized military body—such as a National Guard unit.

II

After the proceedings before the district judge, we decided *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005). We held that plaintiffs bringing a pre-enforcement challenge to the District's gun laws had not yet suffered an injury-in-fact and, therefore, they lacked constitutional standing. Although plaintiffs expressed an intention to violate the District's gun control laws, prosecution was not imminent. We thought ourselves bound by our prior decision in *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997), to conclude that the District's general threat to prosecute violations of its gun laws did not constitute an Article III injury. *Navegar* involved a pre-enforcement challenge by a gun manufacturer to certain provisions of the Violent Crime Control and Law Enforcement Act of 1994, which prohibited the manufacture (and possession) of semiautomatic assault weapons. We held then that the manufacturers whose products the statute listed *eo nomine* had standing to challenge the law in question because the effect of the statute was to single out individual firearms purveyors for prosecution. *Id.* at 999. However, manufacturers whose products were described solely by their characteristics had no pre-enforcement standing because the threat of prosecution was shared among the (presumably) many gun manufacturers whose products fit the statutory description, and, moreover, it was not clear how these descriptive portions of the statute would be enforced. *Id.* at 1001.

In *Navegar*, then, the "factor . . . most significant in our analysis" was "the statute's own identification of particular products manufactured only by appellants" because that indicated a "special priority" for preventing specified parties from engaging in a particular type of conduct. *Id.* Extending *Navegar's* logic to *Seegars*, we said the *Seegars* plaintiffs were required to show that the District had singled them out for prosecution, as had been the case with at least one of the manufacturer plaintiffs in *Navegar.* Since the *Seegars* plaintiffs could show nothing more than a general threat of prosecution by the District, we held their feared injury insufficiently imminent to support Article III standing. 396 F.3d at 1255-56.

We recognized in *Seegars* that our analysis in *Navegar* was in tension with the Supreme Court's treatment of a pre-enforcement challenge to a criminal statute that allegedly threatened constitutional rights. *See id.* (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979)). In *United Farm Workers*, the Supreme Court addressed the subject of pre-enforcement challenges in general terms:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

442 U.S. at 298 (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). The unqualified language of *United Farm Workers* would seem to encompass the claims raised by the *Seegars* plaintiffs, as well as the appellants here. Appellants' assertions of Article III standing also find support in the Supreme Court's decision in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), which allowed a

pre-enforcement challenge to a Virginia statute criminalizing the display of certain types of sexually explicit material for commercial purposes. In that case, the Court held it sufficient for plaintiffs to allege "an actual and well-founded fear that the law will be enforced against them," *id.* at 393, without any additional requirement that the challenged statute single out particular plaintiffs by name.[1] In both *United Farm Workers* and *American Booksellers*, the Supreme Court took a far more relaxed stance on pre-enforcement challenges than *Navegar* and *Seegars* permit. Nevertheless, unless and until this court en banc overrules these recent precedents, we must be faithful to *Seegars* just as the majority in *Seegars* was faithful to *Navegar*.

Applying *Navegar-Seegars* to the standing question in this case, we are obliged to look for an allegation that appellants here have been singled out or uniquely targeted by the D.C. government for prosecution. No such allegation has been made; with one exception, appellants stand in a position almost identical to the *Seegars* plaintiffs. Appellants attempt to distinguish their situation from that of the *Seegars* plaintiffs by pointing to "actual" and "specific" threats, Appellants' Br. at 21, lodged against appellants by D.C.

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[1] Of course, *American Booksellers* can be distinguished from *Navegar*, *Seegars*, and the present case, on the ground that the constitutional challenge at issue there implicated the First (as opposed to the Second) Amendment. The *American Booksellers* Court was concerned that Virginia's statute might chill speech without any prosecution ever taking place, 484 U.S. at 393, thereby creating a wrong without remedy if pre-enforcement standing were denied. But in deciding whether to privilege one amendment to the U.S. Constitution over another in assessing injury-in-fact, we note the statement of our dissenting colleague in *Seegars*: "I know of no hierarchy of Bill of Rights protections that dictates different standing analysis." 396 F.3d at 1257 (Sentelle, J., dissenting). The *Seegars* majority, although it felt constrained by *Navegar* to reach a different result, tacitly agreed with Judge Sentelle's assessment that the injury-in-fact requirement should be applied uniformly over the First and Second Amendments (and presumably all other constitutionally protected rights). *Id.* at 1254.

during the course of the district court litigation. But this is insufficient. None of the statements cited by appellants expresses a "special priority" for preventing *these* appellants from violating the gun laws, or a particular interest in punishing *them* for having done so. Rather, the District appears to be expressing a sentiment ubiquitous among stable governments the world over, to wit, scofflaws will be punished.

The noteworthy distinction in this case—a distinction mentioned in appellants' complaint and pressed by them on appeal—is that appellant Heller has applied for and been denied a registration certificate to own a handgun, a fact not present in *Seegars*. The denial of the gun license is significant; it constitutes an injury independent of the District's prospective enforcement of its gun laws, and an injury to which the stringent requirements for pre-enforcement standing under *Navegar* and *Seegars* would not apply. Since D.C. Code § 22-4504 (prohibition against carrying a pistol without a license) and D.C. Code § 7-2507.02 (disassembly/trigger lock requirement) would amount to further conditions on the certificate Heller desires, Heller's standing to pursue the license denial would subsume these other claims too.

This is not a new proposition. We have consistently treated a license or permit denial pursuant to a state or federal administrative scheme as an Article III injury. *See, e.g.*, *Cassell v. F.C.C.*, 154 F.3d 478 (D.C. Cir. 1998) (reviewing denial of license application to operate private land mobile radio service); *Wilkett v. I.C.C.*, 710 F.2d 861 (D.C. Cir. 1983) (reviewing denial of application for expanded trucking license); *see also City of Bedford v. F.E.R.C.*, 718 F.2d 1164, 1168 (D.C. Cir. 1983) (describing wrongful denial of a preliminary hydroelectric permit as an injury warranting review). The interests injured by an adverse licensing determination may be interests protected at common law, or they may be created by statute. And of course, a licensing decision can also trench upon constitutionally protected interests, *see, e.g.*, *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999) (reviewing District of Columbia's denial of a building permit under the Takings Clause); *Berger v. Bd. of Psychologist Exam'rs*, 521 F.2d 1056 (D.C. Cir. 1975) (reviewing District of Columbia's denial of a license to practice psychology under the Due Process Clause), which will also give rise to Article III injury.

At oral argument, counsel for the District maintained that we should not view this as a licensing case for standing purposes because D.C.'s firearm registration system amounts to a complete prohibition on handgun ownership. The District argues that we must analyze Appellants' standing exclusively under our pre-enforcement precedents, *Seegars* and *Navegar*. We disagree on both counts. The District does not *completely* prohibit handgun registration. *See* D.C. Code § 7-2502.02(a)(4) (allowing certificates for pistols already registered in the District prior to 1976); D.C. Code § 7-2502.02(b) (excluding retired police officers of the Metropolitan Police Department from the ban on pistol registration). Had Heller been a retired police officer, presumably the District would have granted him a registration certificate. The same would be true if Heller had attempted to register a long gun, as opposed to a handgun. In any event, Heller has invoked his rights under the Second Amendment to challenge the statutory classifications used to bar his ownership of a handgun under D.C. law, and the formal process of application and denial, however routine, makes the injury to Heller's alleged constitutional interest concrete and particular. He is not asserting that his injury is only a threatened prosecution, nor is he claiming only a general right to handgun ownership; he is asserting a right to a registration certificate, the denial of which is his distinct injury.

We note that the Ninth Circuit has recently dealt with a Second Amendment claim by first extensively analyzing that provision, determining that it does not provide an individual right, and then, and only then, concluding that the plaintiff lacked standing to challenge a California statute restricting the possession, use, and transfer of assault weapons. *See Silveira v. Lockyer*, 312 F.3d 1052, 1066-67 & n.18 (9th Cir. 2003). We think such an approach is doctrinally quite unsound. The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim. *See Warth v. Seldin*, 422 U.S. 490, 501-02 (1975) (assuming factual allegations and legal theory of complaint for purposes of standing analysis). We have repeatedly recognized that proposition. *See Waukesha v. E.P.A.*, 320 F.3d 228, 235 (D.C. Cir. 2003); *Am. Fed'n of Gov't Employees, AFL-CIO v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982). "Indeed, in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Waukesha*, 320 F.3d at 235 (citing *Wrath*, 422 U.S. at 502). This is no less true when, as here, the merits involve the scope of a constitutional protection.

Still, we have not always been so clear on this point. Although we recognized in *Claybrook v. Slater*, 111 F.3d 904 (D.C. Cir. 1997), that it was not necessary for a plaintiff to demonstrate that he or she would prevail on the merits in order to have Article III standing, the rest of our discussion seems somewhat in tension with that proposition. We did recognize that in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), when the Supreme Court used the phrase "legally protected interest" as an element of injury-in-fact, it made clear it was referring only to a "cognizable interest." *Claybrook*, 111 F.3d at 906-07. The Court in *Lujan* concluded that plaintiffs had a "cognizable interest" in observing animal species without considering whether the plaintiffs had a legal *right* to do so. *Id.* (citing *Lujan*, 504 U.S. at 562-63). We think it plain the *Lujan* Court did not mean to suggest a return to the old "legal right" theory of standing rejected in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54 (1970), because it cited *Warth*, *inter alia*, as precedent for the sentence which included the phrase "legally protected interest." *Lujan*, 504 U.S. at 560. Rather, the cognizable interest to which the Court referred would distinguish, to pick one example, a desire to observe certain aspects of the environment from a generalized wish to see the Constitution and laws obeyed. Indeed, in *Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359 (D.C. Cir. 2005), Judge Williams wrote an extensive concurring opinion (not inconsistent with the majority opinion) in which he persuasively explains that the term "legally protected interest," as used in *Lujan*, could not have been intended to deviate from *Warth*'s general proposition that we assume the merits when evaluating standing. *Id.* at 363-66.

In *Claybrook*, we went on to say, quite inconsistently, that "if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue." *Claybrook*, 111 F.3d at 907. We concluded that plaintiff lacked standing, however, because the government agency in that case had unfettered discretion to take the action it did, and therefore there was "no law to apply." *Id.* at 908. Thus the decision in *Claybrook* was actually based on a separate jurisdictional ground—reviewability under the Administrative Procedure Act—and federal courts may choose any ground to deny jurisdiction, e.g., Article III standing, prudential standing, or subject matter jurisdiction. *See Judicial Watch*, 432 F.3d at 366 (Williams, J., concurring) (noting that *Claybrook* is hard to classify as a standing opinion). There is no hierarchy which obliges a court to decide Article III standing issues before other jurisdictional questions. *In re Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998). Therefore, we do not read *Claybrook* to stand for the proposition, *contra Warth*, that we must evaluate the existence *vel non* of appellants' Second Amendment claim as a standing question.[2]

In sum, we conclude that Heller has standing to raise his § 1983 challenge to specific provisions of the District's gun control laws.

III

As we noted, the Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

U.S. Const. amend. II. The provision's second comma divides the Amendment into two clauses; the first is prefatory, and the second operative. Appellants' argument is focused on their reading of the Second Amendment's operative clause. According to appellants, the Amendment's language flat out guarantees an individual right "to keep and bear Arms." Appellants concede that the prefatory clause expresses a civic purpose, but argue that this purpose, while it may inform the meaning of an ambiguous term like "Arms," does not qualify the right guaranteed by the operative portion of the Amendment.

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[2] Admittedly, in *Taylor v. F.D.I.C.*, 132 F.3d 753, 767 (D.C. Cir. 1997), we observed that the causation requirement of standing could coincide with the causal element in a cause of action. *But cf. id.* at 770 (Rogers, J., concurring). Whether that was correct or not, we concluded that even in that unique situation, not present here, we had discretion to decide the case on the merits or on standing grounds. *Id.* at 767-68.

The District of Columbia argues that the prefatory clause declares the Amendment's only purpose—to shield the state militias from federal encroachment—and that the operative clause, even when read in isolation, speaks solely to military affairs and guarantees a civic, rather than an individual, right. In other words, according to the District, the operative clause is not just limited by the prefatory clause, but instead both clauses share an explicitly civic character. The District claims that the Second Amendment "protects private possession of weapons *only* in connection with performance of civic duties as part of a well-regulated citizens militia organized for the security of a free state." Individuals may be able to enforce the Second Amendment right, but only if the law in question "will impair their participation in common defense and law enforcement when called to serve in the militia." But because the District reads "a well regulated Militia" to signify only the organized militias of the founding era—institutions that the District implicitly argues are no longer in existence today—invocation of the Second Amendment right is conditioned upon service in a defunct institution. Tellingly, we think, the District did not suggest what sort of law, if any, would violate the Second Amendment today—in fact, at oral argument, Appellees' counsel asserted that it would be constitutional for the District to ban all firearms outright. In short, we take the District's position to be that the Second Amendment is a dead letter.

We are told by the District that the Second Amendment was written in response to fears that the new federal government would disarm the state militias by preventing men from bearing arms while in actual militia service, or by preventing them from keeping arms at home in preparation for such service. Thus the Amendment should be understood to check federal power to regulate firearms only when federal legislation was directed at the abolition of state militias, because the Amendment's *exclusive* concern was the preservation of those entities. At first blush, it seems passing strange that the able lawyers and statesmen in the First Congress (including James Madison) would have expressed a sole concern for state militias with the language of the Second Amendment. Surely there was a more direct locution, such as "Congress shall make no law disarming the state militias" or "States have a right to a well-regulated militia."

The District's argument—as strained as it seems to us—is hardly an isolated view. In the Second Amendment debate, there are two camps. On one side are the collective right theorists who argue that the Amendment protects only a right of the various state governments to preserve and arm their militias. So understood, the right amounts to an expression of militant federalism, prohibiting the federal government from denuding the states of their armed fighting forces. On the other side of the debate are those who argue that the Second Amendment protects a right of individuals to possess arms for private use. To these individual right theorists, the Amendment guarantees personal liberty analogous to the First Amendment's protection of free speech, or the Fourth Amendment's right to be free from unreasonable searches and seizures. However, some entrepreneurial scholars purport to occupy a middle ground between the individual and collective right models.

The most prominent in-between theory developed by academics has been named the "sophisticated collective right" model.[3] The sophisticated collective right label describes several variations on the collective right theme. All versions of this model share two traits: They (1) acknowledge individuals could, theoretically, raise Second Amendment claims against the federal government, but (2) define the Second Amendment as a purely civic provision that offers no protection for the private use and ownership of arms.

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[3] *See United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003); *United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001); *Seegars v. Ashcroft*, 297 F.Supp. 2d 201, 218 (D.D.C. 2004); *see also* Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995, 1003-04 (1995).

The District advances this sort of theory and suggests that the ability of individuals to raise Second Amendment claims serves to distinguish it from the pure collective right model. But when seen in terms of its practical consequences, the fact that individuals have standing to invoke the Second Amendment is, in our view, a distinction without a difference. *But cf. United States v. Emerson*, 270 F.3d 203, 218-21 (5th Cir. 2001) (treating the sophisticated collective right model as distinct from the collective right theory). Both the collective and sophisticated collective theories assert that the Second Amendment was written for the exclusive purpose of preserving state militias, and both theories deny that individuals *qua* individuals can avail themselves of the Second Amendment today. The latter point is true either because, as the District appears to argue, the "Militia" is no longer in existence, or, as others argue, because the militia's modern analogue, the National Guard, is fully equipped by the federal government, creating no need for individual ownership of firearms. It appears to us that for all its nuance, the sophisticated collective right model amounts to the old collective right theory giving a tip of the hat to the problematic (because ostensibly individual) text of the Second Amendment.

The lower courts are divided between these competing interpretations. Federal appellate courts have largely adopted the collective right model.[4] Only the Fifth Circuit has interpreted the Second Amendment to protect an individual right.[5] State appellate courts, whose interpretations of the U.S. Constitution are no less authoritative than those of our sister circuits, offer a more balanced picture.[6] And the United States Department of

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[4] *See Silveira*, 312 F.3d at 1092; *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265,

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1273-74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921-23 (1st Cir. 1942).

The District cites a decision in the Second Circuit, *United States v. Toner*, 728 F.2d 115 (2d Cir. 1984), as holding that the Second Amendment protects only a right related to "civic purposes." The District's reliance on this case is plainly wrong. In *Toner*, the court stated only that the Second Amendment right was not "fundamental." *Id.* at 128. The opinion in no way addressed the question whether the Second Amendment requires that use and possession of a weapon be for civic purposes. We are not aware of any Second Circuit decision that directly addresses the collective versus individual nature of the Second Amendment right. *See Silveira*, 312 F.3d at 1063 n.11 (noting that only the Second and D.C. Circuits had yet to decide nature of Second Amendment right).

[5] *Emerson*, 270 F.3d at 264-65.

[6] Of the state appellate courts that have examined the question, at least seven have held that the Second Amendment protects an individual right, *see Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. App. 1988); *Brewer v. Commonwealth*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *State v. Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *State v. Nickerson*, 126 Mont. 157 (1952); *Stillwell v. Stillwell*, 2001 WL 862620, at *4 (Tenn. Ct. App. July 30, 2001); *State v. Anderson*, 2000 WL 122218, at *7 n.3 (Tenn. Crim. App. Jan. 26, 2000); *State v. Williams*, 158 Wash. 2d 904 (2006); *Rohrbaugh v. State*, 216 W. Va. 298 (2004), whereas at least ten state appellate courts (including the District of Columbia) have endorsed the collective right position, *see Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987); *Commonwealth v. Davis*, 369 Mass. 886 (1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. State*, 83 Nev. 404 (1967); *Burton v. Sills*, 53 N.J. 86, 248 (1968); *In re Cassidy*, 268 A.D. 282, (N.Y. App. Div. 1944); *State v. Fennell*, 95 N.C. App. 140 (1989); *Mosher v. City of Dayton*, 48 Ohio St. 2d 243 (1976); *Masters v. State*, 653 S.W.2d 944, 945 (Tex. App. 1983); *State v. Vlacil*, 645 P.2d 677, 679 (Utah 1982); *see also*

Justice has recently adopted the individual right model. *See* Op. Off. of Legal Counsel, "Whether the Second Amendment Secures an Individual Right" (2004) *available at* http://www.usdoj.gov/olc/secondamendment2.pdf; *see also* Memorandum from John Ashcroft, Attorney General, to All United States' Attorneys (Nov. 9, 2001), *reprinted in* Br. for the United States in Opp'n. at 26, *Emerson*, 536 U.S. 907. The great legal treatises of the nineteenth century support the individual right interpretation, *see Silveira v. Lockyer*, 328 F.3d 567, 583-85 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc); *Emerson*, 270 F.3d at 236, 255-59, as does Professor Laurence Tribe's leading treatise on constitutional law.[7] Because we have no direct precedent—either in this court or the Supreme Court—that provides us with a square holding on the question, we turn first to the text of the Amendment.

A

We start by considering the competing claims about the meaning of the Second Amendment's operative clause: "the right of the people to keep and bear Arms shall not be infringed." Appellants contend that "the right of the people" clearly contemplates an individual right and that "keep and bear Arms" necessarily implies private use and ownership. The District's primary argument is that "keep and bear Arms" is best read in a military sense, and, as a consequence, the entire operative clause should be understood as granting only a collective right. The District also argues that "the right of the people" is ambiguous as to whether the right protects civic or private ownership and use of weapons.

Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483 (1984) (stating in dicta that Second Amendment protects collective right).

[7] *See* 1 Laurence Tribe, American Constitutional Law 902 & n.221 (3d ed. 2000). Professor Tribe was not always of this view. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 640 (1989) (critiquing Tribe's earlier collective right position).

In determining whether the Second Amendment's guarantee is an individual one, or some sort of collective right, the most important word is the one the drafters chose to describe the holders of the right—"the people." That term is found in the First, Second, Fourth, Ninth, and Tenth Amendments. It has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation. We also note that the Tenth Amendment—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people"—indicates that the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other. The natural reading of "the right of the people" in the Second Amendment would accord with usage elsewhere in the Bill of Rights.

The District's argument, on the other hand, asks us to read "the people" to mean some subset of individuals such as "the organized militia" or "the people who are engaged in militia service," or perhaps not any individuals at all—e.g., "the states." *See Emerson*, 270 F.3d at 227. These strained interpretations of "the people" simply cannot be squared with the uniform construction of our other Bill of Rights provisions. Indeed, the Supreme Court has recently endorsed a uniform reading of "the people" across the Bill of Rights. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, (1990), the Court looked specifically at the Constitution and Bill of Rights' use of "people" in the course of holding that the Fourth Amendment did not protect the rights of non-citizens on foreign soil:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States."

> The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. Const. amend. I, art. I, § 2, cl. 1. While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. at 265. It seems unlikely that the Supreme Court would have lumped these provisions together without comment if it were of the view that the Second Amendment protects only a collective right. The Court's discussion certainly indicates—if it does not definitively determine—that we should not regard "the people" in the Second Amendment as somehow restricted to a small subset of "the people" meriting protection under the other Amendments' use of that same term.

In sum, the phrase "the right of the people," when read intra-textually and in light of Supreme Court precedent, leads us to conclude that the right in question is individual. This proposition is true even though "the people" at the time of the founding was not as inclusive a concept as "the people" today. *See* Robert E. Shallope, *To Keep and Bear Arms in the Early Republic*, 16 Const. Comment. 269, 280-81 (1999). To the extent that non-whites, women, and the propertyless were excluded from the protections afforded to "the people," the Equal Protection Clause of the Fourteenth Amendment is understood to have corrected that initial constitutional shortcoming.

The wording of the operative clause also indicates that the right to keep and bear arms was not created by government, but rather preserved by it. *See* Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. Rev. 781, 890 (1997). Hence, the Amendment acknowledges "*the* right . . . to keep and bear Arms," a right that pre-existed the Constitution like "*the* freedom of speech." Because the right to arms existed prior to the formation of the new government, *see Robertson v. Baldwin*, 165 U.S. 275, 280 (1897) (describing the origin of the Bill of Rights in English law), the Second Amendment only guarantees that the right "shall not be infringed." Thomas Cooley, in his influential treatise, observed that the Second Amendment had its origins in the struggle with the Stuart monarchs in late-seventeenth-century England. *See* Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 270-72 (Rothman & Co. 1981) (1880).[8]

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[8] Indeed, England's Bill of Rights of 1689 guaranteed "[t]hat the Subjects, which are Protestants, may have Arms for their Defence, suitable to their conditions, as allowed by law." 1 W. & M., Sess. 2, c. 2. Here too, however, the right was not newly created, but rather recognized as part of the common law tradition. The ancient origin of the right in England was affirmed almost a century later, in the aftermath of the anti-Catholic Gordon riots of 1780, when the Recorder of London, who was the foremost legal advisor to the city as well as the chief judge of the Old Bailey, gave the following opinion on the legality of private organizations armed for defense against rioters: The right of His majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of the Kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right which every Protestant most unquestionably possesses, individually, may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.

To determine what interests this pre-existing right protected, we look to the lawful, private purposes for which people of the time owned and used arms. The correspondence and political dialogue of the founding era indicate that arms were kept for lawful use in self-defense and hunting. *See Emerson*, 270 F.3d at 251-55 (collecting historical materials); Robert E. Shallope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599, 602-14 (1982); *see also* Pa. Const. § 43 (Sept. 28, 1776) ("The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not enclosed . . . .").

The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they would be obligated to perform for the state. The premise that private arms would be used for self-defense accords with Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation. *See* William Blackstone, 1 Commentaries *136, *139; *see also Silveira*, 328 F.3d at 583-85 (Kleinfeld, J.); *Kasler v. Lockyer*, 23 Cal. 4th 472, (2000) (Brown, J., concurring). The right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government. *See Silveira*, 328 F.3d at 583-85 (Kleinfeld, J.); *see also id.* at 569-70 (Kozinski, J., dissenting from the denial of rehearing en banc); *Kasler*, 97

Opinion on the Legality of the London Military Foot Association, *reprinted in* William Blizzard, Desultory Reflections on Police 59-60 (1785). For further examination of the Second Amendment's English origins, see generally Joyce Lee Malcolm, To Keep and Bear Arms (1994).

Cal. Rptr. 2d 334, 2 P.3d at 605 (Brown, J., concurring).[9]

When we look at the Bill of Rights as a whole, the setting of the Second Amendment reinforces its individual nature. The Bill of Rights was almost entirely a declaration of individual rights, and the Second Amendment's inclusion therein strongly indicates that it, too, was intended to protect personal liberty. The collective right advocates ask us to imagine that the First Congress situated a *sui generis* states' right among a catalogue of cherished individual liberties without comment. We believe the canon of construction known as *noscitur a sociis* applies here. Just as we would read an ambiguous statutory term in light of its context, we should read any supposed ambiguities in the Second Amendment in light of *its* context. Every other provision of the Bill of Rights, excepting the Tenth, which speaks explicitly about the allocation of governmental power, protects rights enjoyed by citizens in their individual capacity. The Second Amendment would be an inexplicable aberration if it were not read to protect individual rights as well.

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[9] The importance of the private right of self-defense is hardly surprising when one remembers that most Americans lacked a professional police force until the middle of the nineteenth century, *see Levinson*, *supra*, at 646 & n.46, and that many Americans lived in backcountry such as the Northwest Territory.

With respect to the right to defend oneself against tyranny and oppression, some have argued that the Second Amendment is utterly irrelevant because the arms it protects, even if commonly owned, would be of no use when opposed to the arsenal of the modern state. But as Judge Kozinski has noted, incidents such as the Warsaw ghetto uprising of 1943 provide rather dramatic evidence to the contrary. *See Silveira*, 328 F.3d at 569-70 (dissenting from the denial of rehearing en banc). The deterrent effect of a well-armed populace is surely more important than the probability of overall success in a full-out armed conflict. Thus could Madison write to the people of New York in 1788:

> Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes.

The Federalist No. 46, at 299-300 (James Madison) (Clinton Rossiter ed., 1961).

The District insists that the phrase "keep and bear Arms" should be read as purely military language, and thus indicative of a civic, rather than private, guarantee. The term "bear Arms" is obviously susceptible to a military construction. But it is not accurate to construe it exclusively so. First, the word "bear" in this context is simply a more formal synonym for "carry," i.e., "Beware of Greeks bearing gifts." The *Oxford English Dictionary* and the original *Webster's* list the primary meaning of "bear" as "to support" or "to carry." *See Silveira*, 328 F.3d at 573 (Kleinfeld, J.). Dr. Johnson's *Dictionary*—which the Supreme Court often relies upon to ascertain the founding-era understanding of text, *see, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003)—is in accord. The first three definitions for "bear" are "to carry as a burden," "to convey or carry," and "to carry as a mark of authority." *See* Johnson's and Walker's English Dictionaries Combined 126 (J.E. Worcester ed., 1830) [hereinafter Johnson].

Historical usage, as gleaned from the *O.E.D.* and *Webster's*, supports the notion that "bear arms" was sometimes used as an idiom signifying the use of weaponry in conjunction with military service. However, these sources also confirm that the idiomatic usage was not absolute. *Silveira*, 328 F.3d at 573 (Kleinfeld, J.); *Emerson*, 270 F.3d at 229-32. Just as it is clear that the phrase "to bear arms" was in common use as a byword for soldiering in the founding era, *see, e.g.*, Gary Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995, at 62-73, it is equally evident from a survey of late eighteenth—and early nineteenth-century state constitutional provisions that the public understanding of "bear Arms" also encompassed the carrying of arms for private purposes such as self-defense. *See Emerson*, 270 F.3d at 230 n. 29 (collecting state constitutional provisions referring to the people's right to "bear arms in defence of themselves and the State" among other formulations). Thus, it would hardly have been unusual for a writer at the time (or now) to have said that, after an attack on a house by thieves, the men set out to find them "bearing arms."

The District relies heavily on the use of "bearing arms" in a conscientious objector clause that formed part of Madison's initial draft of the Second Amendment. The purpose of this clause, which was later dropped from the Amendment's text, was to excuse those "religiously scrupulous of bearing arms" from being forced "to render military service in person." The Complete Bill of Rights 169 (Neil H. Cogan ed. 1997). The District argues that the conscientious objector clause thus equates "bearing arms" with military service. The Quakers, Mennonites, and other pacifist sects that were to benefit by the conscientious objector clause had scruples against soldiering, but not necessarily hunting, which, like soldiering, involved the *carrying* of arms. And if "bearing arms" only meant "carrying arms," it is argued, the phrase would not have been used in the conscientious objector clause because Quakers were not religiously scrupulous of carrying arms generally; it was carrying arms *for militant purposes* that the Friends truly abhorred (although many Quakers certainly frowned on hunting as the wanton infliction of cruelty upon animals). *See* Thomas Clarkson, A Portraiture of Quakerism, Vol. I. That Madison's conscientious objector clause appears to use "bearing arms" in a strictly military sense does at least suggest that "bear Arms" in the Second Amendment's operative clause includes the carrying of arms for military purposes. However, there are too many instances of "bear arms" indicating private use to conclude that the drafters intended only a military sense.

In addition to the state constitutional provisions collected in *Emerson*, there is the following statement in the report issued by the dissenting delegates at the Pennsylvania ratification convention:

> That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game.

The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, *reprinted in* 3 The Complete Anti-Federalist 5, 151 (Herbert J. Storing ed., 1981). These dissenting Anti-Federalists, writing in December 1787, were clearly using "bear arms" to include uses of weaponry outside the militia setting—e.g., one may "bear arms . . . for the purpose of killing game.[10].

We also note that at least three current members (and one former member) of the Supreme Court have read "bear Arms" in the Second Amendment to have meaning beyond mere soldiering: "Surely a most familiar meaning [of 'carries a firearm'] is, as the Constitution's Second Amendment ('keep and *bear* Arms') and Black's Law Dictionary . . . indicate: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting, joined by Rehnquist, C.J., Scalia, J. and Souter,

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[10] To be sure, collective right theorists have correctly observed that the Pennsylvania dissenters were not speaking for anyone but themselves -- that is, they lost in their attempt to defeat ratification of the Constitution, and lacked the clout to have their suggested amendments sent to the First Congress, unlike the Antifederalist delegates in other state conventions. *See* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 134-35 (2000). But that the dissenting delegates were political losers does not undercut their status as competent users of late-eighteenth-century English.

J.) (emphasis in original). Based on the foregoing, we think the operative clause includes a private meaning for "bear Arms."

In contrast to the collective right theorists' extensive efforts to tease out the meaning of "bear," the conjoined, *preceding* verb "keep" has been almost entirely neglected. In that tradition, the District offers a cursory and largely dismissive analysis of the verb. The District appears to claim that "keep and bear" is a unitary term and that the individual word "keep" should be given no independent significance. This suggestion is somewhat risible in light of the District's admonishment, earlier in its brief, that when interpreting constitutional text "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added." Appellees' Br. at 23 (quoting *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840)). Even if "keep" and "bear" are not read as a unitary term, we are told, the meaning of "keep" cannot be broader than "bear" because the Second Amendment only protects the use of arms in the course of militia service. *Id.* at 26-27. But this proposition assumes its conclusion, and we do not take it seriously.

One authority cited by the District has attempted to equate "keep" with "keep up," a term that had been used in phrases such as "keep up a standing army" or, as in the Articles of Confederation, "every state shall keep up a well regulated and disciplined militia . . . ." *See* Wills, *supra*, at 66. The argument that "keep" as used in "the right of the people to keep . . . Arms" shares a military meaning with "keep up" as used in "every state shall keep *up* a well regulated militia" mocks usage, syntax, and common sense. Such outlandish views are likely advanced because the plain meaning of "keep" strikes a mortal blow to the collective right theory. Turning again to Dr. Johnson's *Dictionary*, we see that the first three definitions of "keep" are "to retain; not to lose," "to have in custody," "to preserve; not to let go." Johnson, *supra*, at 540. We think "keep" is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use. *Emerson*, 270 F.3d at 231 & n. 31; *accord Silveira*, 328 F.3d at 573-74 (Kleinfeld, J.). The term "bear arms," when viewed in isolation, might be thought ambiguous; it could have a military cast. But since "the people" and "keep" have obvious individual and private meanings, we think those words resolve any supposed ambiguity in the term "bear arms."

* * *

The parties generally agree that the prefatory clause, to which we now turn, declares the Second Amendment's civic purpose—i.e., insuring the continuance of the militia system—and only disagree over whether that purpose was exclusive. The parties do attribute dramatically different meanings to "a well regulated Militia." Appellants argue that the militia referenced in the Second Amendment's prefatory clause was "practically synonymous" with "the people" referenced in the operative clause. The District advances a much more limited definition. According to the District, the militia was a body of adult men regulated and organized by state law as a civilian fighting force. The crucial distinction between the parties' views then goes to the nature of the militia: Appellants claim no organization was required, whereas the District claims a militia did not exist unless it was subject to state discipline and leadership. As we have already noted, the District claims that "the Framers' militia has faded into insignificance."

The parties draw on *United States v. Miller*, 307 U.S. 174, (1939), to support their differing definitions. *Miller*, a rare Second Amendment precedent in the Supreme Court, the holding of which we discuss below, described the militia in the following terms:

> The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.
>
> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Id. at 178-79.

The District claims that *Miller's* historical account of the "Militia" supports its position. Yet according to *Miller*, the militia included "*all males physically capable of acting in concert for the common defence*" who were "*enrolled for military discipline.*" And *Miller's* expansive definition of the militia—qualitatively different from the District's concept—is in accord with the second Militia Act of 1792, passed by the Second Congress.[11] Act of May 8, 1792, ch.

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[11] The second Militia Act was passed on May 8, 1792. On May 2, 1792, Congress had enacted a Militia Act "providing for the authority of the President to call out the Militia." Act of May 2, 1792, ch. XXVIII, 1 Stat. 264. The first Militia Act gave the President power to call forth the Militia in cases of invasion by a foreign nation or Indian tribe, and also in cases of internal rebellion. If the militia of the state wherein the rebellion

XXXIII, 1 Stat. 271. Of course, many of the members of the Second Congress were also members of the First, which had drafted the Bill of Rights. But more importantly, they were conversant with the common understanding of both the First Congress and the ratifying state legislatures as to what was meant by "Militia" in the Second Amendment. The second Militia Act placed specific and extensive requirements on the citizens who were to constitute the militia:

> Be it enacted . . . [t]hat each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be *enrolled* in the militia, by the captain or commanding officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this Act. And . . . every such captain or commanding officer of a company . . . shall without delay notify such citizen of the said enrollment . . . . That every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear so armed, accoutred and provided, when called out to exercise, or into service.

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was taking place either was unable to suppress it or refused to be called up, the first Militia Act gave the President authority to use militia from other states.

Id. (emphasis added).[12]

The reader will note that the Act's first requirement is that the "free able-bodied white male" population between eighteen and forty-five *enroll* in the militia. And enrollment was quite distinct from the various other regulations prescribed by Congress, which included the type of weaponry members of the militia must own. Becoming "enrolled" in the militia appears to have involved providing one's name and whereabouts to a local militia officer—somewhat analogous to our nation's current practice of requiring young men to register under the Selective Service Act. *Silveira*, 328 F.3d at 578 (Kleinfeld, J.). Thus when read in light of the second Militia Act, *Miller* defines the militia as having only two primary characteristics: It was all free, white, able-bodied men of a certain age who had given their names to the local militia officers as eligible for militia service. Contrary to the District's view, there was no organizational condition precedent to the existence of the "Militia." Congress went on in the second Militia Act to prescribe a number of rules for organizing the militia. But the militia itself was the raw material from which an organized fighting force was to be created. Thus, the second Militia Act reads:

> And be it further enacted, That *out of the militia enrolled as is herein directed*, there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen; and that to each division there shall be at least one company of artillery, and

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[12] Congress enacted this provision pursuant to its Article I, Section 8 powers over the militia: "The Congress shall have the power . . . [t]o provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress . . . ." U.S. Const., art. I., § 8.

> one troop of horse: There shall be to each company of artillery, one captain, two lieutenants, four sergeants, four corporals, six gunners, six bombardiers, one drummer, and one fifer.

Id. at 272 (emphasis added).

The crucial point is that the existence of the militia preceded its organization by Congress, and it preceded the implementation of Congress's organizing plan by the states. The District's definition of the militia is just too narrow. The militia was a large segment of the population—not quite synonymous with "the people," as appellants contend—but certainly not the organized "divisions, brigades, regiments, battalions, and companies" mentioned in the second Militia Act. *Id.* at 272.

The current congressional definition of the "Militia" accords with original usage: "The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard." 10 U.S.C. § 311. The statute then distinguishes between the "organized militia," which consists of the National Guard and Naval Militia, and the "unorganized militia," which consists of every member of the militia who is not a member of the National Guard or Naval Militia. *Id.* Just as in the 1792 enactment, Congress defined the militia broadly, and, more explicitly than in its founding-era counterpart, Congress provided that a large portion of the militia would remain unorganized. The District has a similar structure for its own militia: "Every able-bodied male citizen resident within the District of Columbia, of the age of 18 years and under the age of 45 years, excepting . . . idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous crime, shall be enrolled in the militia." D.C. Code § 49- 401.

The District argues that the modifier "well regulated" means that "[t]he militia was not individuals acting on their own; one cannot be a one-person militia." We quite agree that the militia was a collective body designed to act in concert. But we disagree with the District that the use of "well regulated" in the constitutional text somehow turns the popular militia embodied in the 1792 Act into a "select" militia that consisted of semi-professional soldiers like our current National Guard. Contemporaneous legislation once again provides us with guidance in reading ambiguous constitutional text. *See* Op. at 30; *see also Silveira*, 328 F.3d at 579-80 (Kleinfeld, J.).

The second Militia Act provides a detailed list of directions to both individuals and states that we take as an indication of what the drafters of the Second Amendment contemplated as a "well regulated Militia." It will be recalled, the second Militia Act requires that eligible citizens enroll in the militia and, within six months, arm themselves accordingly. Subsequent to enrollment, arming oneself became the first duty of all militiamen. *See Silveira*, 328 F.3d at 581 (Kleinfeld, J.). The Act goes on to require of the states that the militiamen be notified of their enrollment; that within one year, the states pass laws to arrange the militia into divisions, brigades, regiments, battalions, and companies, as well as appoint various militia officers; that there be an Adjutant General appointed in each state to distribute all orders for the Commander in Chief of the State to the several corps, and so on.

The statute thus makes clear that these requirements were independent of each other, i.e., militiamen were obligated to arm themselves regardless of the organization provided by the states, and the states were obligated to organize the militia, regardless of whether individuals had armed themselves in accordance with the statute. We take these dual requirements—that citizens were properly supplied with arms and *subject* to organization by the states (as distinct from actually organized)—to be a clear indication of what the authors of the Second Amendment contemplated as a "well regulated Militia."

Another aspect of "well regulated" implicit in the second Militia Act is the exclusion of certain persons from militia service. For instance, the Act exempts from militia duty "the Vice President of the United States, [executive branch officers and judges], Congressmen, custom house officers, . . . post officers, . . . all Ferrymen employed at any ferry on the post road, . . . all pilots, all mariners actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are or may be hereafter exempted by the laws of the respective states." Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. Thus, even after the founding-era militia became "well regulated," it did not lose its popular character. The militia still included the majority of adult men (albeit, at the time, "free able-bodied white male[s]"), who were to arm themselves, and whom the states were expected to organize into fighting units. Quite unlike today's National Guard, participation was widespread and mandatory.

As the foregoing makes clear, the "well regulated Militia" was not an elite or select body. *See Silveira*, 328 F.3d at 577-78 (Kleinfeld, J.). While some of the founding fathers, including George Washington and Alexander Hamilton, favored such organizations over a popular militia, *see* The Origin of the Second Amendment at xlvii (David E. Young ed., 2d ed. 1995), the Second Congress unambiguously required popular participation. The important point, of course, is that the popular nature of the militia is consistent with an individual right to keep and bear arms: Preserving an individual right was the best way to ensure that the militia could serve when called.

* * *

As we observed, the District argues that *even if* one reads the operative clause in isolation, it supports the collective right interpretation of the Second Amendment. Alternatively, the District contends that the operative clause should not, in fact, be read in isolation, and that it is imbued with the civic character of the prefatory clause when the Amendment is read, correctly, as two interactive clauses. The District points to the singular nature of the Second Amendment's preamble as an indication that the operative clause must be restricted or conditioned in some way by the prefatory language. *Compare* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998), *with* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 Chi.-Kent L. Rev. 291 (2000). However, the structure of the Second Amendment turns out to be not so unusual when we examine state constitutional provisions guaranteeing rights or restricting governmental power. It was quite common for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it. Volokh, *supra*, at 801-07.

We think the Second Amendment was similarly structured. The prefatory language announcing the desirability of a well-regulated militia—even bearing in mind the breadth of the concept of a militia—is narrower than the guarantee of an individual right to keep and bear arms. The Amendment does not protect "the right of militiamen to keep and bear arms," but rather "the right of the people." The operative clause, properly read, protects the ownership and use of weaponry beyond that needed to preserve the state militias. Again, we point out that if the competent drafters of the Second Amendment had meant the right to be limited to the protection of state militias, it is hard to imagine that they would have chosen the language they did. We therefore take it as an expression of the drafters' view that the people possessed a natural right to keep and bear arms, and that the preservation of the militia was the right's most salient political benefit—and thus the most appropriate to express in a political document.

That the Amendment's civic purpose was placed in a preamble makes perfect sense given the then-recent ratification controversy, wherein Antifederalist opponents of the 1787 Constitution agitated for greater assurance that the militia system would remain robust so that standing armies, which were thought by many at the time to be the bane of liberty, would not be necessary. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution* 338-60 (Enlarged ed. 1992). The Federalists who dominated the First Congress offered the Second Amendment's preamble to palliate Antifederalist concerns about the continued existence of the popular militia. But neither the Federalists nor the Antifederalists thought the federal government had the power to *disarm* the people. This is evident from the ratification debates, where the Federalists relied on the existence of an armed populace to deflect Antifederalist criticism that a strong federal government would lead to oppression and tyranny. Antifederalists acknowledged the argument, but insisted that an armed populace was not enough, and that the existence of a popular militia should also be guaranteed. *Compare* The Federalist Nos. 8, 28, 59 (Alexander Hamilton), No. 46 (James Madison) (arguing that an armed populace constitutes a check on the potential abuses of the federal government) *with* Melancton Smith [Federal Farmer], *Observations To A Fair Examination Of The System Of Government Proposed By The Late Convention, And To Several Essential And Necessary Alterations In It* (Nov. 8, 1787), *reprinted in The Origin of the Second Amendment*, *supra*, at 89, 91 (despite the fact that the "yeomanry of the country . . . possess arms" for defense, the federal government could undermine the regular militia and render the armed populace of no importance).

To be sure, as the District argues, the *Miller* Court did draw upon the prefatory clause to interpret the term "Arms" in the operative clause. As we note below, interpreting "Arms" in light of the Second Amendment's militia purpose makes sense because "Arms" is an open-ended term that appears but once in the Constitution and Bill of Rights. But *Miller* does not command that we limit perfectly sensible constitutional text such as "the right of the people" in a manner inconsistent with other constitutional provisions. Similarly, the Second Amendment's use of "keep" does not need to be recast in artificially military terms in order to conform to *Miller*.

We note that when interpreting the text of a constitutional amendment it is common for courts to look for guidance in the proceedings of the Congress that authored the provision. Unfortunately, the Second Amendment's drafting history is relatively scant and inconclusive. *Emerson*, 270 F.3d at 245-51. The recorded debates in the First Congress do not reference the operative clause, a likely indication that the drafters took its individual guarantee as rather uncontroversial. There is certainly nothing in this history to substantiate the strained reading of the Second Amendment offered by the District.

B

We have noted that there is no unequivocal precedent that dictates the outcome of this case. This Court has never decided whether the Second Amendment protects an individual or collective right to keep and bear arms. On one occasion we anticipated an argument about the scope of the Second Amendment, but because the issue had not been properly raised by appellants, we assumed the applicability of the collective right interpretation then urged by the federal government. *Fraternal Order of Police v. United States*

(F.O.P.II), 173 F.3d 898, 906 (D.C. Cir. 1999). The Supreme Court has not decided this issue either. *See id.* As we have said, the leading Second Amendment case in the Supreme Court is *United States v. Miller.* While *Miller* is our best guide, the Supreme Court's other statements on the Second Amendment warrant mention.

In *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the Court asserted the applicability of the Bill of Rights to the territories in the following terms:

> [N]o one . . . will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances . . . *[n]or can Congress deny to the people the right to keep and bear arms*, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding . . . .These powers . . . in relation to rights of person . . . are, in express and positive terms, denied to the General Government.

Id. at 450 (emphasis added). Although *Dred Scott* is as infamous as it was erroneous in holding that African-Americans are not citizens, this passage expresses the view, albeit in passing, that the Second Amendment contains a personal right. It is included among other individual rights, such as the right to trial by jury and the privilege against self-incrimination. The other Second Amendment cases of the mid-nineteenth century did not touch upon the individual versus collective nature of the Amendment's guarantee.[13]

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[13] In *United States v. Cruikshank*, 92 U.S. 542, 551 (1876), and *Presser v. Illinois*, 116 U.S. 252, 264-66 (1886), the Court held that the Second Amendment constrained only federal government action and did not apply to the actions of state governments. This holding was reiterated in

In *Robertson v. Baldwin*, 165 U.S. 275 (1897), the Court addressed the scope of the term "involuntary servitude" in the Thirteenth Amendment. In discussing limitations inherent in that constitutional provision, the Court said the following:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case . . . .
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> Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; *the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons;* the provision that no person shall be twice put in jeopardy (article 5)

Maxwell v. Dow, 176 U.S. 581, 597 1900), and *Twining v. New Jersey*, 211 U.S. 78, 98 1908). Indeed, the Second Amendment is one of the few Bill of Rights provisions that has not yet been held to be incorporated through the Fourteenth Amendment. While the status of the Second Amendment within the twentieth-century incorporation debate is a matter of importance for the many challenges to state gun control laws, it is an issue that we need not decide. The District of Columbia is a Federal District, ultimately controlled by Congress. Although subject to § 1983 suits by federal law, *see* An Act to Permit Civil Suits Under [42 U.S.C. § 1983] Against Any Person Acting Under Color of Any Law or Custom of the District of Columbia, Pub. L. No. 96-170, 93 Stat. 1284 (1979), the District is directly constrained by the entire Bill of Rights, without need for the intermediary of incorporation. *See, e.g., Pernell v. Southall Realty*, 416 U.S. 363, 369-80 (1974) (applying Seventh Amendment to local legislation for the District.

> does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion; nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment.

165 U.S. at 281-82 (emphasis added). Just as in *Dred Scott*, the Second Amendment right is mentioned in a catalogue of other well-known individual right provisions, and, in the Supreme Court's thin Second Amendment jurisprudence, *Robertson* has the virtue of straightforwardly suggesting one permissible form of regulatory limitation on the right to keep and bear arms. The decision does not discuss whether the right is individual or collective. Still, *Robertson* tends to cut against any version of the collective right argument. If the right to keep and bear arms offered no protection to individuals, the Court would not likely pick as a noteworthy exception to the right a prohibition on concealed weapons. The individual nature of the permitted regulation suggests that the underlying right, too, concerned personal ownership of firearms.

Few decisions of Second Amendment relevance arose in the early decades of the twentieth century. Then came *Miller*, the Supreme Court's most thorough analysis of the Second Amendment to date, and a decision that both sides of the current gun control debate have claimed as their own. We agree with the *Emerson* court (and the dissenting judges in the Ninth Circuit) that *Miller* does not lend support to the collective right model. *See Silveira*, 328 F.3d at 586-87 (Kleinfeld, J.); *Emerson*, 270 F.3d at 226-27. Nor does it support the District's quasi-collective position. Although *Miller* did not explicitly accept the individual right position, the decision implicitly assumes that interpretation.

Miller involved a Second Amendment challenge by criminal defendants to section 11 of the National Firearms Act (then codified at 26 U.S.C. §§ 1132 *et seq.*), which prohibited interstate transportation of certain firearms without a registration or stamped order. The defendants had been indicted for transporting a short-barreled shotgun from Oklahoma to Arkansas in contravention of the Act. The district court sustained defendants' demurrer challenging their indictment on Second Amendment grounds. The government appealed. The defendants submitted no brief and made no appearance in the Supreme Court. *Miller*, 307 U.S. at 175-77. Hearing the case on direct appeal, the Court reversed and remanded. *Id.* at 183.

On the question whether the Second Amendment protects an individual or collective right, the Court's opinion in *Miller* is most notable for what it omits. The government's first argument in its *Miller* brief was that "the right secured by [the Second Amendment] to the people to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state." Appellant's Br. at 15, 307 U.S. 174. This is a version of the collective right model. Like the Fifth Circuit, we think it is significant that the Court did not decide the case on this, the government's primary argument. *Emerson*, 270 F.3d at 222. Rather, the Court followed the logic of the government's secondary position, which was that a short-barreled shotgun was not within the scope of the term "Arms" in the Second Amendment.

The government had argued that even those courts that had adopted an individual right theory of the Second Amendment[14] had held that the term "Arms," as used in both the Federal and various state constitutions, referred "only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals." Appellant's Br. at 307 U.S. 174. The government then proceeded to quote at length from a Tennessee state court case interpreting "Arms" in the Tennessee Bill of Rights to mean weapons "such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." *Id.* (quoting *Aylett v. State*, 21 Tenn. (2 Hum.) 154, 157 (1840)). The government's weapons-based argument provided the *Miller* Court with an alternative means to uphold the National Firearms Act even if the Court disagreed with the government's collective right argument. The *Miller* Court's holding is based on the government's alternative position:

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[14] Here the brief for the United States cites two state court decisions interpreting state constitutional provisions: *People v. Brown*, 253 Mich.

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Layette v. State*, 2 Humphreys (Tenn.) 154, 158.

Miller, 307 U.S. at 178 (emphasis added). The quotation makes apparent that the Court was focused only on what arms are protected by the Second Amendment, *see Emerson*, 270 F.3d at 224, and not the collective or individual nature of the right. If the *Miller* Court intended to endorse the government's first argument, i.e., the collective right view, it

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537 (1931);. *State v. Duke*, 42 Tex. 455 (1875). *See* Appellant's Br. at 18, 307 U.S. 174.

would have undoubtedly pointed out that the two defendants were not affiliated with a state militia or other local military organization. *Id.*

To be sure, the *Miller* Court linked the Second Amendment's language to the Constitution's militia clause: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces [i.e., the militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." 307 U.S. at 178. We take the "declaration and guarantee" referred to by the *Miller* Court to mean the Second Amendment's prefatory clause (which declares the necessity of a "well regulated Militia") and its operative clause (which guarantees the preservation of a right) respectively.

The District would have us read this passage as recognizing a limitation on the Second Amendment right based on the *individual's* connection (or lack thereof) to an organized functioning militia. We disagree. As already discussed, the *Miller* court was examining the relationship between the *weapon* in question—a short-barreled shotgun—and the preservation of the militia system, which was the Amendment's politically relevant purpose. The term "Arms" was quite indefinite, but it would have been peculiar, to say the least, if it were designed to ensure that people had an individual right to keep weapons capable of mass destruction—e.g., cannons. Thus the *Miller* Court limited the term "Arms"—interpreting it in a manner consistent with the Amendment's underlying civic purpose. Only "Arms" whose "use or possession . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia," *id.* at 177, would qualify for protection.

Essential, then, to understanding what weapons qualify as Second Amendment "Arms" is an awareness of how the founding-era militia functioned. The Court explained its understanding of what the Framers had in mind when they spoke of the militia in terms we have discussed above. The members of the militia were to be "civilians primarily, soldiers on occasion." *Id.* at 179. When called up by either the state or the federal government, "these men were expected to appear *bearing arms supplied by themselves and of the kind in common use at the time.*" *Id.* (emphasis added).

As we noted above, the "Militia" was vast, including all free, white, able-bodied men who were properly enrolled with a local militia officer. By contrast, the Ninth Circuit has recently (and we think erroneously) read "Militia" to mean a "state-created and state-organized fighting force" that excludes the unorganized populace. *Silveira*, 312 F.3d at 1069. As Judge Kleinfeld noted, the Ninth Circuit's decision entirely ignores *Miller's* controlling definition of the militia. 328 F.3d at 578 (dissenting from denial of rehearing en banc). The Ninth Circuit's interpretation of "Militia" also fails to account for the second Militia Act of 1792, *id.* at 578-82, as well as local *federal* militia units such as those provided for by the Northwest Ordinance, *see* Act of Aug. 7, 1789, ch. VIII, 1 Stat. 50, or for the District of Columbia in 1803, Act of March 3, 1803, ch. XX, 2 Stat. 215.

Miller's definition of the "Militia," then, offers further support for the individual right interpretation of the Second Amendment. Attempting to draw a line between the ownership and use of "Arms" for *private* purposes and the ownership and use of "Arms" for *militia* purposes would have been an extremely silly exercise on the part of the First Congress if indeed the very survival of the militia depended on men who would bring their commonplace, *private* arms with them to muster. A ban on the use and ownership of weapons for private purposes, if allowed, would undoubtedly have had a deleterious, if not catastrophic, effect on the readiness of the militia for action. We do not see how one could believe that the First Congress, when crafting the Second Amendment, would have engaged in drawing such a foolish and impractical distinction, and we think the *Miller* Court recognized as much.

* * *

To summarize, we conclude that the Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia. The civic purpose was also a political expedient for the Federalists in the First Congress as it served, in part, to placate their Antifederalist opponents. The individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.

IV

As a corollary to its collective right position, the District argues—albeit almost as an afterthought—that it is not subject to the restraints of the Second Amendment because it is a purely federal entity.[15] Although it has a militia statute,

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[15] This contention originated in a concurring opinion in the District of Columbia Court of Appeals, *see Sandidge v. United States*, 520 A.2d

see D.C. Code § 49-401, the District argues that its militia does not implicate federalism concerns embodied in the Second Amendment—i.e., the District's local legislation does not interfere with the "security of a free State."

The District does not argue, nor could it, that even if the Second Amendment confers an individual right, that right is enjoyed only by the residents of states (that would mean that citizens of the United States who lived in territories, such as the Northwest Territory, prior to their acceptance as states, did not enjoy a constitutional right). In any event, the Supreme Court has unambiguously held that the Constitution and Bill of Rights are in effect in the District. *See O'Donoghue v. United States*, 289 U.S. 516, 539-41 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).

> "The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution . . . . If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution." *Id.* at 541.

Rather, the District's argument amounts to an appendage of the collective right position. It is only if one reads the prefatory language as limiting the operative clause to a guarantee about militias that one ever arrives at the question whether the guarantee is confined to *state* militias.

1057, 1059 (D.C. 1987) (Nebeker, J.), and has been subsequently adopted by a federal district court, *see Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 238-39 (D.D.C. 2004).

Our dissenting colleague recognizes this point; her opinion begins with an acceptance of the collective right interpretation of the Second Amendment. Dissent at 402-04. It is therefore not clear to us that it is even relevant to discuss the meaning of "a free State"—language upon which the dissent heavily relies.[16] Still, taking the argument as presented, we think it wrong on several grounds. First, the dissent (and the District) mistakenly reads "a free State" to mean an actual political unit of the United States, such as New York, etc., rather than a hypothetical polity. In fact, Madison's initial proposal to the First Congress stated that a well-regulated militia was "the best security of a free country." The Complete Bill of Rights, *supra*, at 169. The House committee then substituted "State" for "country" when it initially altered Madison's proposal. We have no record of the House committee's proceedings, but it is not credible to conclude that a profound shift was intended in the change from "country" to "State," particularly as there was no subsequent comment on the change.

The record of the debates in the First Congress relied upon by our dissenting colleague only further undermines the reading of "a free State" as meaning an individual state of the union. As she points out, Elbridge Gerry, an Antifederalist Representative from Massachusetts, criticized an initial formulation of the Second Amendment as follows: "A well regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one." Dissent at 405 n.10. Gerry's obvious fear was that a standing army would be erected as an auxiliary defense of "a free State," and that eventually such an army would entirely displace the militia. That Gerry worried a standing army would be understood as the "secondary" security of a free state, however, indicates that he understood "a free State" to mean the new country *as a whole.* After all, no one contended that a standing federal army would be used to protect *individual* states. It was the entire nation, including the District of Columbia, that a standing army would be erected to defend, and thus if a standing army were to supplant the militia in securing "a free State," the "State" in question would undoubtedly have been the United States.

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[16] The dissent suggests that our opinion consists largely of dicta. Dissent at 401. But dictum refers to reasoning that does not support the holding of a case. We think all of our reasoning (whether correct or not) directly supports our holding. By contrast, the dissent's "free State" discussion might be thought superfluous.

The use of both the indefinite article and the modifier "free" with the word "state," moreover, is unique to the Second Amendment. Elsewhere the Constitution refers to "the states" or "each state" when unambiguously denoting the domestic political entities such as Virginia, etc. With "a free State," we understand the framers to have been referring to republican government generally. The entire purpose of making the militia subject to the authority of the national government was that a standing army would not be necessary. The District's militia, organized by Congress in 1803, *see* Act of March 3, 1803, ch. XX, 2 Stat. 215, was no less integral to that *national* function than its state counterparts. That the D.C. militia is not a state militia does not make it any less necessary to the "security of a free State."

The dissent notes a Supreme Court statement in *Perpich v. Department of Defense*, 496 U.S. 334 (1990), that "there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the *sovereignty of the separate States.*" *Id.* at 340 (emphasis added in dissent). However, the dissent overlooks the other concern with standing armies—that they would pose a threat to *individual liberty*. The language from *Perpich* is entirely consistent, then, with the view that the American people at large (including the residents of the District) would be equally threatened by the presence of a standing army. And it directly contradicts the dissent's position that the Second Amendment was concerned exclusively with the preservation of state power.

Our dissenting colleague—in order to give a meaning to "the people" in the Second Amendment consistent with her interpretation—analogizes to "the people" in the Tenth Amendment. Dissent at 403 n.5. Contrary to her suggestion, however, the Tenth Amendment does not limit "the people" to state citizens. Rather, the Tenth Amendment reserves powers to "the States respectively, or to the people." The dissent provides no case holding that "the people," as used in the Tenth Amendment, are distinct from "the people" referred to elsewhere in the Bill of Rights. The one case relied upon, *Lee v. Flintkote* 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979), is inapposite. That case merely contrasts the District, on the one hand, with the states, on the other; the meaning of "the people" as used in the Tenth Amendment was not at issue. Indeed, *Verdugo-Urquidez*, 494 U.S. at 265, directly contradicts the dissent's reading of "the people" in the Tenth Amendment, just as it contradicts the restrictive reading of "the people" in the Second.

V

The third alternative argument the District presents is that, even if the Second Amendment protects an individual right and applies to the District, it does not bar the District's regulation, indeed its virtual prohibition, of handgun ownership.

The District contends that modern handguns are not the sort of weapons covered by the Second Amendment. But the District's claim runs afoul of *Miller's* discussion of "Arms." The *Miller* Court concluded that the defendants, who did not appear in the Supreme Court, provided no showing that short-barreled (or sawed-off) shotguns—banned by federal statute—bore "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. However, the Court also observed that militiamen were expected to bring their private arms with them when called up for service. Those weapons would be "of the kind in common use at the time." *Id.* at 179. There can be no question that most handguns (those in common use) fit that description then and now. *See Emerson*, 270 F.3d at 227 n.22 (assuming that a Beretta pistol passed the *Miller* test).

By the terms of the second Militia Act of 1792, all militiamen were given six months from the date of their enrollment to outfit themselves with "a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good *rifle*, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder . . . ." Act of May 8, 1792, ch. XXXIII, 1 Stat. 271 (emphasis added).

Commissioned officers had somewhat more onerous requirements. The Act demanded that, in addition to the foregoing, they "shall severally be armed with a sword or hanger and espontoon . . . ." *Id.* at 271-72. Still further demands were placed on the artillery officers, who were to be "armed with a sword or hanger, a fusee, bayonet and belt, with a cartridge-box to contain twelve cartridges . . . ." *Id.* at 272. But commissioned cavalry officers and dragoons had to assume an even greater expense, perhaps due to the fact that these were volunteer positions reserved for the well-off. The cavalry officers were required to procure "good horses of at least fourteen hands and a half high, and to be armed with a sword and pair of *pistols*, the holsters of which to be covered with bearskin caps." The dragoon had it even worse, being required to furnish himself "a serviceable horse, at least fourteen hands and a half high, a good saddle, bridle, mailpillion and valise, holsters, and a breast-plate and crupper, a pair of boots and spurs, a pair of *pistols*, a sabre, and a cartouch-box, to contain twelve cartridges for pistols." *Id.* at 272 (emphasis added).

These items were not mere antiques to be hung above the mantle. Immediately following the list of required weapons purchases, the Act provided that militiamen "shall appear so *armed*, accoutred and provided, when called out to exercise, or into service . . . ." *Id.* (emphasis added). The statute even planned phased-in upgrades in the quality of the militia's firearms: "[F]rom and after five years from the passing of this act, all muskets for arming the militia as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound." *Id.* at 271-72.

It follows that the weapons described in the Act were in "common use" at the time, particularly when one considers the widespread nature of militia duty. Included among these militia weapons were long guns (i.e., muskets and rifles) and pistols. Moreover, the Act distinguishes between the weapons citizens were required to furnish themselves and those that were to be supplied by the government. For instance, with respect to an artillery private (or "matross"), the Act provides that he should "furnish himself with all the equipments of a private in the infantry, until proper ordnance and field artillery is provided." *Id.* at 272. The Act required militiamen to acquire weapons that were in common circulation and that individual men would be able to employ, such as muskets, rifles, pistols, sabres, hangers, etc., but not cumbersome, expensive, or rare equipment such as cannons. We take the outfitting requirements of the second Militia Act to list precisely those weapons that would have satisfied the two prongs of the *Miller* arms test. They bore a "reasonable relationship to the preservation or efficiency of a well regulated militia," because they were the very arms needed for militia service. And by the terms of the Act, they were to be personally owned and "of the kind in common use at the time."

The modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes *Miller*'s standards. Pistols certainly bear "some reasonable relationship to the preservation or efficiency of a well regulated militia." They are also in "common use" today, and probably far more so than in 1789. Nevertheless, it has been suggested by some that only colonial-era firearms (e.g., single-shot pistols) are covered by the Second Amendment. But just as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a "search," the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 31-41 (2001) (applying Fourth Amendment standards to thermal imaging search).

That is not to suggest that the government is absolutely barred from regulating the use and ownership of pistols. The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech . . . ."). Indeed, the right to keep and bear arms—which we have explained pre-existed, and therefore was preserved by, the Second Amendment—was subject to restrictions at common law. We take these to be the sort of reasonable regulations contemplated by the drafters of the Second Amendment. For instance, it is presumably reasonable "to prohibit the carrying of weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror . . . ." *State v. Kerner*, 181 N.C. 574 (1921). And as we have noted, the United States Supreme Court has observed that prohibiting the carrying of concealed weapons does not offend the Second Amendment. *Robertson*, 165 U.S. at 281-82. Similarly, the Court also appears to have held that convicted felons may be deprived of their right to keep and bear arms. *See Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (citing *Miller*, 307 U.S. at 178.) These regulations promote the government's interest in public safety consistent with our common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised.

Reasonable restrictions also might be thought consistent with a "well regulated Militia." The registration of firearms gives the government information as to how many people would be armed for militia service if called up. Reasonable firearm proficiency testing would both promote public safety and produce better candidates for military service. Personal characteristics, such as insanity or felonious conduct, that make gun ownership dangerous to society also make someone unsuitable for service in the militia. *Cf.* D.C. Code § 49-401 (excluding "idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous crime" from militia duty). On the other hand, it does not follow that a person who is unsuitable for militia service has no right to keep and bear arms. A physically disabled person, for instance, might not be able to participate in even the most rudimentary organized militia. But this person would still have the right to keep and bear arms, just as men over the age of forty-five and women would have that right, even though our nation has traditionally excluded them from membership in the militia. As we have explained, the right is broader than its civic purpose. *See* Volokh, *supra*, at 801-07.[17] D.C. Code § 7-2502.02[18] prohibits the registration of a pistol not registered in the District by the applicant prior to 1976.[19] The District contends that since it only bans one type of firearm, "residents still have access to hundreds more," and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined—as we have done—that handguns are "Arms" referred to in the Second Amendment, it is not open to the District to ban them. *See Kerner*, 107 S.E. at 225 ("To exclude all pistols . . . is not a regulation, but a prohibition, of . . . 'arms' which the people are entitled to bear."). Indeed, the pistol is the most preferred firearm in the nation to "keep" and use for protection of one's home and family. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 182-83 (1995). And, as we have noted, the Second Amendment's premise is that guns would be kept by citizens for self-protection (and hunting). D.C. Code § 22-4504 [20] restricts separately the carrying of a pistol. Appellant Heller challenges this provision and a companion provision, § 22-4506, insofar as they appear to ban moving a handgun from room to room in one's own house, even if one has lawfully registered the firearm (an interpretation the District does not dispute). In order to carry a pistol anywhere in the District (inside or outside the home), one must apply for and obtain an additional license from the Chief of Police, whom the Code gives complete discretion to deny license applications. Heller does not claim a legal right to carry a handgun outside his home, so we need not consider the more difficult issue whether the District can ban the carrying of handguns in public, or in automobiles. It is sufficient for us to conclude that just as the District may not flatly ban the keeping of a handgun in the home, obviously it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon which the right was premised—i.e., self-defense.

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[17] Of course, the District's virtual ban on handgun ownership is not based on any militia purpose. It is justified solely as a measure to protect public safety. As amici point out, and as D.C. judges are well aware, the black market for handguns in the District is so strong that handguns are readily available (probably at little premium) to criminals. It is asserted, therefore, that the D.C. gun control laws irrationally prevent only law abiding citizens from owning handguns. It is unnecessary to consider that point, for we think the D.C. laws impermissibly deny Second Amendment rights.

[18] The relevant text of the provision reads as follows:

> (a) A registration certificate shall not be issued for a:
>
> . . .
>
> (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has retired from the Metropolitan Police Department. D.C. Code § 7-2502.02.

[19] Although not relevant here, there is also an exception to the registration restriction for retired police officers of the Metropolitan Police Department. *See* D.C. Code § 7-2502.02(b).

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[20] The relevant text of the provision reads as follows:

> (a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:
>
> (1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than $5,000 or imprisoned for not more than 5 years, or both . . . .
>
> D.C. Code § 22-4504.

Finally, there is the District's requirement under D.C. Code § 7-2507.02 that a registered firearm be kept "unloaded and disassembled or bound by trigger lock or similar device unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes within the District of Columbia." This provision bars Heller from lawfully using a handgun for self protection in the home because the statute allows only for use of a firearm during recreational activities. As appellants accurately point out, § 7-2507.02 would reduce a pistol to a useless hunk of "metal and springs." Heller does not appear to challenge the requirement that a gun ordinarily be kept unloaded or even that a trigger lock be attached under some circumstances. He simply contends that he is entitled to the possession of a "functional" firearm to be employed in case of a threat to life or limb. The District responds that, notwithstanding the broad language of the Code, a judge would likely give the statute a narrowing construction when confronted with a self-defense justification. That might be so, but judicial lenity cannot make up for the unreasonable restriction of a constitutional right. Section 7-2507.02, like the bar on carrying a pistol within the home, amounts to a complete prohibition on the lawful use of handguns for self-defense. As such, we hold it unconstitutional.

VI

For the foregoing reasons, the judgment of the district court is reversed and the case is remanded. Since there are no material questions of fact in dispute, the district court is ordered to grant summary judgment to Heller consistent with the prayer for relief contained in appellants' complaint.

KAREN LECRAFT HENDERSON, Circuit Judge, dissenting:

As has been noted by Fifth Circuit Judge Robert M. Parker in *United States v. Emerson*, 270 F.3d 203, 272 (2001) ("The fact that the 84 pages of dicta contained in [the majority opinion] are interesting, scholarly, and well written does not change the fact that they are dicta and amount to at best an advisory treatise on this long-running debate.") (Parker, J., concurring), exhaustive opinions on the origin, purpose and scope of the Second Amendment to the United States Constitution have proven to be irresistible to the federal judiciary. *See, e.g., Silveira v. Lockyer*, 312 F.3d 1052, 1060-87 (9th Cir. 2003) (as amended); *Emerson*, 270 F.3d at 218-72. The result has often been page after page of "dueling dicta"—each side of the debate offering law review articles and obscure historical texts to support an outcome it deems proper. Today the majority adds another fifty-plus pages to the pile.[1] Its superfluity is even more pronounced, however, because the meaning of the Second Amendment in the District of Columbia (District) is purely academic. Why? As Judge Walton declared in *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 239 (D.D.C. 2004), *aff'd in part, rev'd in part sub nom. Seegars v. Gonzales*, 396 F.3d 1248, *reh'g en banc*

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[1] In declaring the District's challenged firearms ordinances unconstitutional, the majority takes over 45 pages, Maj. Op. at 377-401, explaining that the Second Amendment establishes an unrestricted individual right to keep and bear arms, *see id.* at 395. Its analysis can be summarized as follows: The Second Amendment's guarantee clause--"the right of the people to keep and bear Arms, shall not be infringed"--endows "the people" with a right analogous to the individual rights guaranteed in the First and Fourth Amendments. *Id.* at 380-82 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). That right is unrestricted by the prefatory clause—"A well regulated Militia, being necessary to the security of a free State"—which simply enunciates the Amendment's "civic purpose," Maj. Op. at 395, and modifies only the word "Arms" in the operative clause, *id.* at 390-91 (citing *United States v. Miller*, 307 U.S. 174 (1939)).

denied, 413 F.3d 1 (2005), "the District of Columbia is not a state within the meaning of the Second Amendment and therefore the Second Amendment's reach does not extend to it." For the following reasons, I respectfully dissent.

I.

As our court has recognized, the United States Supreme Court's guidance on the Second Amendment is "notoriously scant." *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (*FOP*). While scant it may be, it is, at least to me, unmistakable in one respect. And in that one respect, it dooms appellant Heller's challenge.[2]

In *United States v. Miller*, 307 U.S. 174 (1939), the only twentieth-century United States Supreme Court decision that analyzes the scope of the Second Amendment, the Government appealed the district court's quashing of an indictment that charged Miller (and one other) with a violation of section 11 of the National Firearms Act, Pub. L. No. 474, 48 Stat. 1236, 26 U.S.C. §§ 1132 *et seq.* (1934), by transporting in interstate commerce an unregistered, short-barreled shotgun. *Miller*, 307 U.S. at 175 & n.1. The district court had quashed the indictment because it concluded that section 11 of the National Firearms Act violated the Second Amendment. *Id* at 177. The High Court disagreed, declaring:

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[2] The other five appellants lack standing, *see Seegars v. Gonzalez*, 396 F.3d 1248 (D.C. Cir. 2005), and Heller has standing to challenge only D.C. Code § 7-2502.02(a)(4), under which he applied for, and was denied, a pistol permit. The *only* difference between the standing of the appellants in this case and that of the *Seegars* appellants relates to Heller's permit denial. That is, none of the appellants here, including Heller, faces imminent injury from D.C. Code § 7-2507.02, which requires that any registered firearm be kept unloaded and disassembled or bound by a trigger lock or similar device, or section 22-4504, which prohibits carrying an unregistered pistol. They "allege no prior threats against them [based on those provisions] or any characteristics indicating an especially high probability of enforcement [of those provisions] against them." *Seegars*, 396 F.3d at 1255. Although the appellants lack an administrative remedy with respect to the trigger lock enough to render [their] claim[s] justiciable if the imminence of the threatened injury is inadequate." *Id.* at 1256.

> *In the absence of* any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has *some reasonable relationship to the preservation or efficiency of a well regulated militia*, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178 (emphases added). Then, quoting Article I, § 8 of the Constitution, [3] the Court succinctly—but unambiguously—set down its understanding of the Second Amendment: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the *declaration and guarantee* of the Second Amendment were made. *It must be interpreted and applied with that end in view.*" *Id.* (emphases added). By these words, it emphatically declared that the *entire* Second Amendment—both its "declaration" and its "guarantee"—

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[3] Article I, section 8 of the Constitution provides:

The Congress shall have Power . . .

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress. U.S. Const., Art. I, § 8, cls. 15-16.

"must be interpreted and applied" together. *Id.*[4] Construing its two clauses together so that, as *Miller* declares, the right of the people [5] to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States, I believe that, under *Miller*, the District is inescapably excluded from the Second Amendment because it is not a State.[6] However the Second Amendment right has

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[4] Nine of our sister circuits have noted that the declaratory clause modifies the guarantee clause. *See Silveira*, 312 F.3d at 1066 ("The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use."); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999) ("Because Gillespie has no reasonable prospect of being able to demonstrate . . . a nexus between the firearms disability imposed by the statute and the operation of state militias, [the district court judge] was right to dismiss his Second Amendment claim."); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) ("[T]he *Miller* Court understood the Second Amendment to protect only the possession or use of weapons that is reasonably related to a militia actively maintained and trained by the states."); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) ("[T]he *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its 'possession or use' and militia-related activity." (quoting *Miller*, 307 U.S. at 178)); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) ("The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia.'" (quoting *Miller*, 307 U.S. at 178)); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) ("Whether the 'right to bear arms' for militia purposes is 'individual' or 'collective' in nature is irrelevant where, as here, the individual's possession of arms is not related to the preservation or efficiency of a militia."); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) ("The purpose of the second amendment as stated by the Supreme Court in *United States v. Miller* . . . was to preserve the effectiveness and assure the continuation of the state militia. The Court stated that the amendment must be interpreted and applied with that purpose in view."); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) ("[T]he Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms . . . ." (internal quotation omitted)); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942) ("[T]here is no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career."). In *Cases*, the First Circuit considered, *inter alia*, a Puerto Rican criminal defendant's Second Amendment challenge to the Federal Firearms Act. Significantly, the court qualified its Second Amendment analysis as follows:

> The applicability of the restriction imposed by the Second Amendment upon the power of Congress to legislate for Puerto Rico, or for that matter any territory, raises questions of no little complexity. However, we do not feel called upon to consider them because we take the view that the Federal Firearms Act does not unconstitutionally infringe the appellant's right, if any one in a territory has any right at all, to keep and bear arms.

Cases, 131 F.2d at 920.

[5] I have not *overlooked* the language in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), to the effect that "the people" as used in various of the first Ten Amendments refers to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." But just as the Tenth Amendment ties the rights reserved thereunder to "the people" of the individual "States," thereby excluding "the people" of the District, *cf. Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[T]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."), the Second Amendment similarly limits "the people" to those of the States, *cf. Adams v. Clinton*, 90 F. Supp. 2d 35, 45 (D.D.C. 2000) ("Although standing alone the phrase 'people of the several States' [in Article I, § 2, cl. 1] could be read as meaning all the people of the 'United States' and not simply those who are citizens of individual states, [Article I's] subsequent and repeated references to 'state[s]' . . . make clear that the former was not intended."); *see also Verdugo-Urquidez*, 494 U.S. at 265 (citing U.S. Const. Art. I, § 2, cl. 1).

[6] Nor do the Militia Clauses (U.S. Const. Art. I, § 8, cls.15, 16) conflict with the view that the "Militia" of the Second Amendment means those of the States. As used in the Militia Clauses, "Militia" is plural. Indeed, Article I, section 8, clause 16 states that the Congress shall have the power "[t]o provide for organizing, arming, and disciplining, *the Militia*, and for governing such Part of *them*." (emphasis added). Article II, section 2 also indicates the Militia Clauses refer to "the Militia *of the several States*." U.S. Const. Art. II, § 2, cl. 1 (emphasis added); *cf.* Oxford English Dictionary 768 (2d ed. 1989) ("Militia" "**4.** *spec.* **a.** Orig., the distinctive name of a branch of the British military service, forming,

been subsequently labeled by others—whether collective, individual or a modified version of either—*Miller*'s label is the only one that matters.[7] And until and unless the Supreme Court revisits *Miller*, its reading of the Second Amendment is the one we are obliged to follow. *See Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-79 (1987) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis.*"); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) ("As one of the inferior federal courts subject to the Supreme Court's precedents, we have neither the license nor the inclination to engage in such freewheeling presumptuousness." (responding to argument that *Miller* is "wrong in its superficial (and one-sided) analysis of the Second Amendment" (internal quotation omitted))).[8]

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together with the volunteers, what are known as 'the auxiliary forces' as distinguished from the regular army . . . .(Construed either as *sing.* or *plural.*)").

[7] Our court has previously "assume[d]" the *Miller* "test" to mean that the guarantee must be read in light of the declaration. *See FOP*, 173 F.3d at 906.

[8] One nineteenth-century Supreme Court precedent, *United States v. Cruikshank*, 92 U.S. 542 (1875), is included in almost every discussion of the Second Amendment. *Miller*, however, does not cite *Cruikshank*, and for good reason. In that case, several criminal defendants challenged their convictions under the Enforcement Act of 1870 making it unlawful to threaten or intimidate "'any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.'" *Id.* at 548 (quoting 16 Stat. 141). In setting aside their convictions, the Supreme Court declared:

> [The right to bear arms for any lawful purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.

Id. at 553. This language does not conflict with *Miller*—as I read *Miller*—because it does not define the right but simply recognizes that the right, whatever its content, cannot be infringed by the federal

II.

The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union. Chief Justice John Marshall, in rejecting the argument that the District constitutes a "State" under Article III, section 2 of the Constitution and, derivatively, the Judiciary Act of 1789, explained:

> [I]t has been urged that Columbia is a distinct political society; and is therefore "a state" according to the definitions of writers on general law. This is true. But as the act of congress obviously uses the word "state" in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the *members of the American confederacy only are the states contemplated in the constitution.... [T]he word state is used in the constitution as designating a member of the union*, and excludes from the term the signification attached to it by writers on the law of nations.

Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 452-53 (1805) (emphasis added); *see also De Geofroy v. Riggs*, 133 U.S. 258, 269 (1890). In fact, the Constitution uses "State"

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government. More interesting is the nineteenth-century case *Miller* does cite, *Presser v. Illinois*, 116 U.S. 252 (1886). There, the Court upheld state legislation against a Second Amendment challenge, relying on *Cruikshank*'s holding that the Second Amendment constrains the national government only. The Court then included the following language:

> [T]he states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

Id. at 584.

or "States" 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union.[9] U.S. Const., *passim*. Accepted statutory construction directs that we give "State" the same meaning throughout the Constitution. *Cf. Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotations omitted))[10]

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[9] In three instances the Constitution refers to a "foreign State," *see* U.S. Const. art. I, § 9, cl. 8; *id.* art. III, § 2, cl. 1; *id.* amend. XI. "State" with a plainly different meaning also appears in reference to the President's "State of the Union." *Id.* art. II, § 3, cl. 1. The Constitution refers to "a" State five times. *See id.* art. III, § 2, cls. 1, 2; *id.* amend. XXIII, § 1, cl. 2. A descriptive adjective precedes "State" two times. *See id.* art. IV, § 3, cl. 1 ("no new State"); *id.* amend. XXIII, § 1, cl. 2 ("the least populous State").

[10] The legislative history of the Second Amendment also supports the interpretation of "State" as one of the States of the Union. In the First Congress, James Madison proposed language that a well-regulated militia was "the best security of a free *country*." David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 610 (2000) (citing *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 12 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) (Documentary Record)) (emphasis added). After the proposal was submitted to an eleven-member House of Representatives committee (including Madison), however, "country" was changed to "State." *Id.* (citing Documentary Record, *supra*, at 30). As Judge Walton noted:

> Anti-Federalist Elbridge Gerry explained that changing the language to "necessary to the security of a free State" emphasized the primacy of the state militia over the federal standing army: "A well-regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one."

Seegars, 297 F.Supp.2d at 229 (internal quotation omitted) (citing Yassky, *supra* (quoting The Congressional Register, August 17, 1789)). Indeed, in light of the meaning of "State" as used throughout the Constitution, *see supra* p. 5, and the care the drafters are presumed to have taken in selecting specific language, *see Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) ("Every word [in the Constitution] appears to have

Although "the Constitution is in effect . . . in the District," *O'Donoghue v. United States*, 289 U.S. 516, 541 (1933), as it is in the States, "[a] citizen of the district of Columbia is not a citizen of a *state* within the meaning of the constitution." *Hepburn*, 6 U.S. at 445 (emphasis in original). Accordingly, both the Supreme Court and this court have consistently held that several constitutional provisions explicitly referring to citizens of "States" do not apply to citizens of the District. *See id.* at 452-53; *see also Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954) (District not "State" under Fourteenth Amendment); *Adams v. Clinton*, 531 U.S. 941 (2000), *aff'g* 90 F. Supp. 2d 35 (D.D.C. 2000) (three-judge district court held that Constitution does not guarantee District citizens right to vote for members of Congress because District does not constitute "State" within Constitution's voting clauses [11]); *LaShawn v. Barry*, 87 F.3d 1389, 1394 n.4 (D.C. Cir. 1996) ("The District of Columbia is not a state. It is the seat of our national government . . . . Thus, [the Eleventh Amendment] has no application here."); *Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[T]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."). On the other hand, the Supreme Court and this court have held that the District can parallel a "State" within the meaning of some constitutional provisions. *Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (Full Faith and Credit Clause binds "courts of the District . . . equally with courts of the states"); *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 198-99 (D.C. Cir. 1996) (while "D.C. is not a state," Commerce Clause and Twenty-first Amendment apply to

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been weighed with the utmost deliberation, and its force and effect to have been fully understood."), the change plainly suggests that the drafters intended to clarify that the right established in the Second Amendment was intended to protect the "free[dom]" of the "State[s]" of the Union rather than the "country."

[11] U.S. Const. art. I, §§ 2-4.

District). Ultimately, "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or *constitutional provision* depends upon the character and aim of the specific provision involved." *District of Columbia v. Carter*, 409 U.S. 418, 419-20, (1973) (emphasis added).

The Second Amendment's "character and aim" does not require that we treat the District as a State. The Amendment was drafted in response to the perceived threat to the "free[dom]" of the "State[s]" posed by a national standing army controlled by the federal government. *See, e.g., Emerson*, 270 F.3d at 237-40, 259; *Silveira*, 312 F.3d at 1076. In *Miller*, the Supreme Court explained that "[t]he sentiment of the time [of the Amendment's drafting] strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia" composed of men who "were expected to appear bearing arms supplied by themselves." 307 U.S. at 179. Indeed, at the time of the Constitutional Convention, "there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the *sovereignty of the separate States.*" *Perpich v. Dep't of Defense*, 496 U.S. 334, 340 (1990) (emphasis added). The Second Amendment, then, "aimed" to secure a military balance of power between the States on the one hand and the federal government on the other.[12] Unlike the States, the

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[12] As noted in *Seegars*:

[I]n his efforts to convince the people of the advantages of the Constitution in The Federalist Papers, James Madison noted that although the federal government had a standing army, the people would have the use of militias, stating:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger . . . . Besides the advantage of being armed, which the Americans possess over the people of almost every

District had—and has—no need to protect itself from the federal government because it is a *federal* entity created as the seat of that government.

> [T]he Second Amendment was included in the Bill of Rights to ensure that the people would have the ability to defend themselves against a potentially oppressive federal government, which had just been given the authority to maintain a national standing army in Article I of the Constitution. But, the drafters of the Constitution having provided for a 'District . . . [to] become the Seat of the Government of the United States,' and having given Congress 'exclusive' authority both to legislate over this District *and to exercise control over 'the Erection of Forts, Magazines, [and] Arsenals* . . . ,' surely it was not intended for the protection afforded by the Second Amendment to apply to an entity that had been created to house the national seat of government. In other words, there is no reason to believe that the First Congress thought that the federal seat of government needed to be protected from itself when the Second Amendment was adopted.

Seegars, 297 F. Supp. 2d at 238-39 (internal citations omitted) (emphasis and alterations in original);[13] *see also*

> other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

Seegars, 297 F. Supp. 2d at 235 (internal quotation omitted) (quoting The Federalist No. 46, at 267 (Clinton Rossiter ed., 1961)).

[13] Even if the District were to be considered a "State" under the Second Amendment, I do not believe D.C. Code § 7-2502.02(a)(4) could be challenged thereunder. When adopted, the Bill of Rights protected individuals only against the federal government. *See, e.g.*, *Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833). Under the "incorporation"

Sandidge v. 520 A.2d 1057, 1058 (D.C. 1987) ("assuming the second amendment applies to the District of Columbia," majority holds "the Second Amendment guarantees a collective rather than an individual right" (internal quotation omitted)); *see also id.* at 1059 (Nebeker, J., concurring) ("I conclude first that [the Second Amendment] does not apply to the Seat of the Government of the United States.").

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doctrine, however, "many of the rights guaranteed by the first eight Amendments to the Constitution have been held [by the Supreme Court] to be protected against state action by the Due Process Clause of the Fourteenth Amendment." *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 (1968) (Sixth Amendment right to jury trial in criminal case protected against state action); *see also Benton v. Maryland*, 395 U.S. 784, 795 1969) ("Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the State and Federal Governments." (internal quotation and citation omitted)). But the Supreme Court has never held that the Second Amendment has been incorporated. *Cf. United States v. Cruikshank*, 92 U.S. 542, 553 (1875) ("[The Second Amendment] is one of the amendments that has no other effect than to restrict the powers of the national government . . . ."); *see also Love*, 47 F.3d at 123 ("The Second Amendment does not apply to the states." (citing *Cruikshank*, 92 U.S. 542)); *Cases*, 131 F.2d at 921-22 ("Whatever rights . . . the people may have [under the Second Amendment] depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right." (citing *Cruikshank*, 92 U.S. at 553)). Thus, the Amendment does not apply to gun laws enacted by the States. Because the Second Amendment "was specifically included by the drafters of the Bill of Rights to protect the states against a potentially oppressive federal government," *Seegars*, 297 F. Supp. 2d at 230, it would make little sense to incorporate the Amendment. Although the District is a *federal* enclave and thus the Second Amendment might seem to apply without regard to incorporation, to hold that the District constitutes a "State" under the Amendment and yet, at the same time, to treat its laws as federal is a self-contradiction. In other words, either the District, as a federal enclave, enacts federal law, including D.C. Code § 7-2502.02(a)(4), or the District is a "State" and D.C. Code § 7-2502.02(a)(4) is state legislation to which the unincorporated Second Amendment does not apply.

III.

In its origin and operation, moreover, the District is plainly not a "State" of the Union. It is, instead, "an exceptional community," *District of Columbia v. Murphy*, 314 U.S. 441, 452 (1941), that "[u]nlike either the States or Territories, . . . is truly sui generis in our governmental structure." *Carter*, 409 U.S. at 432. The Constitution provides for the creation of the District in Article I, granting the Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl. 17. As the Supreme Court explained in *O'Donoghue*, "The object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation." 289 U.S. at 539-40, (internal quotations and citations omitted). In other words, the District is "the capital—the very heart—of the Union itself . . . within which the immense powers of the general government were destined to be exercised for the great and expanding population of forty-eight states." *Id.* at 539.

The Congress possesses plenary power over the District and its officers. *Id.* "Indeed, '[t]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.'" *Carter*, 409 U.S. at 429 (quoting *Berman v. Parker*, 348 U.S. 26, 31 (1954)). Although the Congress delegated certain authority to the District's local government in the Home Rule Act of 1973, D.C. Code §§ 1-201.01 *et seq.*, it reserved the authority to enact legislation "on any subject," D.C. Code § 1-206.01, and to repeal legislation enacted by the local government, *id.* § 1-206.02(c)(1). *See Bliley v. Kelly*, 23

F.3d 507, 508 (D.C. Cir. 1994) (describing Home Rule Act).

As do the States, the District maintains a "militia" of "[e]very able-bodied male citizen . . . of the age 18 years and under the age of 45 years" residing in the District, D.C. Code § 49-401, which includes an "organized" division that is "designated the National Guard of the District of Columbia," D.C. Code § 49-406. Nevertheless, the District is again unique in that its militia "is essentially a component of the federal government." *Seegars*, 297 F. Supp. 2d at 241. That is, it is controlled by the federal government and acts only on the order of the President.[14] Executive Order 11,485 authorizes the Secretary of the United States Department of Defense to "supervise, administer and control" the District's National Guard "while in militia status" and to "order out the National Guard . . . to aid the civil authorities of the District of Columbia." Exec. Order No. 11,485, 34 Fed. Reg. 15,411 § 1 (Oct. 1, 1969). The Executive Order also provides that the "Commanding General and the Adjutant General of the National Guard will be appointed by the President," *id.* § 3, and that the Commanding General "shall report to the Secretary of Defense," *id.* § 1; *see also* D.C. Code § 49-301(a)-(b) ("There shall be appointed and commissioned by the President of the United States a Commanding General of the militia of the District of Columbia . . . .[T]he Commanding General of the militia of the District of Columbia shall be considered to be an employee of the Department of Defense."). Unlike a State Governor who can mobilize the State militia during civil unrest,[15] the Mayor of the District must request the President to mobilize the District's militia. D.C. Code § 49-103 ("[I]t shall be lawful for the Mayor of the District of Columbia . . . to call on the Commander-in-Chief to aid . . . in suppressing . . . violence and enforcing the laws; the Commander-in-Chief shall thereupon order out so much and such portion of the militia as he may deem necessary to suppress the same . . . ."). *See generally Seegars*, 297 F. Supp. 2d at 240-41 (discussing structure of District's militia).

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[14] "The President of the United States shall be the Commander-in-Chief of the *militia* of the District of Columbia." D.C. Code § 49-409 (emphasis added); *see also id.* § 49-404 ("The enrolled militia shall not be subject to any duty except when called into the service of the United States, or to aid the civil authorities in the execution of the laws or suppression of riots."); *id.* § 49-405 ("Whenever it shall be necessary to call out any portion of the enrolled militia the Commander-in-Chief shall order out, by draft or otherwise, or accept as volunteers as many as required.").

To sum up, there is no dispute that the Constitution, case law and applicable statutes all establish that the District is not a State within the meaning of the Second Amendment. Under *United States v. Miller*, 307 U.S. at 178, the Second Amendment's declaration and guarantee that "the right of the people to keep and bear Arms, shall not be infringed" relates to the Militia of the States only. That the Second Amendment does not apply to the District, then, is, to me, an unavoidable conclusion.

For the foregoing reasons, I would affirm the district court's dismissal of Heller's Second Amendment challenge to section 7-2502.02(a)(4) for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6). I would affirm its dismissal of the other five appellants' claims as well as Heller's other claims for lack of standing under Federal Rule of Civil Procedure 12(b)(1). Accordingly, I respectfully dissent.

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[15] See, *e.g.*, 4 Pa. Code § 7.211(a) ("The *Governor* will retain command of State peacekeeping forces during a civil disorder.") (emphasis added), (d) ("In the event of disorder, . . . [w]eapons carried by the National Guard will not be loaded nor will bayonets be fixed without the specific order of the *Governor*.") (emphasis added).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, *et al.*, Plaintiff, v. DISTRICT OF COLUMBIA, *et al.*, Defendants.	Civil Action No. 03-0213 (EGS)

MEMORANDUM OPINION

I. Introduction

Plaintiffs in this case are six residents of the District of Columbia who wish to possess a handgun or an assembled long gun in their homes for self-defense but do not do so because they "fear arrest, criminal prosecution, and fine." Compl. at ¶ 1, 3, 5, and 6. Plaintiff Heller has applied for a permit to possess a handgun in his home and has been rejected. Compl. at ¶ 2. The other five plaintiffs have not applied for a permit. None of the plaintiffs have asserted membership in the District of Columbia Militia.

Plaintiffs argue that D.C. Code § 7-2502.02(a)(4)[1], barring registration of handguns, D.C. Code § 7-2507.02[2], barring the possession of firearms within the home or possessed land, and D.C. Code §§ 22-4504[3] and 4515, forbidding the carrying of firearms within one's home or possessed land without a license, ("D.C. gun control laws") should be permanently enjoined because these laws violate the Second Amendment, which establishes a fundamental individual right to bear arms. Plaintiffs are asking this Court to grant Summary Judgment in their favor.

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[1] "A registration certificate shall not be issued for a . . . (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976." "Pistol means any firearm originally designed to be fired by use of a single hand." D.C. Code § 7-2501.01(12) (2003).

Defendants in this case are the District of Columbia and Anthony Williams, Mayor of the District of Columbia. Defendants argue that the Second Amendment does not provide an individual right to bear arms. Defendants ask the Court to grant their Motion to Dismiss.

II. Legal Standard

When considering a Motion to Dismiss, the Court construes the facts in the complaint as true and construes all reasonable inferences in the light most favorable to the plaintiff. *See Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002). A Motion to Dismiss is granted and the complaint dismissed only if no relief could be granted on those facts. *See Sparrow v. United Air Lines Inc.*, 216 F.3d 1111, 1114 (D.C. Cir. 2002).

In reviewing a Motion for Summary Judgment, the Court must first determine if there are genuine issues of material fact. *Shields v. Eli Lilly & Co.*, 895 F.2d 1453, 1465 (D.C. Cir. 1990) (citing Fed. R. Civ. P. 56(c)).

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[2] "Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia."

[3] "(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law . . . Whoever violated this section shall be punished as provided in § 22-4515 . . ."

Summary judgment should be granted only if the moving party has shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

III. Legal Analysis

A. Supreme Court Analysis of the Second Amendment Right

Plaintiffs move for summary judgment in this case on the grounds that the D.C. gun control laws are unconstitutional because they violate the Second Amendment to the U.S. Constitution. Defendants have filed a Motion to Dismiss Plaintiffs' Complaint because plaintiffs have not made any showing that their possession or use of a firearm has some reasonable relationship to the preservation or efficiency of a well-regulated Militia.

The Second Amendment provides:

> A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

U.S. Const. amend. II. The U.S. Supreme Court has not considered a direct Second Amendment challenge since its 1939 decision in *United States v. Miller*, 307 U.S. 174 (1939). *In Miller*, the district court granted the defendant's Motion to Dismiss his indictment under the National Firearms Act for unlawfully transporting in interstate commerce an unregistered double barrel 12-gauge shotgun with a barrel of less than 18 inches, on the grounds that the

Act was "in contravention of the Second Amendment to the Constitution." *United States v. Miller*, 26 F. Supp. 1002, 1003 (1939).

The U.S. Supreme Court, on appeal of the dismissal, held that:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178.

The Court noted that, as originally adopted, the U.S. Constitution reserved to the states "the Authority of training the Militia according to the discipline prescribed by Congress." *Id.* (citing U.S. Const. art. 1 § 8). Accordingly, the Court reasoned that it was "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id.* at 178.

The Court went on to explain the nature and purpose of the Militia in the time when the Second Amendment was enacted. "The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion." *Id.* at 179. When the Militia was called into service, these men were expected to appear bearing arms, which they supplied themselves. *Id.*

Although the Supreme Court decided *Miller* sixty-five years ago, there has recently been some debate concerning whether Miller should be construed as interpreting the Second Amendment to guarantee either: (1) a collective right of the states to arm the Militia; or (2) a limited individual right to bear arms but only as a member of a state Militia; or (3) an individual right to bear arms for non-Militia use.

This Court reads *Miller*, in concert with the vast majority of circuit courts, as rejecting an individual right to bear arms separate and apart from Militia use. *See id.* at 179-182; *United States v. Emerson*, 270 F.3d 203, 218-19 (5th Cir. 2001). In doing so, this Court incorporates by reference section III (2)(A) Early Judicial History of the Second Amendment and III (2)(B) Modern Second Amendment Jurisprudence of Judge Reggie Walton's opinion in *Seegars v. Ashcroft*, 297 F. Supp. 2d 201 (D.D.C. 2004)(Amended January 29, 2004).

The Supreme Court has twice been presented with the opportunity to re-examine *Miller* and has twice refused to upset its holding. In *Lewis v. United States*, the Court concluded that a statute that criminalizes possession of a firearm by a convicted felon "[did not] trench on any constitutionally protected liberties." 445 U.S. 55, 65 n.8 (1980) (citing *Miller* and three lower court cases rejecting Second Amendment challenges.) Further, the Court dismissed an appeal in which a state court held that the Second Amendment did not confer a right to bear arms unrelated to Militia service for "want of a substantial federal question." *Burton v. Sills*, 394 U.S. 812 (1969). Had the Court thought that the Second Amendment created an individual right that was infringed, the Court could not have reached these conclusions.

Plaintiffs suggest that *Miller* may simply have proposed a test to separate weapons "covered" by the Second Amendment from weapons "not covered" by the Second Amendment. *Cf. Fraternal Order of Police v. United States*, 173 F.3d 898, 906. (D.C. Cir. 1999) (raising the question of the potential meaning of the *Miller* test).

While plaintiffs' arguments are not without merit, if the Supreme Court truly thought that *Miller* was being read to stand for a proposition much greater than the Court intended, it surely would have taken one of the opportunities it has had in the last sixty-five years to grant *certiorari* and correct the misunderstanding. This Court is thus reluctant to accept plaintiffs' reading of *Miller*.

B. Circuit Courts Analysis of the Second Amendment Right

Plaintiffs rely primarily on the Fifth Circuit's decision in *United States v. Emerson* to support their contention that the Second Amendment establishes a fundamental individual right to bear arms, regardless of membership or service in an organized Militia. 270 F.3d 203 (5th Cir. 2001). In *Emerson*, the Fifth Circuit held that the ban on carrying a pistol while subject to a restraining order was reasonable. *Id.* at 260. The two judge majority went on to conclude that the Second Amendment guarantees an individual's right to keep and bear arms for self-defense, defense of property, game hunting, and to enable him to be called on as needed by a state to resist oppression and tyranny by the federal government and the federal standing armies, so long as the weapons are not of a type that have no conceivable application in the context of a state Militia. *United States v. Emerson*, 270 F.3d 203, 260 (citing *United States v. Miller*, 307 U.S. 174 (1939)). In so doing, the two judge majority recognized that it stood alone among all the Circuits in recognizing an individual right to bear arms under the Second Amendment and conceded that Miller did not go so far as to adopt this view. *Id.* at 218-20, 227 (and cases cited therein). The third judge, who concurred in the result, criticized the majority's Second Amendment opinion as irrelevant dicta because the existence of an individual's right to bear arms was unnecessary to the court's decision. *Id.* at 272-74.

Interestingly, in finding an individual right to bear arms, the two judge majority ignored prior Fifth Circuit decisions. Almost thirty years earlier, the Fifth Circuit was twice presented with criminal defendants who claimed that their fundamental individual right to bear arms under the Second Amendment was violated. In both cases, the Fifth Circuit upheld the defendants' convictions for unregistered saw-off shotguns. Applying *Miller*, the Circuit held that the defendants' possession of shotguns had no relationship to the "preservation or efficiency of a well-regulated Militia" and that the Second Amendment did not guarantee the defendants' right to possess firearms. *United States v. Williams*, 446 F.2d 486, 487 (5th Cir. 1971); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971)).

This change in position by the Fifth Circuit is troubling in light of the Fifth Circuit's rule that a subsequent panel is precluded from disregarding the holding of an earlier panel unless it is changed by an en banc decision or by a decision of the United States Supreme Court. *See United States v. McFarland*, 264 F.3d 557, 559 (5th Cir. 2001); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425-26 (5th Cir. 1987).

The two judge majority attempted to reconcile the appearance of a change of position by dropping a footnote in *Emerson* in which it distinguishes these former cases as being cases that "do no more than apply Miller to virtually identical facts." *Emerson*, 270 F.3d at 227 n. 21. In doing so, the two judge majority brushed these cases aside without any real attempt to distinguish them. Thus, this Court does not place a great deal of reliance on the stability of *Emerson* even within the Fifth Circuit.

Since *Emerson* was decided, the Fifth Circuit appears to remain the only Circuit to adopt either its narrow construction of Miller as non-dispositive of the nature of the right guaranteed by the Second Amendment, or its finding that the Second Amendment guarantees an individual and fundamental right to bear arms. *See Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) ("Established case law makes clear that the federal Constitution grants appellant no right to carry a concealed handgun."); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (noting gun possession is not a fundamental right); *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (dicta) (*Miller* is controlling on the individual rights question); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995) (The Second Amendment "does not confer an absolute individual right to bear any type of firearm."); *United States v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000) (finding no reason to depart from its established precedent that the Second Amendment does not guarantee an individual right to bear arms); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (Because the Second Amendment right applies only to state Militias, "there can be no serious claim to any express constitutional right of an individual to posses a firearm."); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) (The Second Amendment "establishes no right to possess a firearm apart from the role possession of a gun might play in maintaining a state Militia."); *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (recognizing no plausible claim that challenged statute "would impair any state Militia"); *United States v. Hinostroza*, 297 F.3d 924, 927 (9th Cir. 2002); *United States v. Graham*, 305 F.3d 1094, 1106-07 (10th Cir. 2002); *United States v. Bayles*, 310 F.3d 1302, 1307 (10th Cir. 2002); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) (The Second Amendment is limited to the "possession or use of weapons that is reasonably related to Militia actively maintained and trained by the states.").

In response to the numerous Circuit Court opinions, plaintiffs argue that although the Supreme Court used the correct interpretation of the term "Militia" when deciding *Miller*, the definition of "Militia" used by most present courts is too narrow. Rather than a small group of people organized by the state to take arms against a tyrannical federal government, plaintiffs claim that the "Militia" referred to in *Miller* was intended and understood at the time to include all private individuals who would be capable of acting for the common defense (i.e. all able-bodied men). Pls.' Opp'n to Defs. Mot. to Dismiss at 8 (citing *Miller*, 307 U.S. at 178-79.).

The Eleventh Circuit considered plaintiffs' broad definition of Militia, but concluded that *Miller* "strongly suggests that only Militias actively maintained and trained by the states can satisfy the 'well regulated Militia' requirement of the Second Amendment." *United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997).

In response to the Eleventh Circuit's holding, plaintiffs argue that the Framers were largely suspect of any organized Militia and could not have intended for only state-trained Militia to have the right to bear arms. Pls.' Opp'n to Defs. Mot. to Dismiss at 19. Plaintiffs further argue that the Second Amendment could not be construed as a right of the states to arm a Militia because that would be in conflict with Art. 1 § 8, cl. 16 (Congress has the power "to provide for . . . arming . . . the Militia."). Pls.' Mot. for Summ. J. at 32.

This Court is not persuaded that a "well-regulated Militia" means each able-bodied person separate and apart from his or her enrollment or association with a Militia. As the Eleventh Circuit and the plain meaning of the Second Amendment make clear, a Militia must not be a free-for-all.

Rather, a Militia must be "well-regulated" fighting force, implying, at the very least, some semblance of organization at the state or local level. See *Wright v. United States*, 302 U.S. at 583, 588 (1938) ("[E]very word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.")

C. District of Columbia Circuit Court Guidance

The District of Columbia Circuit Court's opinions to date provide some guidance regarding its position with respect to the nature of the right guaranteed by the Second Amendment. On rehearing of *Fraternal Order of Police v. United States*, the Circuit upheld a statute that prohibits possession of a firearm by persons convicted of a domestic violence misdemeanor against a Second Amendment challenge by the Fraternal Order of Police. *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) [hereinafter "FOP II"]. In so doing, the Circuit assumed without deciding, based on the parties' failure to object, that the Miller test was applicable on the facts before it. *Id.* It went on to express some confusion as to the meaning of the test set forth in Miller. The D.C. Circuit then proceeded to avoid altogether the questions of the nature of the right guaranteed by the Second Amendment on the grounds that the FOP argued, without submitting any evidence on the issue, that in "most states," police officers can be called into service in Militias. *Id.*; see also *Fraternal Order of Police v. United States*, 152 F.3d 998, 1002 (D.C. Cir. 1998) [hereinafter "FOP I"]. The D.C. Circuit saw no need to proceed with an in-depth analysis of the Second

Amendment challenge in light of the lack of evidence presented regarding the relationship of these police officers with any Militia. FOP II, 173 F.3d at 906. While inconclusive, the D.C. Circuit's comments in *FOP II* suggest to this Court that, if presented with the issue, the D.C. Circuit is likely to reject the notion that the Second Amendment guarantees an individual's right to bear arms absent a substantial nexus between the person and the states' ability to maintain a Militia. *Id.* ("FOP never indicates how restrictions . . . would have a material impact on the Militia.").

Plaintiffs argue that implicit in *FOP II* is the idea that if a significant portion of "ordinary citizens" are prohibited from owning handguns, as they are under the D.C. gun control laws, then that in itself would have a material impact on the Militia. Pls.' Opp'n. to Defs. Mot. to Dismiss at 12.

This Court, like the D.C. Circuit Court, sees no need to proceed with an in-depth analysis because none of these plaintiffs have asserted membership or any relationship with any Militia.

In the only other case in this Circuit in which a challenge to a statute was made on Second Amendment grounds, the Circuit dismissed the claim based on defendant's failure to make the argument in the district court. *See United States v. Drew*, 200 F.3d 871, 876 (D.C. Cir. 2000).[4]

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[4] On January 14, 2004, Judge Walton of this Court issued an opinion in Seegar v. Ashcroft that rejected a challenge by five District of Columbia citizens to the D.C. gun control laws on Second Amendment grounds. 297 F. Supp. 2d 201 (D.D.C. 2004) (Amended January 29, 2004).

On October 1, 2003 defendant submitted a Supplemental Memorandum to the Court calling the Court's attention to the recent decision of Judge Roberts of this Court in United States v. Cole, 2003 U.S. Dist LEXIS 14029, filed August 15, 2003. In denying a Motion to Dismiss by a

D. District of Columbia Court of Appeals Holdings

The D.C. Court of Appeals has had occasion to rule on a Second Amendment issue in a case in which the District of Columbia's Carrying a Pistol Without a License statute was challenged. While plaintiffs are correct in their assertion that the holding of the District of Columbia Court of Appeals is not binding on this Court, this Court nonetheless finds the opinions of that court persuasive. On this issue, the District of Columbia Court of Appeals sided squarely with those Circuits that rejected the Fifth Circuit's narrow construction of Miller, and held that "the Second Amendment guarantees a collective rather than an individual right." *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987). The D.C. Court of Appeals held that the Second Amendment only:

> protects a state's right to raise and regulate a Militia by prohibiting Congress from enacting legislation that will interfere with that right . . . In sum, 'the right to keep and bear arms is not a right conferred upon the people by the federal constitution.'

Id. (citing *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942)).

The D.C. Court of Appeals was again confronted with a challenge to the Second Amendment in *Barron v. United States*, 818 A.2d 987 (D.C. 2003). In *Barron*, a criminal defendant appealed his conviction on several grounds including the notion that the District of Columbia's

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criminal defendant charged with possession of a firearm by a convicted felon, Judge Roberts concluded that "...with the exception of the Fifth Circuit, the courts of appeals have consistently held that individuals have no fundamental constitutional right to possess a firearm." Slip Opinion at 12.

statutes prohibiting the carrying of pistol without a license - D.C. Code § 22-4504 and D.C. Code § 7-2502, two of the four statutes at issue in this case—violate the Second Amendment. *Id.* While the D.C. Court of Appeals overturned the conviction on other grounds, the court summarily addressed and dismissed the Second Amendment challenge noting, "in *Sandidge* . . . this court found that the Second Amendment protects the rights of the state to bear arms, not the right of the individual. Therefore, our carrying a pistol without a license statute does not violate the Second Amendment." *Id.* at 994.

IV. Conclusion

Because this Court rejects the notion that there is an individual right to bear arms separate and apart from service in the Militia and because none of the plaintiffs have asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment of the United States Constitution. Thus, plaintiffs' complaint must be dismissed and their Motion for Summary Judgment denied as moot.

While plaintiffs extol many thought-provoking and historically interesting arguments for finding an individual right, this Court would be in error to overlook sixty-five years of unchanged Supreme Court precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia.

An appropriate Order accompanies this Memorandum Opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

03cv00213

Filed On: May 24, 2007
[1042482]

Shelly Parker, et al.,
Appellants

v.

District of Columbia and Adrian M. Fenty,
Mayor of the District of Columbia,
Appellees

BEFORE: Henderson and Griffith, Circuit Judges, and Silberman, Senior Circuit Judge*

ORDER

Upon consideration of appellees' unopposed motion to stay issuance of the mandate, it is:

ORDERED that the motion be granted. The Clerk is directed to withhold issuance of the mandate until August 7, 2007.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Nancy G. Dunn
Deputy Clerk

* A separate statement by Senior Circuit Judge Silberman is attached.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

Silberman, *Senior Circuit Judge*: Although the District's motion for stay only indicates it "may" petition for certiorari, since appellants did not object, I assume it is understood that the District intends to petition for review in the Supreme Court. If it did not so intend, in my view, it would be inappropriate for it to have sought the stay. *Boim v. Quranic Literacy Institute*, 297 F.3d 542, 543-44 (7th Cir. 2002) (Rovner, J.).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

03cv00213

Filed On: July 26, 2007
[1056464]

Shelly Parker, et al.,
Appelants

v.

District of Columbia and Anthony A. Williams,
Mayor of the District of Columbia,
Appellees

ORDER

Upon consideration of appellees' unopposed motion to extend stay of issuance of the mandate is

ORDERED that the motion be granted. The Clerk is directed to withhold issuance of the mandate until September 6, 2007.

FOR THE COURT:
Mark J. Langer, Clerk

BY: Nancy G. Dunn
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

03cv00213

Filed On: May 8, 2007
[1039073]

Shelly Parker, et al.,
Appellants

v.

District of Columbia and Adrian Fenty,
Mayor of the District of Columbia,
Appellees

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph,* Rogers,* Tatel,* Garland,* Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Appellees' petition for rehearing en banc and the response thereto was circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing and appellees' Fed. R. App. P. 28(j) letter, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

* Circuit Judges Randolph, Rogers, Tatel, and Garland would grant the petition for rehearing en banc.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

03cv00213

Filed On: May 8, 2007
[1039073]

Shelly Parker, et al.,
Appellants

v.

District of Columbia and Adrian Fenty,
Mayor of the District of Columbia,
Appellees

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph,* Rogers,* Tatel,* Garland,* Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Appellees' petition for rehearing en banc was circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing and appellees' Fed. R. App. P. 28(j) letter, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

* Circuit Judges Randolph, Rogers, Tatel, and Garland would grant the petition for rehearing en banc.

APPENDIX G

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the D.C. Firearms Control Regulations are codified in D.C. Code §§ 7-2501 *et seq*. as follows:

§ 7-2501.01. Definitions.

As used in this unit the term:

(1) "Acts of Congress" means:

(A) Chapter 45 of Title 22;

(B) Omnibus Crime Control and Safe Streets Act of 1968, as amended (title VII, Unlawful Possession or Receipt of Firearms (82 Stat. 1236; 18 U.S.C. Appendix)); and

(C) An Act to Amend Title 18, United States Code, To Provide for Better Control of the Interstate Traffic in Firearms Act of 1968 (82 Stat. 1213; 18 U.S.C. § 921 et seq.).

(2) "Ammunition" means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device.

(3) "Antique firearm" means:

(A) Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and

(B) Any replica of any firearm described in subparagraph (A) if such replica:

(i) Is not designed or redesigned for using rim-fire or conventional center-fire fixed ammunition; or

(ii) Uses rim-fire or conventional ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

(4) "Chief" means the Chief of Police of the Metropolitan Police Department of the District of Columbia or his designated agent.

(5) "Crime of violence" means a crime of violence as defined in § 22-4501, committed in any jurisdiction, but does not include larceny or attempted larceny.

(6) "Dealer's license" means a license to buy or sell, repair, trade, or otherwise deal in firearms, destructive devices, or ammunition as provided for in subchapter IV of this unit.

(7) "Destructive device" means:

(A) An explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device;

(B) Any device by whatever name known which will, or is designed or redesigned, or may be readily converted or restored to expel a projectile by the action of an explosive or other propellant through a smooth bore barrel, except a shotgun;

(C) Any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known;

(D) Any device designed or redesigned, made or remade, or readily converted or restored, and intended to stun or disable a person by means of electric shock;

(E) Any combination of parts designed or intended for use in converting any device into any destructive device; or from which a destructive device may be readily assembled; provided, that the term shall not include:

(i) Any pneumatic, spring, or B-B gun which expels a single projectile not exceeding .18 inch in diameter;

(ii) Any device which is neither designed nor redesigned for use as a weapon;

(iii) Any device originally a weapon which has been redesigned for use as a signaling, line throwing, or safety device; or

(iv) Any device which the Chief finds is not likely to be used as a weapon.

(8) "District" means District of Columbia.

(9) "Firearm" means any weapon which will, or is designed or redesigned, made or remade, readily converted or restored, and intended to, expel a projectile or projectiles by the action of an explosive; the frame or receiver of any such device; or any firearm muffler or silencer; provided, that such term shall not include:

(A) Antique firearms; or

(B) Destructive devices;

(C) Any device used exclusively for line throwing, signaling, or safety, and required or recommended by the Coast Guard or Interstate Commerce Commission; or

(D) Any device used exclusively for firing explosive rivets, stud cartridges, or similar industrial ammunition and incapable for use as a weapon.

(10) "Machine gun" means any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot:

(A) Automatically, more than 1 shot by a single function of the trigger;

(B) Semiautomatically, more than 12 shots without manual reloading.

(11) "Organization" means any partnership, company, corporation, or other business entity, or any group or association of 2 or more persons united for a common purpose.

(12) "Pistol" means any firearm originally designed to be fired by use of a single hand.

(13) "Registration certificate" means a certificate validly issued pursuant to this unit evincing the registration of a firearm pursuant to this unit.

(13a) "Restricted pistol bullet" means any bullet designed for use in a pistol which, when fired from a pistol with a barrel of 5 inches or less in length, is capable of penetrating commercially available body armor with a penetration resistance equal to or greater than that of 18 layers of kevlar.

(14) "Rifle" means a grooved bore firearm using a fixed metallic cartridge with a single projectile and designed or

redesigned, made or remade, and intended to be fired from the shoulder.

(15) "Sawed-off shotgun" means a shotgun having a barrel of less than 20 inches in length; or a firearm made from a shotgun if such firearm as modified has an overall length of less than 26 inches or any barrel of less than 20 inches in length.

(16) "Shotgun" means a smooth bore firearm using a fixed shotgun shell with either a number of ball shot or a single projectile, and designed or redesigned, made or remade, and intended to be fired from the shoulder.

(17) "Short barreled rifle" means a rifle having any barrel less than 16 inches in length, or a firearm made from a rifle if such firearm as modified has an overall length of less than 26 inches or any barrel of less than 16 inches.

(18) "Weapons offense" means any violation in any jurisdiction of any law which involves the sale, purchase, transfer in any manner, receipt, acquisition, possession, having under control, use, repair, manufacture, carrying, or transportation of any firearm, ammunition, or destructive device.

§ 7-2502.01. Registration requirements.

(a) Except as otherwise provided in this unit, no person or organization in the District of Columbia ("District") shall receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device, and no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm. A registration certificate may be issued:

(1) To an organization if:

(A) The organization employs at least 1 commissioned special police officer or employee licensed to carry a firearm whom the organization arms during the employee's duty hours; and

(B) The registration is issued in the name of the organization and in the name of the president or chief executive officer of the organization;

(2) In the discretion of the Chief of Police, to a police officer who has retired from the Metropolitan Police Department; or

(3) In the discretion of the Chief of Police, to the Fire Marshal and any member of the Fire and Arson Investigation Unit of the Fire Prevention Bureau of the Fire Department of the District of Columbia, who is designated in writing by the Fire Chief, for the purpose of enforcing the arson and fire safety laws of the District of Columbia.

(b) Subsection (a) of this section shall not apply to:

(1) Any law enforcement officer or agent of the District or the United States, or any law enforcement officer or agent of the government of any state or subdivision thereof, or any member of the armed forces of the United States, the National Guard or organized reserves, when such officer, agent, or member is authorized to possess such a firearm or device while on duty in the performance of official authorized functions;

(2) Any person holding a dealer's license; provided, that the firearm or destructive device is:

(A) Acquired by such person in the normal conduct of business;

(B) Kept at the place described in the dealer's license; and

(C) Not kept for such person's private use or protection, or for the protection of his business;

(3) With respect to firearms, any nonresident of the District participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction; provided, that such person, whenever in possession of a firearm, shall upon demand of any member of the Metropolitan Police Department, or other bona fide law enforcement officer, exhibit proof that he is on his way to or from such activity, and that his possession or control of such firearm is lawful in the jurisdiction in which he resides; provided further, that such weapon shall be unloaded, securely wrapped, and carried in open view.

§ 7-2502.02. Registration of certain firearms prohibited.

(a) A registration certificate shall not be issued for a:

(1) Sawed-off shotgun;

(2) Machine gun;

(3) Short-barreled rifle; or

(4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has

retired from the Metropolitan Police Department.

(b) Nothing in this section shall prevent a police officer who has retired from the Metropolitan Police Department from registering a pistol.

APPENDIX H

COUNCIL OF THE DISTRICT OF COLUMBIA

REPORT*

To: Members of the Council.
From: Committee on the Judiciary and Criminal Law,
David A. Clarke, Chairperson
Date: April 21, 1976.
Subject: Bill No. 1-164, the "Firearms Control Act of 1975."

The Committee on the Judiciary and Criminal Law, to which Bill No. 1-164 was referred, having considered the same, reports favorably on the bill as amended.

BACKGROUND OF THIS LEGISLATION

Bill No. 1-164, as amended, evolved from a series of "gun control" bills which have been introduced in this Council. On February 11, 1975, Councilmember John Wilson introduced the first bill (Bill No. 1-24) to amend the D.C. Police Regulations, Articles 50 through 55, dealing with comprehensive firearm bans, registration and licensing. On March 11, 1975, Councilmember Polly Shackleton introduced Bill No. 1-42, the "District of Columbia Handgun Control Act of 1975", which would have defined new crimes in the D.C. Code involving a comprehensive ban, except in certain circumstances, on handguns or handgun ammunition in the District of Columbia. On June 6 and 7, 1975, your committee conducted extensive public hearings concerning the above-described bills and concerning the more general issue of firearm controls. A copy of the notice and the witness list for such public bearings is attached hereto as

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* This report describes the bill as approved by the Council's Judiciary Committee and reported to the Council, which thereafter made some changes in the bill itself before passage.

"Exhibit A". Councilmember Wilson, who participated in the conduct of the aforementioned hearings, on July 22, 1975, introduced Bill No. 1-164 in lieu of his previous bill, in order to amend the D.C. Police Regulations, Articles 50 through 55. Your committee concentrated its attention to Bill No. 1-164 which basically was aimed at reforming the current, firearm registration and licensing regulations. In its major parts, original Bill No. 1-164 would have (1) expanded the registration and reporting requirements currently placed on firearm owners and/or dealers, (2) substantially increased the fees for registering firearms and for obtaining a license to deal in firearms, (3) placed specific duties on personnel of the Office of Corporation Counsel to prosecute and to monitor the firearm regulations, (4) increased the penalties for violating the police firearm regulations, (5) abolished judicial discretion in the process of meting out punishment for violation of the firearm regulations, and (6) mandated that the Chief of Police conduct an active campaign to seize all prohibited firearms. After lengthy research with regard to original Bill No. 1-164 and refinements of gun controls in the District of Columbia, your committee conducted a roundtable discussion and preliminary mark-up on Tuesday, April 6, 1976 to consider an amendment in the nature of a substitute to Bill No. 1-164. On Thursday, April 15, 1975, your committee conducted a mark-up of such amendment. The reported Bill No. 1-164, as amended, is the product of the foregoing deliberations by your committee.

THE PURPOSE OF THIS LEGISLATION

The goals of this legislation are twofold: (1) to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia; and (2) to strengthen the capacity of the District of Columbia government to monitor the traffic in firearms and ammunition within this jurisdiction. Bill No. 1-164, as amended, would circumscribe the persons eligible to register firearms in the District of Columbia and would delineate the types of firearms which could not be registered within the District of Columbia. The bill sets forth new and stringent criteria in order to relegate guns with legitimate uses in an urban area to demonstrably responsible types of persons. This legislation would also place more expansive reporting duties upon all firearm owners and dealers. This increased accountability would fortify the government's ability to keep track of the guns which are within the District of Columbia. The increased penalties for violation of these new regulations are designed to deter avoidance of the new requirements.

THE NEED FOR THIS LEGISLATION

Your committee finds that, with reference to the possession, sale, purchase and control of any firearm or destructive device in the District of Columbia, the design and scope of the current D.C. Police Regulations, Articles 50 through 55, have not been sufficiently effective in reducing the potentiality of gun-related deaths and gun-related crimes from occurring within the District of Columbia, and there is a need to significantly improve the capacity of the District government to monitor the traffic of firearms within this jurisdiction.

The easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 years. The number of deaths attributed to firearms grows each year. Since 1900, more people have been killed by private citizens using firearms than were killed in all our wars. One out of every 100 deaths in the United States is the result of a firearm. Guns are responsible for 69 deaths in this country each day. Approximately 25,000 gun-deaths occur each year and 200,000 individuals are wounded by firearms during this same period. Close to 3,000 accidental deaths are caused by firearms (1/4 of the victims are under 14 years of age). For every intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home.

The nationwide statistics dealing with handguns are even more staggering. The number of handguns alone in the U.S. is estimated to be as high as 40 million. (Congressional findings in *Proposed Federal Firearms Act of 1976—H.R. 11193)*. That's approximately 1 handgun for every 5 citizens in this country. And the supply of handguns may be increasing by as much as 2-1/2 million each year.

A crime committed with a pistol is 7 times more likely to be lethal than a crime committed with any other weapon. Over the last several years, statistics have shown that handguns are used in roughly 54% of all murders, 60% of robberies, 26% of assaults and 87% of all murders of law enforcement officials. In 1973, the FBI reported 19.510 murders in the United States, 53% of these homicides were committed with handguns. From 1964-1973 firearms were used to commit 95% of the slayings of police officers—613 by handguns, 104 by rifles and 101 with shotguns. (*Statement of D.C. Delegate Walter E. Fauntroy*).

In 1973, Detroit police reported 751 deaths from all criminal homicides, 24 more than the total number of civilians killed in Northern Ireland during the entire 5-1/2 years of their civil strife. The picture in the District of Columbia is not bright either. The Metropolitan Police Department reported a record 285 murders in the District of Columbia during 1974. Handguns were responsible for 155 of these homicides. In other violent crimes in which firearms were used in 1974-1975, handguns accounted for 88% of the robberies and 91% of the assaults.

Contrary to popular opinion on this subject, firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities. Most murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion or intoxication, and where the killer and victim are acquainted. (*Murder and Gun Control, American Journal of Psychiatry*, 128 Jan. 1972: 456 No. 7). Twenty-five percent of these murders occur within families.

In addition to the inability of the present D.C. firearms law to reduce the potentiality for gun-related violence, the present regulations have not been sufficiently effective in efficiently monitoring the traffic of firearms and ammunition in the District. The Metropolitan Police Department reports that during the period of 1968-1975, 57,755 firearms were registered in the District of Columbia.[1] Of this total, 41,015 were handguns. However, in spite of the present regulations, less than 1/2 of 1% of the total number of firearms (1974) used in crimes and recovered by the police were registered in D.C. *(Statement of Maurice J. Cullinane, Chief of Police, Metropolitan Police Department before Committee on Judiciary and Criminal Law—1975)*. Approximately 12% of the firearms recovered from all crimes in DC are then registered and only 1.7% of the above-mentioned firearms are registered by the person from whom they were recovered. In addition, pistols have become easy for juveniles to obtain, although the existing regulations prohibit possession of pistols by juveniles.

The startling statistics presented here emphasize the inability of the present law to cope with the problems of gun control in the District of Columbia. This bill, as amended, will strengthen the District Government's role in firearm control by:

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[1] The total number of firearms registered in the District of Columbia as of 11 :00 a.m., March 26, 1976, was 61,089. This includes firearms owned and used by the Metropolitan Police Department.

(1) making pistols and shotguns not registered according to the regulations in effect prior to the effective date of this bill unregisterable in a reasonable endeavor toward eventually freezing the pistol and shotgun population within the District of Columbia:

(2) providing more appropriate penalties for violation of these Regulations.

(3) providing a more stringent pre-clearance procedure to prevent the acquisition, possession and use of firearms by disqualified persons.

(4) providing for annual registration, which will enable the District Government to better monitor the traffic in firearms and provide additional revenue (from annual license and permit fees) to implement this comprehensive program of gun control.

(5) providing for a program of education in the District of Columbia designed to inform the community of the provisions of this act.

Your committee realizes the most effective gun control must eventually be applied at the national level. In the absence of such national action however, it becomes necessary for local governments to act to protect their citizens, and certainly the District of Columbia as the only totally urban statelike jurisdiction should be strong in its approach.

IMPACT ON EXISTING LEGISLATION

A. Effect Upon Title 22, D.C. Code and Related Authority Questions

Bill No. 1-164 as amended, the "Firearms Control Regulations Act of 1975", is enacted for the purpose of amending the existing District of Columbia Police Regulations. Specifically affected are Articles 50 through 55 of those Regulations. This bill does not amend or conflict with the provisions of Chapter 32 of Title 22 of the D.C. Code. It specifically provides as much in section 902.

The authority for the Council of the District of Columbia to amend the aforementioned D.C. Police Regulations stems from not only the plenary delegation of section 302 of the D.C. Self-Government and Governmental Reorganization Act (hereinafter "Home Rule Act") (87 Stat. 787, D.C. Code, sec. 1-124) but also from the second sentence of section 404(a) of that Act (D.C. Code, sec. 1-444(a)), which vests the Council of the District of Columbia with all functions granted to its predecessor District of Columbia Council, including but not limited to the police regulatory powers provided for in the Act of January 26, 1887 (D.C. Code § 1-224), the health and welfare regulatory powers provided for in the Act of February 26, 1892 (D.C. Code § 1-226), the firearm regulation powers provided for in the Act of June 30, 1906 (D.C. Code § 1-227), and the penalty-creating powers provided for in the Act of December 17, 1942 (D.C. Code § 1-224a).

The United States Court of Appeals for the District of Columbia Circuit has rendered a lengthy opinion delineating the relationship between the plenary power of Congress over District affairs and delegated the local government's powers (based on the pre-Home-Rule Act delegations) in the area of firearm control. In *Maryland and District of Columbia Rifle and Pistol Association, RC. v. Washington*, 142 U.S. App. D.C. 375, 442 F.2d 123 (1971), the U.S. Court of Appeals upheld the authority of the former D.C. Council to promulgate the current gun control regulations.

Those seeking a declaration of invalidity in that case claimed that the Congress had pre-empted the area of gun control by the passage of An Act to Control the Possession, Sale, Transfer and Use of Pistols and Other Dangerous Weapons in the District of Columbia (47 Stat. 650) (codified in Chapter 32 of Title 22 of the District of Columbia Code), and that, in the passage of those Regulations the old Council was treading on ground the Congress had reserved for itself. The Court closely examined the legislative history of the various statutes noting that the 1932 statute was a substantial re-enactment of an 1892 statute (Act of July 13, 1892, 27 Stat. 116) predating the delegation of firearms regulatory powers.[2] The Court went on to note that Congress failed to repeal the regulatory powers when it passed the 1932 Act (now codified in Title 22 of the D.C. Code) finding therefrom and from the rest of its examination "a satisfying assurance that Congress, having dealt with some aspects of weapons control, left others for regulation by the District. Indeed ... [the Court could] not fathom any other purpose to be achieved by leaving Section 1-227 in force." (442 F.2d at 131). The Court set forth the text as follows:

> The important consideration, we think, is not whether the legislature and municipality have both entered the same field, but whether in doing so they have clashed. Statutory and local regulation may coexist in identical areas although the latter, not inconsistently with the former, exacts additional requirements, or imposes additional penalties. The test of concurrent authority, this court indicated many years ago, is the absence of conflict with the legislative will. As the court declared in *French v. District of Columbia*, where [t]he subject [is] peculiarly within the scope of the [expressly delegated] police powers of the municipality, the

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[2] Act of June 30, 1906 (D.C. Code, sec. 1-227 (1973)).

> exercise of authority ought not to be questioned unless clearly inconsistent with the expressed will of Congress.

Bill 1-164, as amended, would-not clash at all with any provision of Chapter 32 (or any other part) of Title 22 of the Code. Chapter 32 was not enacted to afford the right to possess or carry weapons. Absent some legislation to the contrary, one could possess and carry a gun. Rather Chapter 32 was enacted to restrict the ability to possess and carry a gun.

Far from being in conflict with it, Bill 1-164 applies to present day conditions, the same approach the 72nd Congress took with respect to 1932 conditions. Bill 1-164, as amended, does not permit anything which Chapter 32 was designed to prohibit.

The Corporation Counsel of the District of Columbia argued in his brief in *Maryland and D.C. Rifle and Pistol Association, Inc. v. Washington.* That "since neither the Act of July 8, 1932 [codified in Chapter 32 of Title 22 of the Code], nor any other Act, deals with the registration of pistols by private owners, Article 51, section 1 [of the Police Regulations, prohibiting possession without registration], is not in conflict with any congressional enactment . . . Merely because the District of Columbia Council has added to the very limited congressional enactments relating to possession and transfer of weapons in the District of Columbia, does not mean that the *additions* are in conflict with the original limited provisions of the 1932 Act." (Brief of Appellees, p. 14).

Thus it is clear that Bill 1-164, as amended, was within the authority of the former D.C. Council to enact had it seen fit to do so.

There is no "expressed will of Congress" in the Home Rule Act to repeal the earlier delegations of gun control authority to the city. Any repeal would have to be by implication, and it "is a well-settled rule of statutory construction that there is a presumption against repeals by implication. *See*, Sutherland, Statutory Construction, sec. 2014 (3rd Ed., 1943).[3]

The legislative history of the Home Rule Act clearly indicates that it was the intent of Congress to transfer to the new Council the full and immediate power of the old Council in this area. Both section 321(b) of S. 1435, as reported by the Senate Committee on the District of Columbia, and the second sentence of section 404(a) of H.R. 9682, as reported by the House Committee on the District of Columbia, contain transfers of the authority of the old Council to the new. Both of the Reports indicate an intent to carry forth the old authority. Senate Report No. 93-219 says at p. 3: "The powers of the present Council and Mayor-Commissioner are transferred to the new Council and Mayor." House Report No. 93-482 says on p. 21: "Section (sic] (a) [of section 404] provides that the powers and functions of the present Council and Commissioner are transferred to the new Council and Mayor." Neither of these bills included at the time of their report to their respective houses the contents of section 602(a)(9) of the Home Rule Act. That was added in conference, and thus the "except as otherwise provided in this Act" language of the second sentence of section 404(a) was not directed to section 602(a)(9). It was more probably directed to delegations by the Home Rule Act of authority held by the old Council to other agencies [S. 1435, as reported, provided in the very next section (sec. 322) for functions subdelegated by the old

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[3] Brief for Appellees, *Maryland and D.C. Rifle and Pistol Association, Inc. v. Washington*, U.S. App. D.C. No. 22,927 (1969), p. 17, citing *United States v. Greathouse*, 166 U.S. 601 (1897).

Council and Mayor-Commissioner were not to be considered as transferred pursuant to section 321 of the bill but to be recoupable by specific Council or Mayoral action]. The gun control powers delegated to the city by D.C. Code, sections 1-224, 1-224a, 1-226, and 1-227 conferred on the old Council by section 401(1), 401(2), and 401(4) of the Reorganization Plan Numbered 3 of 1967 were not subdelegated by the old Council nor were they reassigned by the Home Rule Act.

It would be absurd therefore to now conclude that the Home Rule Act, designed and understood by all to have expanded the authority of the local legislature, to have repealed the powers delegated earlier. "It is axiomatic that a statute must not be construed to produce an absurd result." See *Lange v. United States*, 143 U.S. App. D.C. 305, 307-308, 443 F. 2d 720, 722-723 (1971).[4]

Furthermore, Congressional Delegate Water E. Fauntroy, former Chairman of the Subcommittee on the Judiciary of the Committee on the District of Columbia of the United States House of Representatives, submitted for the record a legal memorandum (Exhibit B) supporting this Council's authority to pass Bill No. 1-42, which, as mentioned earlier, would have amended the current firearms law in the District of Columbia by creating a *statutory* ban on handguns within the District of Columbia. And Attorney Harley Daniels, former Counsel to the Subcommittee on the Judiciary of the Committee on the District of Columbia of the United States House of Representatives, also testified in support of this Council's authority to enact Bill 1-42. By contrast, Bill No. 1-164 as reported herein, amends the current police regulations passed by the former D. C. Council. The scope of Bill No. 1-164, as amended, is significantly more clearly within the ambit of authority of this Council than Bill 1-42.

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[4] Memorandum of the District of Columbia, *District of Columbia v. Smith*, et al., D.C.C.A. No. 8780 (1974), p. 5.

The following analysis of the major impact of this bill upon the current firearms regulations illustrates the point further.

B. More Stringent Provisions Regarding Firearm Registration

Bill No. 1-164, as amended, abolishes the dual system under the current regulations whereby persons who own rifles or shotguns must both register and get a license for such firearms. Under the bill, a uniform system of registration is required whereby the Chief obtains not only the same data about the firearms and their owners as he does under the current regulations; but, in addition, the Chief is authorized to obtain information which supplements the current data which he lawfully obtains. For example, under the bill, an applicant would have to inform the Chief as to purpose for which he or she intends to use the firearm.

The bill would require annual registration of firearms as opposed to the current, one-time registration requirement.

The bill would give the Chief 60 days within which to rule upon a registration application in contrast to 30 days under the current regulations.

The new regulations formulated in this bill would expand the existing pre-requisites to be met by any person in order to register his firearm. For example, the class of convicted persons ineligible to register a firearm has been enlarged in this bill. The bill disqualifies anyone from registering who within the 5 years preceding the application for registration was convicted of any weapons offenses (as defined in the bill), violation of any narcotics or dangerous drug laws, or violation of any laws regarding assaults or threats so as to indicate a likelihood to make unlawful use of a firearm. The current regulations have only a three-year disqualification period for persons convicted of offenses similar to those listed above. Unlike any provisions in the existing regulations, the bill disqualifies any person from registering who was involuntarily committed to a mental hospital within the five years prior to the application or who was adjudicated by any court to be insane or to be a chronic alcoholic within the five years prior to the application. The bill requires a medical certification of cure of the foregoing maladies prior to a registration certificate ever being issued by the Chief to such persons.

The bill changes the current fee schedule for registration certificates. The public record indicates that the $2.00 fee for a registration certificate under the current regulations does not even approximate the cost to the District of Columbia to administer the existing gun control registration system. This bill directs that the Mayor set the fee for registration at whatever amount will meet the cost to the government for administering the registration system.

Just as in the current gun regulations, the bill generally will not allow destructive devices, sawed-off shotguns, machine guns, or short-barreled rifles to be registered. Of course, the bill recognizes that on-duty federal and local law enforcement officers are permitted to possess the above noted weapons. *Cf.* D.C. Code §22-3214.

The bill adds a new category of generally unregisterable firearms in the District of Columbia, namely pistols not registered and shotguns not registered and licensed pursuant to the regulations in effect immediately prior to the effective date of this bill. Such provision denotes a policy decision that handguns and shotguns have no legitimate use in the purely urban environment of the District of Columbia while at the same time avoiding any conflict with constitutional doctrines which might require compensation for materials declared to be illegal but which were legally possessed prior to the declaration. Moreover, the bill reflects a legislative decision that, at this point in time and due to the gun-control tragedies and horrors enumerated previously in this report, pistols and shotguns are no longer justified in this jurisdiction. During the Congressional review period of thirty legislative days, there will be adequate time for any current possessor of a pistol or shotgun, who is otherwise eligible, to register the same and thus be eligible for registration under the new regulations. Under section 203(c) of the bill, and Article 52, section 414 of the current regulations, his or her application cannot be used to prosecute him or her for illegal possession. If there is any fear that possibly there will be a flurry of firearm purchases or registrations of currently unregistered pistols and shotguns in the District of Columbia prior to this bill completing the full legislative process, it should be noted that the Police Department can provide the Council with daily statistics concerning recent registrations of firearms and with less frequent reports on the inventories of local firearm dealers. If the basis for the above-noted fears becomes a reality based on law enforcement reports, then this Council or the Congress can take further appropriate action prior to the bill being enacted.

Another innovation of the registration provisions of this bill would be the requirement in section 203(a)(10) whereby applicants would have to demonstrate to the Chief that they are knowledgeable of the District of Columbia firearms laws and that they can safely use the firearm which they seek to register.

C. Expanded Licensure Provisions

Bill No. 1-164, as amended, creates two classes of business licensees whereas only one class now exists. The impact of such classification is to freeze at the current level of fourteen the number of dealers who can sell registerable firearms to the public.

The bill would extend from the current 30 days to 60 days the time allotted to the Chief to rule upon applications for licenses.

The bill requires that applicants for licenses meet the same expanded eligibility requirements as are placed on persons applying for a registration certificate.

A major revision contemplated in this bill is the establishment of a process whereby a licensed dealer can dispose of his inventory in the event that he receives an unfavorable response to his application for renewal of his license. This is to avoid any constitutional problems of confiscation. The current regulations do not address the situation of what, a dealer should do if his license is revoked. Under the provisions of this bill, if a denial or revocation becomes final, than the dealer would have to do any one of the following: register any registerable firearms in his possession, surrender to the Chief those firearms not registered plus all destructive devices, or lawfully dispose of or remove from the District of Columbia any firearms in. which he has an interest.

Bill No. 1-164 as amended contemplates more accountability in the reporting requirements than are presently required of licensees under Article 54, sec. 5(c) of the D.C. Police Regulations. Whereas a licensed dealer is currently required to submit "periodic" reports, Bill No. 1-164, as amended (sec. 410), would require the maintenance of very detailed monthly records by the licensee. The licensee would be required to keep the records current and to open them to inspection upon demand by the Chief.

D. *Delineation of Sales or Transfers of Firearms*

In both this bill and the current regulations, the range of firearms which may be generally sold or transferred coincides with the range of firearms which may be lawfully registered in the District of Columbia. However, Article 5 of Bill No. 1-164 provides that all sales and transfers of registerable firearms be accomplished only through a licensed dealer to a qualified purchaser.

E. *Ammunition Transfers*

Article 6 of Bill No. 1-164 substantially follows Article 53 of the current D.C. Police Regulations. Beyond this, section 602 of the bill sets out in detail the precise universe of lawfully possessors' of firearms ammunition; namely, licensees, authorized government personnel, certified collectors, and registrants of firearms of the same caliber as the ammunition possessed.

F. *Registration of Firing Range Operators*

Section 703 provides that for the first time in this jurisdiction that firing ranges shall be registered with the Chief.

G. *Expanded Enforcement Provisions*

Under the present Regulations (Article 55, sec. 2) no penalty will befall a person who voluntarily surrenders to the Police a firearm which is not registered, so long as a proclaimed amnesty period is in effect. This bill would abolish the current amnesty and redemption regulations and allow for surrender of firearms to the Chief at any police station and at any time. The same provision is made regarding the voluntary surrender of ammunition.

This bill also provides in section 803 that the Chief of Police publicize certain aspects of the Police regulations concerning firearms. These matters include: the elements of lawful possession, the limitations placed on holders of permits, the provisions for enforcement of the regulations, the provisions for voluntary surrender, and the means by which persons may aid the Police in enforcing the firearms regulations.

The bill sets a new mandatory minimum penalty of 10 days imprisonment and a $300 fine for violation of certain key sections of the bill (section 201 (re: prohibition of possession of a destructive device or unregistered firearm), section 401 (re: prohibition of engaging in firearms business without firearms business license), section 501 (re: limitations on sale or transfer of firearms), section 601 (re: limitations on the sale of ammunition), and section 602 (re: limitations on the possession of ammunition)). Under the current regulations there are no such mandatory sentencing provisions. The Committee reluctantly rejected higher penalties in an effort to remain within the delegated powers of D.C. Code, secs. 1-224, 1-224a, 1-226, and 1-227 so as to be certain of the Council's authority.

The foregoing considered, it should be apparent that this bill would not cause a confiscation law, would not amend any existing laws beyond the current D.C. Police Regulations governing firearms, and would take nothing away from sportsmen and collectors.

APPENDIX I

STATEMENT OF HON. WALTER E. WASHINGTON, MAYOR OF THE DISTRICT OF COLUMBIA

Upon Approving Bill I-165,
The Firearms Control Regulations Act July 23, 2976

Today I have approved Bill I-164, the "Firearms Control Regulations Act." The bill is an effort by the Government of the District of Columbia—within the limitations of the Charter—to meet the need to protect its residents and its visitors from both the anguish and fear that firearms produce. It is an important step in the right direction. It represents a step taken with the understanding that no system of firearms control can be fully effective without appropriate controls at the regional and national levels. However, the fact that others must also assist obviously does not serve as a valid reason why the City Government should not do its part to reduce the human misery and toll caused by the passion of handguns by certain persons in our community.

The bill will ban possession of handguns by anyone except police officers and special police, unless the weapons are registered with the City when the law takes effect; new handguns may not thereafter be registered. Possession of sawed-off shotguns, short-barreled rifles and machine guns will continue to be illegal.

It should be noted that the measure does not bar ownership or possession of shotguns and rifles. However, it does require that any firearm validly registered under prior regulations must be registered pursuant to the new law; an application for re-registration is to be filed within sixty days.

Measures such as this one raise issues concerning the rights and privileges of private individuals in our society. Our mail has been particularly heavy on the gun control issue in the past weeks. The letters have ranged from those who want no controls to those who want outright confiscation of all firearms. The majority of letters have stressed individual concern for personal safety. I understand these concerns. But, as law enforcement officers have stressed, a gun in the hands of anyone other than a law enforcement officer or the military does not provide genuine protection for any of us.

I have considered all of the substantial arguments and raised against gun control, and I'm not indifferent to any. But, the time has come when it must be concluded that the lessons of recent history demonstrate that this government must provide the best program of gun control within the limits of its powers.

In short, we regard this measure as a sound attempt to curtail the source of weapons in the City. The City Council has worked closely with my staff in an effort to pass a bill which addresses these concerns and many of the arguments of those who oppose gun control. The measure which it passed, this Bill—is administratively acceptable. I appreciate this effort by the Council. And although there is some concern about the administrative costs and inconvenience of the re-registration provisions of this measure, these concerns are not, in my opinion, of so serious a nature as to warrant disapproval of the Bill.

Finally, I would add a word to those who disagree with the action the City Government has taken. I ask your cooperation and support of our efforts to do what we can to assure the safety and protection of the residents of this community and the many visitors to the nation's capital. We know this Bill is not a panacea; it is just a beginning of a long process in this nation. In the opinion of the Chief of Police the Bill represents, on balance, a clear improvement over current law and would foster public safety. In the opinion of the Corporation Counsel there is no compelling reason to find the Bill legally objectionable. As the Chief Executive of the District of Columbia, I think it is my duty to approve the Bill and I ask the community to support the City Government in its action today which has but one purpose, that is the protection of the safety and welfare of its citizens and visitors.

APPENDIX J

APPLICATION FOR FIREARMS REGISTRATION OF DICK ANDREW HELLER

A copy of the original handwritten application filled out by Dick Andrew Heller is attached inside of the back cover to this petition.

REGISTRATION NUMBER

DATE REGISTERED

DEALER'S LICENSE NO.

P.D. 219 Rev. 9/76 [illegible]

METROPOLITAN POLICE DEPARTMENT WASHINGTON, D.C.

APPLICATION FOR FIREARMS REGISTRATION CERTIFICATE

$10.00 FEE REQUIRED WITH THIS APPLICATION PRINT ALL INFORMATION

This application for a Firearms Registration Certificate must be handcarried to the Metropolitan Police Department, Firearms Registration Section, 300 Indiana Avenue, N.W. Washington, D.C. 20001 by the purchaser.
The purchaser MUST 1) be fingerprinted by the Metropolitan Police Department, however, if the purchaser has been fingerprinted by this department within the (2) years prior to submitting this application he need not be fingerprinted again if he offers other satisfactory proof of identity 2) submit with this application two full face photographs of himself, 1½ x 1-7/8 inches taken within 30 days of filing this application 3) have vision better than or equal to that required to obtain a valid driver's license in the District of Columbia (a current driver's license will be prima facie evidence that the applicant's vision is sufficient) 4) demonstrate satisfactory knowledge of the laws of the District of Columbia pertaining to firearms and the safe and responsible use of same.
No transfer of a firearm between the seller and the purchaser may be made until a reply from the Chief of Police has been received by both parties involved.

SELLER'S NAME

STREET ADDRESS APT. NO.

CITY ZIP CODE

HELLER, Dick A.
PURCHASER'S [✓ OWNER'S] NAME

263 KENTUCKY AVE S.E.
STREET ADDRESS APT. NO.

WASH DC 20003
CITY ZIP CODE

DESCRIPTION OF FIREARM

☐ NEW ☒ USED

MAKE OF WEAPON: HIGH STANDARD

MODEL: BUNTLINE

SERIAL NUMBER: M0 499-17

MFG. I.D. NUMBER:

NO. OF SHOTS: 9

CALIBER: .22

NO. OF BARREL / LENGTH: 1 9½

FINISH: BLACK

TYPE OF ACTION: Single

IDENTIFYING MARKS:

DESCRIPTION OF PURCHASER/OWNER

DATE OF BIRTH: 10 DEC '41

PLACE OF BIRTH: SAN Diego, CA

OPERATOR'S PERMIT NUMBER: 5555-88-211

RACE:

SEX: M

OCCUPATION: Armed Security Guard

BUSINESS NAME: BlackHawk Sec.

BUSINESS ADDRESS: 5210 AUTH Rd SUITLAND MD 20746

HOME PHONE NUMBER: 202-544-3425

BUSINESS PHONE NUMBER: 301-316-8172

PURCHASER/OWNER'S ADDRESSES FOR THE PAST FIVE (5) YEARS WITH DATES OF RESIDENCE

263 KENTUCKY AVE S.E. DC 20003

PURCHASER/OWNER'S OCCUPATION, BUSINESS NAME AND ADDRESSES FOR THE PAST FIVE (5) YEARS WITH DATES OF EMPLOYMENT

GSA Security, Black Hawk, 5210 AUTH Rd. SUITLAND, MD, Dec 01-JY02 - DCSPO, STING Sec, 635 MASS. AVE. NW, OCT00-DEC'01 - BURNS Sec., 701 S. 12th, ARL, VA, NOV99-SEP'00 - VANCE Sec. 1000 Wilson Bl. ARL VA, JY98-NOV99, HUDCU. 451 7th SWDC, Teller, MAY97-OCT98.

HAVE YOU PREVIOUSLY BEEN DENIED IN THE DISTRICT OF COLUMBIA OR ELSEWHERE ANY PISTOL, RIFLE OR SHOTGUN LICENSE OR REGISTRATION CERTIFICATE? ☒ NO ☐ YES IF YES, EXPLAIN WHY AND BY WHOM

HAVE YOU EVER BEEN INVOLVED IN ANY MISHAP INVOLVING A PISTOL, RIFLE OR SHOTGUN? ☒ NO ☐ YES IF YES, EXPLAIN CIRCUMSTANCES, INCLUDING DATES, PLACES, AND NAMES OF ANY PERSONS INJURED OR KILLED

GIVE A BRIEF STATEMENT OF YOUR INTENDED USE OF THE FIREARM AND WHERE THE FIREARM WILL BE KEPT

PERSONAL PROTECTION

I HEREBY CERTIFY THAT I AM NOT FORBIDDEN BY EXISTING LAWS AND REGULATIONS FROM PURCHASING OR POSSESSING A FIREARM AND THAT THE INFORMATION GIVEN BY ME ON THIS APPLICATION IS CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF AND DOES NOT KNOWINGLY CONTAIN ANY MATERIAL MISREPRESENTATION OF FACT

Dick A. Heller 7-17-02
SIGNATURE OF SELLER DATE

Dick A. Heller 7-17-02
SIGNATURE OF PURCHASER/OWNER DATE

The Seller and the Purchaser MUST SIGN IN THE PRESENCE OF EACH OTHER

NOTICE

This application is VALID as a FIREARMS REGISTRATION CERTIFICATE only when stamped APPROVED by the Chief of Police and a REGISTRATION NUMBER is affixed thereto.

THIS IS NOT A LICENSE TO CARRY A CONCEALED FIREARM.

DISAPPROVED DC Code 7-2502.02

OPPOSITION
BRIEF

69

3

No. 07-290

FILED
OCT 4 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

◆

DISTRICT OF COLUMBIA AND
MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

◆

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

◆

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Second Amendment guarantees law-abiding, adult individuals a right to keep ordinary, functional firearms, including handguns, in their homes.

LIST OF PARTIES

Although only Respondent Heller is listed in Petitioners' caption, Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon were parties in the proceedings below and are Respondents before this Court per Sup. Ct. R. 12.6. Respondents initiated this case by filing a complaint against Petitioner District of Columbia and its former Mayor, Anthony Williams, in the United States District Court for the District of Columbia. Respondents appealed the District Court's ruling to the United States Court of Appeals for the District of Columbia Circuit.

Petitioner Adrian Fenty was substituted for Anthony Williams by the court of appeals upon his succession to the Mayoralty.

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The Second Amendment to the United States Constitution is reproduced on page one of the petition. D.C. Code §§ 7-2501.01(12), 7-2502.01, and 7-2502.02 are reproduced in the appendix to the petition. Pet. App. at 91a-98a. D.C. Code §§ 7-2507.02, 7-2507.06, 22-4504, and 22-4515 are reproduced in the appendix to the cross-petition. Cross-Pet. App. at 39-41.

◆

SUMMARY OF ARGUMENT

Respondents welcome Petitioners' effort to have this Court review the nature of Second Amendment rights. This case presents the Court a unique opportunity to correct a persistent misconception that the people do not actually enjoy a right that is specifically enumerated in the Constitution. "The people" – individuals in our country – retain the right to keep and bear arms.

This case raises a profound constitutional law question in the context of a stark split of authority among the lower federal courts and state courts of last resort. Indeed, the local court of last resort and the federal circuit court within the nation's capital are divided on the nature of Second Amendment rights, an untenable situation should individuals unconstitutionally convicted in the city's Article I courts seek habeas corpus review.

The case is further suitable for review because the question it presents is quite narrow. Contrary to Petitioners' tendentious formulation of the question presented in their petition, the question presented by this case is whether the Second Amendment secures an individual right to keep basic functional firearms, including ordinary handguns, within the home. In resolving that narrow, specific question, this Court need not decide the full extent of Second Amendment rights nor even determine the appropriate level of constitutional scrutiny for regulations that implicate the Second Amendment.

This case does not involve any laws that merely regulate the possession of firearms. As the court of appeals found, the code provisions at issue amount to a complete prohibition of the possession of all functional firearms within the home. The challenged laws are thus an absolute negation of the people's right to keep arms. If the right exists, the laws must yield.

The split of authority among lower courts on an issue of profound importance – not Petitioners' emotional appeal grounded in flawed social science, nor Petitioners' premature argument on the merits – warrants the granting of the petition for certiorari.

Respondents are not required to argue the merits of their case at this stage, nor are Respondents bound to rebut Petitioners' characterization of the social science record. Respondents will comprehensively describe the Second Amendment's individual character and rebut all of Petitioners' theories should certiorari be granted.

At this stage, it suffices to point out that the court of appeals' decision is neither unprecedented nor outside the norms of American jurisprudence. Courts have long struck down legislative enactments on account of the Second Amendment and its analogs in various state constitutions. This Court has repeatedly indicated that the Second Amendment secures individual rights. In so doing, this Court has agreed with long-held views of the amendment dating from the Framers.

Respondents will confine their responses to misstatements of law and fact that bear on the issues that would be before the Court were certiorari granted. Sup. Ct. R. 15.2.

Petitioners certainly have broad latitude to criticize the court of appeals' decision, but they are not free to mischaracterize that holding, or claim that their laws permit conduct that the D.C. Circuit specifically found the laws to forbid. Should the Court grant the petition, Respondents respectfully urge the Court to frame the question presented anew. The question in this case is not merely whether the city may ban handguns as a subclass of firearm; the question is whether a law that prevents people from keeping functional firearms – of any kind – in their homes violates the "right to keep and bear arms" recognized by the Second Amendment. Thus, unlike Petitioners' formulation, the question presented by

Respondents fairly and accurately reflects *all* the laws adjudicated by the courts below.

Even taking Petitioners' framing of the question presented on its own terms – namely, that District of Columbia law merely bans handguns – Petitioners' arguments in support of handgun prohibition share a common defect: none is grounded in law.

The petition does not claim that the court of appeals misapplied the test for determining whether particular arms are within Second Amendment protection, nor does the petition suggest any alternative test for making such determinations. Rather, Petitioners claim that the law is desirable, and allege they have complied with the Constitution by not forbidding other arms. Such logic could sustain any constitutional violation. It is not a serious means of legal argument.

Respondents strongly disagree with Petitioners' assertion that the laws at issue have made the District of Columbia a safer or less violent place, which they manifestly have not. In any event, that argument is simply not relevant to the resolution of what is a purely legal question.

Moreover, Respondents are troubled by the underlying suggestion that regardless of what the Constitution requires, the government is free to act in any manner that it believes has social utility. That reasoning would not logically stop at the abrogation of Second Amendment rights, but render obsolete the entire constitutional enterprise of delegated powers and retained rights. In any event, even a cursory examination of the evidence demonstrates that gun prohibition in the District of Columbia has utterly failed.

Finally, Respondents are constrained to respond to the remarkable declaration that "[w]hatever right the Second Amendment guarantees, it does not require the District to stand by while its citizens die." Pet. at 30. The statement suggests, contrary to Petitioners' consistent litigating position in other cases, that citizens are generally entitled to rely upon the city for police protection.

Neither Petitioners' sympathy for crime victims nor their effectiveness (or ineffectiveness, as the case might be) at preventing violent crime are properly at issue. However, Petitioners' suggestion that the wholesale violation of people's right to defend themselves in their homes with functional firearms is necessary to protect those very citizens cannot be sustained.

◆

ARGUMENT

I. The Court Should Provide Essential Guidance to Courts That Misconstrue the Second Amendment.

While there exists a broad array of federal and state laws regulating the possession and use of firearms, even partial firearms prohibition is rare. The

District of Columbia's complete ban on functional firearms is unique.

If a court were to conclude that the Second Amendment secures individual rights, adjudicating a blanket prohibition on the possession of functional firearms within the home would not require announcing or clarifying any constitutional standards. The mere existence of the Second Amendment right would clearly be sufficient to dispose of the city's general ban on functional firearms. And plain application of this Court's test for protected weapons, announced in *United States* v. *Miller*, 307 U.S. 174 (1939), is sufficient to dispose of the city's specific prohibition on the possession of handguns. In applying those principles, the decision below is unremarkable.

Even were the Court inclined to offer guidance as to the level of scrutiny to be applied in Second Amendment cases, a case involving mere regulation – rather than complete abrogation of Second Amendment rights – might be a better vehicle for that purpose. In such a case, the governmental interest in public safety would necessarily be balanced against the individual liberty interest at stake.

Unfortunately, a majority of federal circuit courts of appeal fail to acknowledge the requisite first element of Second Amendment analysis: the existence of an individual right. Clarifying that the Second Amendment secures individual rights would enable courts to properly analyze firearms regulations, even if the unusual facts of this case are unlikely to be repeated.

As Petitioners note, there is a profound split of authority among the federal appellate courts on the question of whether the Second Amendment secures individual rights. The split arises from a misreading of this Court's only direct Second Amendment precedent in *Miller*. As a rule, the more cursory the citation to *Miller*, the more likely a court has erred in its Second Amendment analysis. See, e.g., Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretation of* United States v. Miller *and the Second Amendment*, 26 Cumb. L. Rev. 961 (1996). Contrary to the persistent myth repeated by Petitioners, *Miller* is consistent only with the individual rights model of the Second Amendment.

Miller raised a Second Amendment challenge to his indictment under the National Firearms Act for transporting an unregistered and untaxed sawed-off shotgun across state lines. Rather than focus on the nature of the substantive right claimed by Miller, the Supreme Court focused on the sawed-off shotgun to which Miller claimed a right.

As the Second Amendment contains a prefatory justification clause providing, "A well regulated Militia being necessary to the security of a free State," U.S. Const. amend. II, *Miller* reasoned that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178.

"With that end in view," this Court set out to define "the militia," concluding that "militia" referred simply to members of the public capable of bearing arms in defense of the government if called upon to do so. *Miller*, 307 U.S. at 178-79. Reviewing "the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators," this Court determined

> that the Militia *comprised all males physically capable of acting in concert for the common defense*. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time.

Miller, 307 U.S. at 179 (emphases added). The "militia system . . . implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence." *Miller*, 307 U.S. at 179-80 (citation omitted).

This Court's treatment of the issue in *Miller* indicates that the militia "referred to the generality of the civilian male inhabitants . . . and to their personally keeping their own arms, and not merely to individuals during the time (if any) they might be actively engaged in actual military service or only to those who were members of special or select units." *United States* v. *Emerson*, 270 F.3d 203, 226 (5th Cir. 2001).

Miller's membership in the "Militia," as that term was used in the Second Amendment, was unquestioned. "Had the lack of [militia] membership or engagement been a ground of the decision in *Miller*, the Court's opinion would obviously have made mention of it. But it did not." *Id.* at 224 (footnote omitted). The court below made the same point, Pet. App. at 40a, as has Judge Kozinksi. *Silveira* v. *Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). Instead, the case turned on whether the sawed-off shotgun in question was a weapon in ordinary use suitable for common defense. Given the peculiar nature of the weapon at issue, this Court remanded the case for an evidentiary determination as to whether it had military utility. *Miller*, 307 U.S. at 178.

Had Miller survived to offer evidence on that point, he might well have been acquitted on Second Amendment grounds. It is surprising that this case, which so clearly assumed the individual nature of Second Amendment rights and explicitly declared that the "militia" is composed of ordinary citizens expected to have their own private arms, continues to be invoked on behalf of the collectivist theory.

Allegations that the Court has adopted the collectivist interpretation of the Second Amendment are still more surprising considering that the Court has consistently suggested the opposite view.

> "The people" protected by the Fourth Amendment, and by the First *and Second Amendments*, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

United States v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (citation omitted) (emphasis added).

Finding that enemy combatants outside the United States are not entitled to claim constitutional rights, this Court rejected the notion "that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, *right to bear arms as in the Second. . . .*" *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950) (emphasis added).

A century earlier, the infamous *Dred Scott* case reasoned that no Southern state would have adopted a constitution obligating it to respect privileges and immunities of citizenship held by African-Americans, including "the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went.*" *Scott* v. *Sandford*, 60 U.S. 393, 417 (1857) (emphasis added).

While *Scott*'s odious holding is an aberration, its recognition of the fact that citizens enjoy a personal right to keep and bear arms certainly was not. This Court and its members have spoken approvingly of

> "the *personal rights* guarantied and secured by the *first eight* amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms. . . .*"

Duncan v. *Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J., concurring) (quoting statement of Sen. Howard, Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866)) (emphases added).

This Court "has rejected the view" that "liberty encompasses no more than those rights already guaranteed *to the individual* against federal interference by the express provisions of the *first eight* Amendments." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 847 (1992) (emphases added). Thus,

> "[t]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific

> guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on."

Id. at 848 (quoting *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (emphasis added); see also *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (same).

Finding no support in this Court's decisions for the collectivist notion of Second Amendment rights, Petitioners offer an elaborate interpretation of the amendment's ratification history and original meaning. Notably missing from this exercise is a single 18th-century voice explaining the Second Amendment in collectivist terms.

> If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.

Stephen Halbrook, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 83 (1984). Yet contrary evidence from the period is overwhelming. Only a few examples should suffice:

Patrick Henry demanded an amendment of which "[t]he great object is that every man be armed. . . . Everyone who is able may have a gun." 3 Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 45 (2d ed. 1836). Sam Adams demanded that "the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971). As Tench Coxe put it,

> Their swords, and every other terrible implement of the soldier, are the birth right of an American. . . . [The] unlimited power of the sword is not in the hands of either the federal or state governments, but where I trust in God it will ever remain, in the hands of the people.

Halbrook, *supra*, at 69 (quoting Tench Coxe, PENNSYLVANIA GAZETTE, Feb. 20, 1788).

Likewise, every notable constitutional commentator of the 19th Century understood the Second Amendment as securing individual rights. Justice Story called the right protected by the amendment "a right of the citizens" and noted that "[o]ne of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms. . . ." Joseph Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES, 264-65 (1842).

St. George Tucker, the earliest prominent commentator on the Constitution, regarded the Second Amendment right as equivalent to Blackstone's "right of the subject," protecting "[t]he right of self defence [which] is the first law of nature." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, 143, 300 (1803). William Rawle, in his 1829 treatise, also affirmed the individual rights view, declaring that the amendment's wording was broad enough to protect the right from state infringement as well as federal. William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (2d ed. 1829) (Da Capo Press 1970).

While Petitioners' collectivist views are not without adherents, the individual rights model continues to dominate the legal academy.[1] As Professor Tribe writes, the Second Amendment

> achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually

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[1] See, e.g., William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983).

> strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes . . . a right that directly limits action by Congress or by the Executive Branch. . . .

1 Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 902 n.221 (3d ed. 2000).

The federal government argued that the Second Amendment secures an individual right to keep and bear arms as early as 1875. *United States* v. *Cruikshank*, 92 U.S. 542 (1875). This is the current understanding of the Executive Branch. Steven Bradbury, Howard Nielson, Jr., and Kevin Marshall, *Whether the Second Amendment Secures an Individual Right*, http://www.usdoj.gov/olc/secondamendment2.pdf (Aug. 24, 2004) (last visited Sept. 29, 2007); see also Opposition to Petition for Certiorari in *United States* v. *Emerson*, No. 01-8780, at 19 n.3 (2001), and Appendix A thereto.

By no means did the decision below break new ground by affirming that the Second Amendment secures individual rights. In addition to the Fifth Circuit, at least ten state appellate courts have reached the same conclusion, starting 161 years ago. *State* v. *Williams*, 148 P.3d 993, 998 (Wash. 2006); *Brewer* v. *Commonwealth*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *Rohrbaugh* v. *State*, 607 S.E.2d 404, 412

(W. Va. 2004); *State* v. *Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *Stillwell* v. *Stillwell*, 2001 Tenn. App. LEXIS 562 (Tenn. Ct. App. July 30, 2001); *State* v. *Anderson*, 2000 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Jan. 26, 2000); *Hilberg* v. *F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. App. 1988); *State* v. *Nickerson*, 247 P.2d 188, 192 (Mont. 1952); *In re Brickey*, 70 P. 609 (Idaho 1902); *Nunn* v. *State*, 1 Ga. 243, 250 (1846).[2]

Nor was the court below the first to strike down a law on Second Amendment grounds. *Nunn*, 1 Ga. at 250; *Brickey*, 70 P. at 609.[3] And if cases are considered in which laws were struck down based on state constitutional analogs to the Second Amendment, the decision below is not exceptional. See, e.g., *State ex rel. City of Princeton* v. *Buckner*, 377 S.E.2d 139 (W. Va. 1988); *State* v. *Delgado*, 692 P.2d 610 (Or. 1984); *City of Lakewood* v. *Pillow*, 501 P.2d 744 (Colo. 1972); *Las Vegas* v. *Moberg*, 485 P.2d 737 (N.M. App. 1971); *State* v. *Rosenthal*, 55 A. 610 (Vt. 1903).

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[2] Some of these decisions may "simply mention[ ] the Second Amendment in passing, with no analysis," Pet. at 8 (footnote omitted), but that is not to say the Second Amendment was not a grounds of adjudication. See, e.g., *Stillwell*, at *11-13. Petitioners are correct, however, in pointing out that courts need not labor long to distill an individual right from the Second Amendment's plain text.

[3] Petitioners' blanket assertion that "[s]tate courts that have in fact separately addressed the meaning of the Second Amendment have rejected the approach used by the court below," Pet. at 10 (footnote omitted), is thus demonstrably false.

Although the decision below is the first of a federal appellate court to strike down laws on Second Amendment grounds,[4] that may simply be a function of these laws' extreme nature. And while federal courts have not subjected state laws to Second Amendment review for lack of incorporation, Pet. at 9, that anomaly will presumably be addressed in a future case. As Judge Reinhardt observed, this Court's Reconstruction Era opinions refusing to incorporate Second Amendment rights against the states "rest on a principle that is now thoroughly discredited." *Silveira* v. *Lockyer*, 312 F.3d 1052, 1066 n.17 (9th Cir. 2002) (citing *Emerson*, 270 F.3d at 221 n.13).

This case is sufficiently worthy of certiorari owing to the widespread misapprehension of the nature of Second Amendment rights and the intra-jurisdictional conflict within the District of Columbia. Petitioners need not support their petition with gross mischaracterizations of the D.C. Circuit's holding, to the effect that it "drastically departs from the mainstream of American jurisprudence." Pet. at 8.

Considering the Second Amendment's text, the overwhelming weight of scholarship, the long history of judicial enforcement of the Second Amendment and its state analogs, and the consistent characterization of the Second Amendment by this Court and its members as protecting an individual right – including *United States* v. *Miller* – it is the "collective rights" theory, not the individual right to arms, that "departs from the mainstream of American jurisprudence."

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[4] Respondents do not agree that the laws at issue are in the nature of "gun-control," Pet. at 8, a term that implies regulation rather than prohibition.

II. The Question Presented by Petitioners Misrepresents the Court of Appeals' Holding and the Central Issue in This Case.

The question presented by Petitioners bears scant resemblance to the actual issues litigated in the court below. The question is not whether the District of Columbia may ban handguns "while allowing possession of rifles and shotguns," Pet. at i, any more than it is whether the District of Columbia may ban handguns while "allowing" possession of bricks, baseball bats, kitchen knives, or any other implement that can be used as a weapon. Rather, the question is whether the District of Columbia may ban *all* functional firearms, including handguns, without violating "the right of the people to keep and bear arms." U.S. Const., amend. II.

Petitioners gloss over the fact that the court of appeals struck down their statute banning the possession of all functional firearms, D.C. Code § 7-2507.02, not even citing that provision as relevant to the case. Sup. Ct. R. 14.1(f). The provision requires that all firearms (i.e., rifles, shotguns, and pre-ban handguns) be "unloaded and disassembled or bound by a trigger-lock or similar device unless such firearm is kept at [a] place of business, or [is] being used for lawful recreational purposes within the District of Columbia."

The court of appeals explained that allowing individuals to possess only non-functional firearms inside their home is tantamount to prohibiting such weapons outright. "As appellants accurately point out, § 7-2507.02 would reduce a pistol to a useless hunk of 'metal and springs.'" Pet. App. at 55a. Notwithstanding the fact that the D.C. Circuit struck down the functional firearms ban, Petitioners now claim Respondent Heller may possess such weapons for self-defense. Pet. at 28.

Yet the court of appeals found D.C. Code § 7-2507.02 "amounts to a complete prohibition on the lawful use of handguns for self-defense," Pet. App. at 55a, and the law plainly covers *all* firearms. Under the plain text of the statute, Heller could only use such a gun in self-defense by throwing it at an assailant, or by wielding it as a club. Heller could never actually possess a working firearm in his home, even while engaging in lawful self-defense.

Petitioners' only reference to the functional firearms ban struck down by the court of appeals appears in a footnote: "The District does not . . . construe this provision to prevent the use of a lawful firearm in self-defense." Pet. at 7 n.2. But it is unclear how Petitioners would define the term "lawful firearm." Any firearm lawfully possessed in one's home automatically becomes unlawful per D.C. Code § 7-2507.02 when it is rendered functional.

That lack of clarity simply will not do. If a woman were beaten and threatened by her husband, would that be sufficient cause for having a functional firearm? See *Morgan* v. *District of Columbia*, 468 A.2d 1306 (D.C. 1983) (en banc) (wife repeatedly complained of abusive police officer husband; city not liable when officer subsequently shoots wife, son, other officer, murders father in law). Or what if a woman obtains a protective order against an abusive spouse, but reasonably doubts the government's willingness or ability to enforce it? *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748 (2005) (police fail to enforce protective order, man murders three children).

May a citizen take the initiative of loading her shotgun or rifle in violation of D.C. Code § 7-2507.02 if she hears strange noises outside her door, or gunshots? What if she does so on a day in which a front-page headline reads, "Police Chief Declares D.C. Crime Emergency?" Allison Klein, WASHINGTON POST, July 12, 2006, at A1.

What if a woman is repeatedly targeted by criminals for her anti-drug civic activism, and sustains a pattern of crime culminating in a drug dealer's attempt to break into her home at night, vowing to kill her? These are the uncontested facts of Respondent Parker's circumstances. Not once have Petitioners suggested that Parker may ignore

D.C. Code § 7-2507.02. To the contrary, Petitioners vowed to prosecute her were she to violate the challenged laws. See Cross-Pet. at 4-5.

Had the city council wished to permit an exemption to § 7-2507.02 for home self-defense, it knew how to do so: the statute's plain text contains exemptions for keeping functional firearms at a place of business, or while engaged in recreational shooting. And had the city wanted merely to require "safe storage," it could easily have done so – by requiring the safe storage of functional firearms, e.g., in a child-proof safe.[5]

Because the city represented to this Court that a legal environment exists in the District of Columbia in which rifles and shotguns are "allowed" – an environment in which the functional firearms ban no longer exists – Respondent Heller moved the court of appeals to lift the stay of the mandate with respect to that provision.

Opposing Heller's motion, Petitioners reiterated that they disagree with the court of appeals' interpretation of D.C. Code § 7-2507.02, and offered that the section should remain enjoined "[b]ecause [Petitioners] have presented arguments that would result in a ruling of constitutionality if the Supreme Court agrees with them." Opp'n to Mot. to Lift Stay, D.C. Cir. No. 04-7041, Sept. 24, 2007 at 4-5.

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[5] Ironically, the functional firearms ban does nothing to prevent a child or a thief from assembling and loading a firearm.

In denying Heller's motion, the court of appeals reasoned that should this Court accept the premise that a handgun ban would be valid if long guns were permitted, this Court "would necessarily be obliged to consider the impact of Section 7-2507.02, since a disassembly or trigger lock requirement might render a shotgun or rifle virtually useless to face an unexpected threat." *Parker* v. *District of Columbia*, 2007 U.S. App. LEXIS 22872 at *5 (D.C. Cir. Sept. 25, 2007) (per curiam) (footnote omitted).

Petitioners admitted that their "question presented is based on the premise that rifles and shotguns are available to District residents for use in self-defense." Opp'n to Mot. to Lift Stay, *supra*, at 4 (footnote omitted). But this was not the premise of Respondents' case, and it was not the premise of the court of appeals' decision.

Indeed, it was not even the premise of Petitioners' defense below. "The truth is that neither the [D.C.] Code nor the District, in this litigation, ever suggested that a rifle or shotgun, as opposed to a handgun, could be legally employed in self defense." *Parker*, 2007 U.S. App. LEXIS 22872 at *6 n.3. Petitioners' newly invented right of self-defense lacks legal support, lacks credibility, and contradicts the plain language of the statute.

Petitioners conceded that should this Court question their premise with respect to the availability of long guns, "it has broad authority to add to or reframe the question presented." Opp'n to Mot. to Lift Stay, *supra*, at 4 n.3 (citing Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 313-14 & 416-17 (8th ed. 2002)).

Reframing the question presented is plainly called for, along the lines suggested at the outset of this brief. Petitioners may still argue that they can prohibit all handguns, regardless of whether handguns are a class of arms the individual possession of which is constitutionally guaranteed under the *Miller* test. And of course, Petitioners may still present arguments that might be construed by some courts to save the functional firearms ban; namely, arguments that the Second Amendment does not secure individual rights.

But Petitioners cannot recast their draconian laws, or the nature of this case, by creative presentation of the question at issue.

III. Whether the Second Amendment Forbids Handgun Prohibition Is a Discrete Constitutional Question That Must Be Answered on Its Own Terms.

The question whether handguns are arms whose possession by individuals is secured by the Second Amendment must be answered under the test laid out for this purpose in *Miller*, or under whatever new test the Court might fashion.

This task was correctly performed by the court of appeals. Pet. App. at 51a. The court's finding that handguns are constitutionally protected arms within the meaning of the Second Amendment was consistent not only with the Fifth Circuit's individual rights precedent in *Emerson*, 270 F.3d at 227 n.22, but also with the First Circuit's collectivist interpretation of the right to arms, which acknowledged that handguns would pass the *Miller* test. See *Cases* v. *United States*, 131 F.2d 916, 922-23 (1st Cir. 1942).

Petitioners cannot establish that handguns fail either prong of the *Miller* test. Handguns are plainly arms of the type that would be in common use absent (and even despite) their prohibition, such that individuals may be expected to keep them for ordinary, legitimate purposes. And handguns just as plainly have military application. Indeed, as the court of appeals found, handguns were specifically defined as militia arms by the second Congress. Pet. App. at 49a-50a.

Petitioners are apparently unable either to argue that handguns fall outside of *Miller*'s protection, or to posit any other standard for determining whether particular arms are protected by the Second Amendment. Petitioners thus attempt to save their prohibition by alleging that they respect gun rights in other ways, and by claiming that handguns pose an unacceptable risk to society. Neither argument is remotely relevant.

The city's handgun ban is not rendered constitutional simply because the city claims (mistakenly) to refrain from violating the Constitution in other ways, e.g., by not banning rifles and shotguns. The court of appeals aptly described that argument as "frivolous." Pet. App. at 53a. By Petitioner's logic, the city could ban the practice of religions it believes foment a disproportionate level of violence so long as it "allowed" an array of other religious practices that still satisfy spiritual needs.

Handguns are "arms." Their possession is either within or without the protection of the Second Amendment, owing to their particular characteristics, without regard to whether the city prohibits other arms.

The notion that handguns may be forbidden because they are alleged to be harmful is equally spurious. That the city's police power allows it to regulate firearms in the interest of public safety is unquestioned. But the police power is checked by the Second Amendment, just as it is checked by other constitutional rights. In questioning whether a law is constitutional, it is no answer to respond that the law's rationale is simply that public safety is a proper interest of government. That sort of argument does not resolve constitutional questions, it ignores them. "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure . . . . [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner* v. *Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

Should this Court review Petitioner's handgun ban, it need consider only whether the court of appeals correctly determined that handguns, as a class of arms, come within the Second Amendment ambit as per *Miller*.

IV. The City's Policy and Social Science Arguments Are Irrelevant and Factually Baseless.

The rights secured by the Second Amendment are not negated by the various policy preferences masquerading as social science in Petitioners' brief. The city is not required to approve of the freedoms guaranteed by the Second Amendment. The city is not required to believe such rights are efficient or well-advised, or contribute to the formation of a wholesome society. The city is required only to obey the Constitution.

There is not one individual right secured by the Constitution that cannot be challenged in some manner on policy grounds. The fact that some may think those values unwise, or even unsafe, does not mean they may simply be ignored. Indeed, the whole point of enshrining certain rights in a constitution is to ensure that the liberties they protect not be subject to competing, evolving – and often, as in this case, misinformed – policy views of government officials. And if policy benefits could be invoked to ignore constitutional provisions delegating power to the government, this Court would soon be asked to adjudicate the existence of everything from the postal monopoly to the income tax.

Petitioners' opinions of the normative policy choices reflected in the Constitution, as ratified and still operable today, are irrelevant. Whatever a court of social science might say about the city's firearms prohibitions, this is a court of law. As eloquently described in the opinion below, the law is very clear.

Although policy arguments are wholly irrelevant to the questions of whether the Second Amendment secures an individual right and whether handguns satisfy this Court's two-prong test for protected Second Amendment arms in *Miller*, Respondents are compelled to address the claim that the city's gun ban reduces violence. Clearly, it does no such thing.

As an initial matter, the propositions that "handguns cause accidents," Pet. at 25, "violence [is] caused by handguns," Pet. at 2, or that there exist "firearms-caused homicides," Pet. at 27, are true only in the sense that cars cause motor vehicle accidents. Likewise, "handguns enable suicide," Pet. at 26, just as matches enable arson. But while there is little available data as to whether match prohibition would reduce arson, the real-world results of the city's 31-year experiment with gun prohibition are quite stark: It has been a complete failure.

According to the FBI's Uniform Crime Reports, the city experienced 26.8 murders and 1,481.3 violent crimes per 100,000 inhabitants in 1976, the year before gun prohibition began. The crime rate has skyrocketed since then. In 12 of the years between 1980 and 1997, including all nine years from 1989 through 1997, the violent crime rate in the District exceeded 2,000 per 100,000 inhabitants, reaching a high of 2,921.8 in 1993. The high point represented a 97 percent increase in violent crime, 17 years after law-abiding citizens were forbidden from defending themselves with firearms. Moreover, the murder rate climbed as high as 80.6 per 100,000 inhabitants in 1991 – triple the pre-prohibition level. The murder rate is still 32 percent above the 1976 pre-prohibition level.[6]

Rather than confront the cold, hard rates of crime, Petitioners provide creative or incomplete statistical analyses to promote a Potemkin facade of success. For example, Petitioners cite to a study claiming that the gun ban "coincided with an abrupt decline in firearms-caused homicides in the District." Pet. at 26-27 (citation omitted). A cursory glance at the actual crime statistics, *supra* n.6, indicates something quite different. The District recorded 188 murders in 1976, but 223 murders in 1981. By the early 1990s, the city was recording nearly 500 murders a year.

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[6] FBI UCR Data compiled by Rothstein Catalog on Disaster Recovery and The Disaster Center, available at http://www.disastercenter.com/crime/dccrime.htm (last visited Sept. 27, 2007).

Perhaps the best evidence of gun prohibition's failure comes from Petitioners' 2006 ANNUAL REPORT ON GUNS IN THE DISTRICT OF COLUMBIA, http://mpdc.dc.gov/mpdc/frames.asp?doc=/mpdc/lib/mpdc/publications/2006_AR_Guns_in_DC.pdf (last accessed Sept. 27, 2007). Petitioners' report acknowledges that "Guns [Are] Still Readily Accessible. . . . [d]espite the limitations on gun possession and use under District of Columbia law." *Id.* at 4. Indeed, just last year, "2656 firearms were recovered by law enforcement." *Id.*

The social science benefits of gun prohibition are, at best, debatable. Yet that debate is not the sort of "case or controversy" that this Court is tasked with resolving under Article III. Even were the city's gun ban effective in reducing crime, which it certainly does not appear to have been, it would still be unconstitutional.

V. Citizens Under Criminal Attack Are Not Required to Stand By and Die Awaiting Police Protection.

Petitioners correctly note that the Second Amendment "does not *require* the District to stand by while its citizens die." Pet. at 30 (emphasis added). Yet the city consistently fights to secure its *right* to stand by while its citizens are victimized by crime. For example, the city has successfully defended its right to "stand by while its citizens" are raped, kidnapped from their homes, and further abused. *Warren*

v. *District of Columbia*, 444 A.2d 1 (D.C. 1981) (en banc). The city has likewise successfully defended its right to "stand by" in the face of the worst urban rioting in our nation's history. *Westminster Investing Co.* v. *G.C. Murphy Co.*, 434 F.2d 521 (D.C. Cir. 1970).

The city has even defended its right to "stand by while its citizens die" when the perpetrator is a police officer. *Morgan* v. *District of Columbia*, 468 A.2d 1306 (D.C. 1983) (en banc). Indeed, the city has asserted its right to "stand by while its citizens die" in the course of volunteering their assistance to the police. *Butera* v. *District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001).

Petitioners cannot be begrudged their arguments that they are under no general obligation to protect citizens from violent crime. As a matter of tort law, Petitioners' position is consistent with accepted notions of sovereign immunity and the public duty doctrine. And as a matter of constitutional law, citizens do not enjoy any positive right to police protection. *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989); *Castle Rock*, 545 U.S. 748.

Petitioners' sincere desire to reduce violent crime is unquestioned. And Petitioners' consistent assertion of immunity for failing to police the city is valid policy, borne of the regrettable truth that even the best police force cannot perfectly protect the general population against violence. Accordingly, the people's need for Second Amendment rights is inevitably, regardless of Petitioners' best intentions, a matter of life and death.

Because of Petitioners' demonstrated – even if understandable – inability to police the entire city, local government cannot substitute for the right of individuals to keep functional firearms in their homes. Washington, D.C. is, after all, the same city whose police chief once lowered his aspirations to solve only 50.9 percent of homicides because "[i]t's more encouraging. . . . You get these stretch goals [65 percent], and when you don't even come near it, you get hammered for it." David A. Fahrenthold, *D.C. Police Cut Goals on Closing Homicides: Ramsey Calls New Target for Solving Cases Realistic*, WASHINGTON POST, June 25, 2002, at B1.[7] The failure to timely solve homicides allows perpetrators to commit additional murders, for which the city is, of course, not liable. See, e.g., *Varner* v. *District of Columbia*, 891 A.2d 260 (D.C. 2006).

Data on police response times are no more encouraging than data on crime closures. While there has been some improvement in recent years, the response time to a "Priority 1 call in fiscal 2003 was 8 minutes, 25 seconds, up over a minute from the prior year. Matthew Cella, *Police Response to 911s Slowing; D.C. Cops Take a Minute More*, WASHINGTON TIMES, May 10, 2004, at A1. No doubt the city's police force would be more effective if it were adequately staffed. But "D.C. police routinely staff neighborhood patrols below their own minimum standards, with some areas having just one officer or none at all." David A. Fahrenthold, Craig Timberg and Clarence Williams, *D.C. Patrol Staffing Falls Short; Some Areas Get Just One Officer*, WASHINGTON POST, May 4, 2003, at A1.

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[7] Petitioners' homicide closure rates are calculated by excluding unsolved homicides committed in prior years but available for closure in the current year, while including solved homicides which occurred in prior years. The true closure rates are thus much lower than the claimed numbers would suggest. Charles C. Maddox, Inspector General, AUDIT OF CONTRACT PERFORMANCE MEASURES AND THE MAYOR'S SCORECARD MEASURES, Audit Report No. OIG-00-2-12MA (Mar. 20, 2001).

If the city does not wish to "stand by while its citizens die," it has many opportunities to act without infringing upon the Bill of Rights. "[U]ntil issues like onerous requirements for officers to appear in court, outmoded technology, counterproductive work rules and lax attitudes are fixed, residents won't see dramatic change." *Shuffling the Force*, WASHINGTON POST, Sept. 29, 2007, at A18.

In the meantime, people need not stand by and die while waiting for Petitioners to provide a safe city in which to live. The Second Amendment guarantees to citizens something that Petitioners have expressly and consistently disclaimed any legal obligation to provide: an effective means of preserving their lives.

◆

CONCLUSION

The Court should grant certiorari on the question as presented by Respondents.

Respectfully submitted,

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REPLY
BRIEF

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No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The decision below has created a square conflict concerning the central meaning of the Second Amendment. As the petition explains, the decision is wrong because the District of Columbia's longstanding law banning handguns—a uniquely dangerous weapon in the urban context—while allowing private possession of rifles and shotguns does not infringe the militia-based right protected by the Amendment.

Respondent Heller agrees that the petition should be granted, although he disagrees with the question presented and he asks the Court to decide *more* than the petition presents. The District first addresses his arguments on the meaning of the Second Amendment, then explains why this Court should grant certiorari on the question in the petition and not take Heller's suggestion to decide questions not actually at issue in this case. Finally, the District shows why Heller's proffered *per se* rule is inappropriate and why the Court should not disregard the serious consequences of eliminating the handgun ban that the District's legislature decided would save lives.

1. Despite prevailing below, Heller correctly recognizes that the Court should grant the petition given the "profound constitutional law question" involved and the "stark split of authority" (both within and outside the District) on the question presented. Brief in Response (Resp.) 1. He takes issue with the petition's assertion that the divided decision below departs drastically from settled constitutional decisions, but he errs in asserting that the view of the panel majority—rather than the square holdings of *nine* other courts of appeals and numerous state courts—represents "the mainstream of American jurisprudence." *Compare* Resp. 7-18 *with* Pet. 8-11. He nonetheless concedes that the decision below is the first by any federal appellate court to strike down a law on Second Amendment grounds. Resp. 17; *see* Pet. 1-2, 8.

Heller mischaracterizes the relevant authorities in trying to make the panel majority's decision appear ordinary rather than extreme. He disparages as "persistent myth" the proposition that *United States v. Miller*, 307 U.S. 174 (1939), supports the view that the Second Amendment protects a civic right tied to a state-regulated militia. Resp. 7-9. This reading is indeed "persistent," as nearly all courts that have followed *Miller* have read it as the District does and as Judge Henderson did in dissent. *E.g.*, *United States v. Rybar*, 103 F.3d 273, 285-86 (3d Cir. 1996); Pet. App. 57a-60a. That is the best reading precisely because *Miller* recognizes that the "obvious purpose" of the Second Amendment is to ensure the effectiveness and continuation of the militias that are the subject of the Militia Clauses. 307 U.S. at 178; *see* Pet. 12-13.[1]

Heller also cites other decisions of this Court that mention the Second Amendment in passing but concern distinct issues, such as *Dred Scott v. Sanford*, 60 U.S. (1 How.) 393 (1857).[2] Resp. 10-12. The District's position is fully consistent with the *dicta* he quotes to the effect that the Amendment protects a

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[1] Heller posits that *Miller* determines that the "militia" at issue was not an actual state-regulated force but "the generality of the civilian male inhabitants." Resp. 8-9 (quoting *United States v. Emerson*, 270 F.3d 203, 226 (5th Cir. 2001)). That argument disregards the words "well regulated" in the Second Amendment and *Miller*'s reference to the fact that militias consist of members "enrolled for military discipline." 307 U.S. at 179. It also fails to account for the Militia Clauses, which *Miller* stressed and which authorize Congress to organize the militia, so that the composition of the militia is subject to congressional control, not fixed in constitutional understanding. *Id.* at 178-79; *see* U.S. Const. art. I, § 8, cls. 15-16. Heller's suggestion that the *Miller* Court understood the militia as a unitary entity unaffected by political distinctions also overlooks the fact that *Miller* addresses the militia in the plural—the "forces" of the states. 307 U.S. at 178; *see* U.S. Const. art. II, § 2 (referring to "Militia of the several States").

Heller also asserts that the Court's language should not be taken as written because the opinion does not address whether Miller was a member of the militia. Resp. 9. Having concluded that he had not demonstrated that his weapon was subject to Second Amendment protection, however, the Court had no need to inquire whether Miller himself qualified.

[2] There is, of course, reason to doubt that Chief Justice Taney's views of constitutional liberty remain authoritative. Heller's reliance on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is similarly suspect since it was enumerating rights the respondents were held *not* to possess.

"right of the people." The crucial difference between the District's view of the right and Heller's is not whether it is "individual" or "collective"—the terminology Heller favors—but instead whether the right protects uses of firearms for private purposes or only uses related to service in state-regulated militias. The cases cited do not speak to that difference.

Next Heller quotes various eighteenth- and nineteenth-century figures while avoiding the most relevant material: the text of the Second Amendment, the drafts and debates relating to its passage, and the reasons for its existence. *Compare* Pet. 11-16 *with* Resp. 13-14. His quotations are taken out of context, and none of those he quoted was even involved in drafting the Amendment.[3] His representation about the extent to which the legal academy supports his position (Resp. 14-15) is likewise overstated. *See, e.g.*, Pet. 13 n.10. *See generally* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 Chi.-Kent L. Rev. 3 (2000).

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[3] Nothing in the quoted language from Patrick Henry and Tench Coxe suggests that either thought someone in Heller's position had an inalienable right to own an arm for private purposes. In the quoted passage, Henry was ridiculing Madison's argument that Congress and the States would have concurrent power to arm the militia. His speech deals only with the use of arms for military applications. 3 John Elliot, *Debates in the Several State Conventions on the Adoption of the Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, 382, 386 (2d ed. 1836). Coxe had no known role in formulating the Second Amendment; he was in any event discussing the limits on congressional power under the Militia Clauses over military matters. Tench Coxe, *A Pennsylvanian III*, Pa. Gazette, Feb. 20, 1788.

Samuel Adams did indeed propose a constitutional amendment, including language that Heller cites. But that language never made it into the Constitution (or out of the Massachusetts ratifying convention). *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 181 (Neil H. Cogan ed., Oxford Univ. Press 1997).

Heller also distorts nineteenth-century writings. Justice Story's analysis of the Second Amendment, written a half-century after its adoption, reflects a classic civic, not individual, interpretation. Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22, 42 (1984). Story saw the Amendment as protecting the militia's role as primary military defender against invasion, insurrection, and usurpation. 3 Joseph Story, *Commentaries on the Constitution* §§ 1889-1890 (1833). He lamented that the Amendment's intent was being undermined by "growing indifference to any system of militia discipline."

Citing *United States v. Cruikshank*, 92 U.S. (4 Otto) 542 (1875), Heller next suggests that the federal government's current position on whether the Second Amendment secures a right to use weapons for private uses is longstanding. Resp. 15. Nothing in *Cruikshank* substantiates that claim. On the contrary, the current position of the federal government is notable precisely *because* it departs from settled views. *See* Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. Ky. L. Rev. 705, 747-68 (2002).

Finally, Heller relies on various state court decisions. Resp. 15-16. As the petition explains and Heller does not dispute, the panel majority exaggerated the support found from such decisions regarding the Second Amendment. Pet. 9-10. Moreover, though Heller relies on state court decisions dealing with supposed state constitutional "analogs," Resp. 16, every case cited involved provisions that differ materially from the Second Amendment by, for instance, explicitly protecting weapons used for self-defense or hunting.[4]

In any event, the most important question before this Court if review is granted will not be what fine parsing of *Miller* or

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Id. § 1890. Similarly, Heller excerpts St. George Tucker's writing without relevant context. Tucker "approached the right to bear arms as both a right of the states and as a civic right." Saul Cornell, *St. George Tucker and the Second Amendment*, 47 Wm. & Mary L. Rev. 1123, 1126-27 (2006). More significantly, he located the right of individual self-defense in the common law, not the Second Amendment. *Id.*

[4] *E.g.*, *State ex rel. Princeton v. Buckner*, 377 S.E. 2d 139, 141 (W. Va. 1988) (applying provision that "[a] person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use"); *State v. Delgado*, 692 P.2d 610, 610 (Or. 1984) (applying provision that "[t]he people shall have the right to bear arms for the defence of themselves, and the State").

any other case may reveal, or what state courts have decided, or what commentators think the Second Amendment covers, but what its words mean, construed in light of their history, purpose, and place in this Nation's tradition. On that inquiry the authorities the petition cites strongly support a militia-related, not a private-use, interpretation.

2. Although Heller agrees that this Court should decide "whether the city may ban handguns as a subclass of firearm," he contends that the question should reflect his broader assertion that the District's laws in fact ban the possession of any "functional" firearm. Resp. i, 3, 18-23. This Court should reject his suggestion that it reframe the question presented.

First, the District may petition on a question it frames "as broadly or as narrowly as [it] sees fit." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). The petition identifies three errors below that warrant reversal—first, the right protected by the Second Amendment is limited to weapons possession and use in connection with service in state-regulated militias; second, laws limited to the District do not violate the Amendment; and third, the District's handgun ban does not infringe the right to keep and bear arms under any view of the Amendment. Pet. 11-30. Heller does not dispute that all of these errors are properly before the Court. *E.g.*, Resp. 23.[5]

Second, the District does not in fact ban all "functional" firearms. As the petition explains, District residents may use lawfully registered rifles and shotguns in self-defense. Pet. 7 n.2, 28. Heller misreads D.C. Code § 7-2507.02, which prescribes how a gun registrant "shall keep any firearm in his possession" under normal circumstances, but says nothing about use during an emergency. The section merely requires firearms kept at home to be kept safely—for instance, with a trigger lock, a mechanism that, like a password on a computer, allows the owner access in time of need. As reflected by the fact that the District's Council enacted this requirement secure in the knowledge that "locked guns can be ready for use in under a minute" (C.A. Br. 17 (quoting legislative history); *see* Pet. App. 116a), it is incorrect to read Section 7-2507.02 to prohibit use of a gun in self-defense in an emergency. Both the D.C. Circuit and the D.C. Court of Appeals "have long recognized exceptions to general law under exigent circumstances." C.A. Br. 17 (citing *Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952), and *Emry v. United States*, 829 A.2d 970, 972 (D.C. 2003)).[6]

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[5] Heller does not expressly address whether laws limited to the District implicate the Second Amendment but quotes with approval Professor Tribe's understanding that it "achieves its central purpose by assuring that the *federal* government may not disarm individual citizens without some unusually strong justification *consistent with the authority of the states to organize their own militias*." Resp. 14-15 (quoting 1 Laurence H. Tribe, *American Constitutional Law* 902 n.221 (3d ed. 2000)) (emphasis added).

Third, broadening the question to address the effect of Section 7-2507.02 would needlessly complicate the case. The panel majority construed this provision to forbid ever unlocking guns, such that it "amounts to a complete prohibition on the lawful use of handguns for self-defense." Pet. App. 55a. Rather than adopt this erroneous reading in order to hold that the provision violates the Second Amendment, the panel majority surely should have avoided the constitutional question by adopting a readily available statutory interpretation that would not violate the Amendment. The point, however, is largely academic because the District and the panel majority *agree* that Section 7-2507.02 should not be applied as a "functional firearms ban."[7] Thus, far from "mischaracteriz[ing]" the decision below, as Heller contends (Resp. 3), the question presented reflects the fact that the District has no cause to seek this Court's review of that particular aspect of the decision.

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[6] The District made the quoted arguments in the court of appeals. In a recent order denying Heller's motion to lift the stay of the mandate in part, the panel majority stated that the District had never suggested that shotguns and rifles could lawfully be used in self-defense. Reply App. 2ra-3ra. (Judge Henderson joined only in the order's result.) Heller argues the same. Resp. 22. But that contention is demonstrably incorrect. *E.g.*, C.A. Br. 15-18 ("Outlawing a particular type of weapon because its harms outweigh its benefits does not frustrate the core purposes of constitutional arms provisions—whether to promote the common defense, the militia, *or* self-defense—so long as other arms remain available to serve those purposes."). The panel majority below in fact acknowledged that the District made that argument. *See* Pet. App. 53a ("The District contends that since it only bans one type of firearm, 'residents still have access to hundreds more,' and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament."). Indeed, the District's view predates this litigation. *See, e.g.*, Brief for the District of Columbia in *Seegars v. Gonzales*, D.C. Cir. Nos. 04-5016 & 04-5081, at 34. Moreover, there are no reported decisions involving prosecutions under Section 7-2507.02 for the use of firearms in self-defense, nor is the District aware of any.

By contrast, as his wish list of hypotheticals for this Court to address shows (Resp. 20-21), Heller in essence seeks a broad advisory opinion on questions not legitimately at issue given the District's authoritative position on Section 7-2507.02. Especially since he could petition the District for clarifying rulemaking if he thinks the provision unclear, *see* D.C. Code § 2-505(b), there is no reason for this Court to consider how the District *might* apply Section 7-2507.02 in factual scenarios not presented here.

3. Other points merit only brief response at this stage.

a. Heller reads *Miller* to establish a *per se* rule for Second Amendment jurisprudence even broader and less defensible than that suggested by the panel majority. Under Heller's rule, if a firearm is "in common use" and has "military application," it is an "Arm[]" subject to the Second Amendment and cannot be banned no matter what other weapons remain available for self-defense and other private uses. Resp. 24-26. The panel majority would also require that the weapon be a "lineal descendant" of a "founding-era weapon." Pet. App. 51a. Either way, Heller does not respond to the point in the petition that nothing in *Miller* indicates that a weapon that qualifies as an "Arm" should have absolute protection. Pet. 29.

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[7] In its recent order, the panel majority also wrote: "our opinion does not specifically address the constitutionality of [Section 7-2507.02] as it applies to shotguns and rifles . . . ." Reply App. 2ra. Although it did not specifically address shotguns and rifles, the panel majority's reasons for holding Section 7-2507.02 unconstitutional as to pistols are equally applicable to other weapons. Pet. App. 55a.

Nor does Heller's proposed rule find support in this Court's constitutional jurisprudence. He argues that outlawing a particularly dangerous type of weapon should be as impermissible as outlawing a particular religious practice. Resp. 25. That analogy is inapt. The very core of the Free Exercise Clause is choice. By contrast, the right to "keep and bear Arms" serves a specified end, "the security of a free State" (or even, in Heller's view, self-defense); free choice of weapons is not a constitutional end in itself. In any event, particularly harmful religious practices, like particularly harmful guns, *can* be outlawed. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 876-82 (1990) (smoking peyote is not immunized from general criminal law even when a key element of religion); *Reynolds v. United States*, 98 U.S. 145, 164-67 (1878) (polygamy).[8]

b. The Council found that the easily concealable handgun is disproportionately involved in gun violence, both accidental and deliberate, and is a criminal's weapon of choice. Pet. 3-5. Subsequent studies confirm those judgments. Pet. 21-30.[9]

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[8] Particularly harmful speech may also be restricted. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*) (incitement to imminent lawless action); *Watts v. United States*, 394 U.S. 705, 707 (1969) (*per curiam*) (true threats); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-74 (1942) (fighting words); *see also Morse v. Frederick*, 127 S. Ct. 2618 (2007) (school may restrict pure speech reasonably viewed as promoting illegal drug use). Furthermore, as the panel majority recognized, protected speech may be subjected to "time, place, or manner" restrictions. Pet. App. 51a (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[9] Heller's suggestion that the District has presented merely policy arguments that are not "grounded in law" (Resp. 4, 26-27) is mistaken. As the petition explains and the panel majority recognized, the right protected

Heller does not contest that the Council had a reasonable basis to enact the handgun ban in 1976. Indeed, it makes no difference to him how much good the ban might do; he asserts that "[e]ven were the city's gun ban effective in reducing crime . . . it would still be unconstitutional." Resp. 29. He argues nonetheless that the ban has been shown ineffective by post-enactment crime statistics. Resp. 27-28. Of course, legislatures can act only on the information then available. Whatever one's view of the Second Amendment, this type of judgment is one legislatures must make in the real world, and one fundamentally ill-suited to post-hoc judicial determination.

In any event, Heller's crime statistics do not undermine the reasonableness of the District's law for two basic reasons. First, handguns cause significant harm to the public safety and welfare that has nothing to do with crime. For instance, the petition demonstrates handguns' unique responsibility for accidents and suicides, often involving children and youth. Pet. 25-26; *see also* Amicus Br. of American Academy of Pediatrics *et al.* 4-15. Heller does not respond.

Second, even if it were proper to focus only on crime, Heller's statistics are misleading. He notes that rates of violent crime, particularly homicide, rose between 1980 and 1997. Resp. 27-28. This sad truth shows nothing about the District's handgun ban. The rise in violent crime rates was a nationwide phenomenon.[10] Moreover, that rise was attributable to in-

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by the Second Amendment is not infringed by laws that reasonably regulate the right. Pet. 21-22; Pet. App. 51a. Courts consider the reasons why the legislature enacts particular laws not because they are engaging in naked policy analysis, but because they must determine (under whatever level of scrutiny is appropriate) whether those laws infringe constitutional rights.

[10] *See* James A. Fox & Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States*, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf; FBI, *Crime in the United States: 2006*, tbl. 1, *available at* http://www.fbi.gov/ucr/cius2006/data/table_01.html; FBI, *Crime in the United States: 1996*, at 62 tbl. 1, *available at* http://www.fbi.gov/ucr/Cius_97/96CRIME/96crime2.pdf.

creased crime in large cities across the Nation due to factors like drug- and gang-related activity.[11] Given the evidence that handguns are criminals' favored weapon by an overwhelming margin, that more handgun ownership means more homicide, and that handguns are disproportionately used to murder police officers, victims of domestic violence, and children at school (Pet. 24-27), it is highly probable that crime would have been worse in the District if handguns had not been outlawed.[12]

Heller also uses the number of firearms recovered by law enforcement—which shows that the District vigorously enforces its ban—as evidence that the handgun ban is a failure. Resp. 29. There are few criminal laws that succeed so perfectly that they never need to be enforced. The handgun ban undisputedly lowers the number of handguns in the District and has a deterrent effect on handgun traffic.

c. Finally, Heller claims that the District's laws improperly prevent law-abiding citizens from protecting themselves given the inability of the police to provide complete protection. Resp. 29-32. But, again, the straightforward answer is that the District allows citizens to register rifles and shotguns and use them in self-defense. Pet. 28. The Council concluded that handguns pose dangers that far outweigh their utility. Nothing in the Second Amendment gives the courts a license to second-guess that eminently reasonable judgment.

CONCLUSION

For the reasons stated, the Court should grant the petition.

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[11] Fox & Zawitz, *supra*; Jeff Grogger & Michael Willis, *The Emergence of Crack Cocaine and the Rise in Urban Crime Rates*, 82 Rev. Econ. & Stats. 519 (Nov. 2000).

[12] Heller's crime statistics are also incomplete. He does not refer separately, for instance, to rape, one of the crimes the Council intended to address when banning handguns. Pet. 4. During the overall rise in violent crime that Heller identifies, rape rates in the District did not rise and in fact remained consistently lower than in 1976 and immediately preceding years. *See* District of Columbia Crime Rates 1960-2006, *available at* http://www.disastercenter.com/crime/dccrime.htm.

Respectfully submitted,

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OCTOBER 23, 2007

APPENDIX

REPLY APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2007**

03cv00213

Filed On: September 25, 2007

[1069215]
Shelly Parker, et al.,
Appellants

v.

District of Columbia and Anthony A. Williams, Mayor of the District of Columbia,
Appellees

BEFORE: Henderson[1] and Griffith, *Circuit Judges*, and Silberman, *Senior Circuit Judge*.

ORDER

Upon consideration of appellants' motion to lift stay of mandate and the opposition thereto, it is

ORDERED that appellants' motion to lift (partially) our stay of mandate be denied. Appellants' contention is that appellees' petition for certiorari concedes the unconstitutionality of D.C. Code Section 7-2507.02 as it requires the disassembling of shotguns and rifles or the placement of trigger locks, making such arms practically useless for self defense.[2] Therefore, appellants argue, our mandate holding this provision unconstitutional should issue. But our opinion does not specifically address the constitutionality of that statute as it applies to shotguns and rifles because the only plaintiff we concluded had standing under our precedent was Dick Heller, who complained solely about the restrictions on ownership and use of a handgun. *Parker*, 478 F.3d 370, 373-76 (D.C. Cir. 2007). At least one other plaintiff (Gillian St. Lawrence) did address Section 7-2507.02 as it applied to shotguns but she did not have the same injury as Heller – the denial of a license. *Id.* To be sure, as our opinion suggested, the Supreme Court may well disagree with *Seegars*, 396 F.3d 1248 (D.C. Cir. 2005), and conclude that all the plaintiffs have standing.

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[1] **Judge Henderson concurs in the denial of the motion.**

In any event, the District's petition for certiorari makes an alternative argument not presented in our court – that the District's ban on handguns can be justified so long as rifles and shotguns can be utilized in the home for self protection. The Supreme Court, if it should reach argument – and conclude it was constitutional to ban handguns in the home if long guns were permitted – would necessarily be obliged to consider the impact of Section 7-2507.02, since a disassembly or trigger lock requirement might render a shot-

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[2] Appellants' motion does not mention the other provisions we held unconstitutional with regard to handgun possession – D.C. Code Sections 22-4504 and 22-4506 – nor does the District in its opposition.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2007**

gun or rifle virtually useless to face an unexpected threat.[3]

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:

Nancy G. Dunn
Deputy Clerk

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[3] The District of Columbia Council never contemplated the specific use of a rifle or shotgun in that situation. Had the Council contemplated such, it would, perforce, have had to consider the danger posed by a rifle's range and a shotgun's pellet spread, as well as the difficulty one would have handling such long weapons in enclosed spaces – particularly by smaller individuals. Appellees' brief at 17 did suggest that any gun (including a pre-1976 legal handgun) might be used in self defense in a "true emergency," otherwise described as "genuine imminent danger." But the Code does not allow for such, nor did the District ever specify how one would define the circumstances under which one could assemble or unlock a rifle or shotgun to face a "true emergency" (professionals might well be amused at such a hypothetical). The truth is that neither the Code nor the District, in this litigation, ever suggested that a rifle or shotgun, as opposed to a handgun, could be legally employed in self defense.

AMICUS CURIAE BRIEF

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④

No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA and ADRIAN M. FENTY,
Mayor of the District of Columbia,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN ACADEMY OF PEDIATRICS, THE SOCIETY FOR ADOLESCENT MEDICINE, AND THE CHILDREN'S DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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ARGUMENT 4

- I. Handguns Pose a Unique Danger to Children and Youth. 5
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This amicus curiae brief is submitted on behalf of the American Academy of Pediatrics ("AAP"), The Society for Adolescent Medicine ("SAM"), and the Children's Defense Fund ("CDF").[1]

STATEMENT OF INTEREST OF AMICI CURIAE THE AMERICAN ACADEMY OF PEDIATRICS, THE SOCIETY FOR ADOLESCENT MEDICINE, AND THE CHILDREN'S DEFENSE FUND

These amici share a commitment to the health and well-being of America's children and youth.

Founded in 1930, the American Academy of Pediatrics is a national, not-for-profit organization dedicated to furthering the interests of children's health and the pediatric specialty. Since its inception, the membership of AAP has grown from the original group of 60 physicians specializing in children's health to 60,000 primary care physicians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past 77 years, AAP has become a powerful voice for children's health through education, research, advocacy, and expert advice and has demonstrated a continuing commitment to working with hospitals and clinics, as well as with state and federal governments to protect the well-being of America's children.

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[1] Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. Amici curiae further state that no one other than AAP, SAM, CDF and their counsel made a monetary contribution to the preparation or submission of this brief.

The Society for Adolescent Medicine is a multidisciplinary international non-profit organization of health care professionals who are committed to advancing the health and well-being of adolescents. Over its 39-year history, members of SAM have worked to enhance public and professional awareness of adolescent health issues through education, research, clinical services, and advocacy activities. For over 20 years, SAM has published the *Journal of Adolescent Health*, the pre-eminent, authoritative peer-reviewed journal in the field of adolescent health.

Founded in 1969 as the Washington Research Project, the Children's Defense Fund began work under its new name in 1973 as a national non-profit organization whose mission is to ensure every child a Healthy Start, a Head Start, a Fair Start, a Safe Start, and a Moral Start in life and successful passage to adulthood with the help of caring families and communities. CDF pays particular attention to the needs of poor and minority children and those with disabilities. The organization strives to educate the nation about the needs of children and encourages preventive investment before they get sick or into trouble, drop out of school, or suffer family breakdown. Moreover, CDF has monitored gun violence against children in its annual report, *Protect Children Not Guns*, which reported that 2,827 children and teens died from gunfire in the United States in 2003.

AAP's, SAM's, and CDF's interest as amici curiae in this case arises from their long-standing mission of protecting the safety and well-being of children and adolescents. In connection with its goals of preventing violence against children and reducing accidental injury to children, AAP holds that the absence of guns from children's homes and communities is the most reliable and effective measure to prevent firearm-related injuries to children and youth.[2] Consistent with its objective of improving adolescent health, SAM advocates that reducing the availability of firearms in general, and handguns in particular, will reduce the frequency of youth gun violence.[3] CDF believes that it is up to adults to protect children from firearms in our homes, schools, communities, and nation by supporting common sense gun safety measures, removing guns from homes, and focusing public attention on child gun deaths.[4]

These amici recognize that firearm-related injury to children is a significant public health problem both in terms of its impact on children's physical and mental health and its impact on and cost to the public health system in America. Because of their historical and continuing commitment to protecting children and youth and their recognition of the particular threat that handguns pose to America's young people, AAP, SAM, and CDF have closely followed and been actively involved in developments in controlling access to and possession of all firearms, including handguns. It is the firm belief of the amici that the absence of handguns from children's homes and communities is the most reliable and effective method to prevent firearm-related injuries to children and adolescents.

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[2] *See* Am. Acad. of Pediatrics, Comm. on Inj. & Poison Prevention, *Firearm-Related Injuries Affecting the Pediatric Population*, 105 Pediatrics 888, 888 (2000).

[3] *See* Naomi Duke et al., Soc'y for Adolescent Med.,*Adolescent Firearm Violence: Position Paper of the Society for Adolescent Medicine*, 37 J. of Adolescent Health 171, 173 (2005).

[4] *See* Children's Defense Fund, *Protect Children Not Guns* 4-5 (2006), http://www.childrensdefense.org/site/DocServer/gunrpt_revised06.pdf? docID=1761.

Accordingly, based on their collective interest in preventing handgun injuries to children and youth nationwide, AAP, SAM, and CDF respectfully request that this Court consider the following arguments in support of the District of Columbia's petition for writ of certiorari.[5]

ARGUMENT

The United States generally and the District of Columbia in particular face the cruel reality that their children and youth are being slaughtered and maimed by handguns. These readily concealed, easily transferred, and widely available instruments of death are the leading weapons of choice when children or adolescents kill or wound each other or themselves.

In response to this public health epidemic, the District of Columbia carefully considered and then enacted reasonable legislation narrowly tailored to thwart the crisis. The decision of the United States Court of Appeals for the District of Columbia Circuit places that Court in direct conflict with the applicable precedent of this Court and the decisions of no fewer than eight Circuits and the District of Columbia Court of Appeals. Unless the decision is reviewed and reversed, the residents of the District of Columbia, and particularly its children and adolescents, will be placed at direct and immediate increased risk of harm by handgun violence. Nothing in the jurisprudence of this Court, the intention of the Framers of the Constitution, or sound public policy allows for a court to invalidate reasonable public health measures and in their place visit serious harm upon so many.

For the reasons set forth below, these amici urge the Court to grant the Petition for Certiorari.

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[5] If this Court grants the instant petition for a writ of certiorari, the amici anticipate seeking to file a brief on the merits.

I. *Handguns Pose a Unique Danger to Children and Youth.*

Handguns pose a danger to all citizens. Handguns are more likely than any other type of gun to be used in interpersonal violence and crime, as well as self-directed injury. Firearm & Inj. Ctr. at Penn, *Firearm Injury in the U.S.*, at 7 (Oct. 2006), http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf. Indeed, handguns are used in nearly 70 percent of firearm suicides and 75 percent of firearm homicides in the United States. *See* Garen J. Wintemute et al., *The Choice of Weapons in Firearm Suicides*, 78 Am. J. Pub. Health 824 (1988); Stephen W. Hargarten et al., *Characteristics of Firearms Involved in Fatalities*, 275 JAMA 42 (1996).[6] Handguns account for 77 percent of all traced guns used in crime. Firearm & Inj. Ctr. at Penn, *supra*, at 8.

Handguns, however, pose a particular risk to children and adolescents. When a gun is carried outside the home by a high school-aged youth, it is most likely to be a semiautomatic handgun (50 percent) and next most likely to be a revolver (30 percent). Josh Sugarman, *Every Handgun Is Aimed at You: The Case for Banning Handguns* 113 (2001) (citing Joseph F. Sheley & James D. Wright, Nat'l Inst. of Justice, *High School Youths, Weapons, and Violence: A National Survey* 6 (1998)). Further, there is no way to make guns "safe" for children—gun safety programs have little effect in reducing firearms death and injury. *Id.* at 125. Death of and injury to America's children and youth is undeniably linked to the presence and availability of handguns, as discussed further below.

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[6] For additional data, see U.S. Dep't of Justice, Fed. Bureau of Investigation, *Crime in the United States, 2005*, at Table 7 (Murder Victims by Weapon, 2001-2005) (2006), *available at* http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_07.html.

A. The District of Columbia Handgun Law Is a Reasonable Restriction Because Handguns Make Suicide More Likely and Suicide-Attempts More Injurious to Children and Adolescents.

Access to firearms, and handguns in particular, increases the risk that children will die in a firearm-related suicide. In 1997, 1,262 children committed suicide using a firearm, and 63 percent of all suicides in adolescents 15 through 19 years of age were committed with a firearm. Am. Acad. of Pediatrics, Comm. on Inj. & Poison Prevention, *supra* n.2, at 889-90 Fig. 1. In 1996, handguns were involved in 70 percent of teenage suicides in which a firearm was used. *Id.* at 889.

Case studies reveal that suicide by firearm is strongly associated with the presence of a gun in the home of the victim. *See generally* David A. Brent et al., *Firearms and Adolescent Suicide*, 147 Am. J. of Diseases of Child. 1066 (1993); Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 New Eng. J. Med. 467 (1992). In fact, the risk of suicide is five times greater in households with guns. Brent, *supra*, at 1068. A study on adolescent suicide and firearms found that while 87.8 percent of suicide victims who lived in a home with a gun died by firearms, only 18.8 percent of suicide victims that did not have a gun died by firearms. *Id.* Even more telling is that homes with handguns have a risk of suicide almost twice as high as that in homes containing only long guns. Kellermann, *supra*, at 470.

Moreover, statistics reveal that restrictions on access to handguns in the District of Columbia significantly reduced the incidence of suicide by firearms and resulted in a substantial reduction in the number of deaths by suicide. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of*

Columbia, 325 New Eng. J. Med. 1615, 1617 (1991). A study by the Institute of Criminal Justice and Criminology at the University of Maryland showed a decline of 23 percent in the number of suicides by firearms in the District of Columbia from 1968 to 1987. *Id.* at 1616 Table 1. Tellingly, the number of non-firearm-related suicides in the District of Columbia during that same time frame did not decline; nor did the number of firearm-related suicides in neighboring communities that were not subject to a similar ban on handguns. *Id.* at 1617-18. Additionally, the reduction in the number of suicides by firearms in the District during this time did not result in a corresponding increase in the incidents of suicides by other means. *See id.* at 1619. Thus, researchers concluded from the study that "restrictions on access to guns in the District of Columbia prevented an average of 47 deaths each year after the law was implemented." *Id.*

In addition, between 2000 and 2002, no child under the age of 16 died from suicide by firearm in the District of Columbia. In contrast, states without handgun bans (and less restrictive guns laws generally), such as Alaska, Montana and Idaho, led the country with 14, 15, and 15, respectively, firearm suicide deaths, respectively, in the same population in the same time period. Violence Pol'y Ctr., Press Release, *New Study Shows District of Columbia's Tough Gun Laws Work to Prevent Youth Suicide—No Child 16 Years of Age or Younger in DC Was the Victim of Firearm Suicide According to Most Recent Federal Data* (July 12, 2005), http://www.vpc.org/press/0507dc.htm. Given that in 2003, the third leading cause of death nationwide among youth aged ten to twenty-four was suicide and that the risk of suicide is five times greater in homes with guns, invalidation of the law will almost certainly increase the number of children that die from a suicide. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Vital

Statistics Sys., Nat'l Ctr. for Health Statistics, *10 Leading Causes of Death by Age Group, United States – 2003*.[7]

B. The District of Columbia's Handgun Law Is a Reasonable Restriction Because Handguns Increase the Likelihood and Deadliness of Accidents Involving Children.

The increased accessibility to handguns that will result if the District of Columbia handgun ban is struck down will increase the number of children who will be harmed in accidents involving firearms. Studies have shown that fewer than half of United States families with both firearms and children secure firearms separate from ammunition. *See, e.g.*, Mark A. Schuster et al., *Firearm Storage Patterns in U.S. Homes with Children*, 90 Am. J. of Pub. Health 588, 590-91 (2000). This practice is especially troubling because children as young as three are able to pull the trigger of most handguns. Am. Acad. of Pediatrics, Comm. on Inj. & Poison Prevention, *supra* n.2, at 890. Approximately 70 percent of all unintentional firearm injuries and deaths are a result of handguns. *Id.* at 888.

Unintentional firearm death disproportionately affects children: In 2004, firearms accounted for 27 percent of the unintentional deaths in 2004 among youth aged 10-19, while accounting for only 22 percent of unintentional deaths among the population as a whole. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, WISQARS database, http://www.cdc.gov/ncipc/wisqars/ (last visited Oct. 3, 2007).[8] Additionally, each year nearly 90 children are killed and approximately 1,400 are treated in hospital emergency rooms for unintentional firearm-related injuries. SAFE KIDS USA, Press Release, *Unintentional Shooting Prompts SAFE KIDS to Issue Warning About Dangers of Guns in the Home* (2003), http://www.usa.safekids.org/tier3_cd.cfm?folder_id=300& content_item_id=11370 (last visited Oct. 3, 2007). Most of these deaths occur in or around the home, and most involve guns that are loaded and accessible to children. *Id.*

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[7] URL: ftp://ftp.cdc.gov/pub/ncipc/10LC-2003/JPEG/10lc-2003.jpg.

[8] Compare search for unintentional firearm deaths for all ages to search for unintentional firearm deaths for ages 10-19.

The more guns a jurisdiction has, the more likely children in that jurisdiction will die from a firearm accident. In a study of accidental firearm deaths that occurred between 1979 and 1999, children aged four and under were 17 times more likely to die from a gun accident in the four states with the most guns versus the four states with the fewest guns. Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 333 Accident Analysis & Prevention 477, 481 Table 3 (2001). Thus, if the decision to strike the handgun ban in the District of Columbia is not reversed, the number of children who will die or be injured by handguns accidentally will increase significantly.

C. The District of Columbia Handgun Law Is a Reasonable Restriction Because Firearms and Especially Handguns Increase Homicide and Nonfatal Assault Rates Among America's Youth.

Firearm-related homicides and assaults affect children, adolescents, and young adults in staggering measure. Between 1987 and 1992, adolescents aged 16 to 19 had the highest rate of handgun crime victimization, nearly three times the average rate. Michael R. Rand, U.S. Dep't of Justice, Bureau of Justice Statistics, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, NCJ 147003 (Apr. 1994, rev. Sept. 2002).[9] Between

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[9] URL: http://www.ojp.usdoj.gov/bjs/pub/ascii/hvfsdaft.txt.

1993 and 1997, those aged 19 and younger accounted for 20 percent of firearm homicide victims and 29 percent of victims of nonfatal firearm injury from assault. Marianne W. Zavitz & Kevin J. Strom, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearm Injury and Death from Crime, 1993-1997*, at 3, NCJ 182993 (Oct. 2000).[10] For the period 1993-2001, of the average 847,000 violent victimizations committed with firearms each year, 87 percent were committed with handguns. Craig Perkins, U.S. Dep't of Justice, Bureau of Justice Statistics, *Nat'l Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime*, at 3, NCJ 194820 (Sept. 2003).[11] In 2005, 25 percent of the nation's 10,100 firearm homicide victims were under the age of 22. U.S. Dep't of Justice, Fed. Bureau of Investigation, *Crime in the United States, 2005*, at Table 8 (Murder Victims by Age by Weapon, 2005) (2006).[12] Handguns were responsible for 75 percent of those homicides. *Id.* at Table 7 (Murder Victims by Weapon, 2001-2005).[13] Indeed, the number of juvenile handgun homicides is directly correlated to the overall number of juvenile homicides. Sugarman, *supra*, at 116 Fig. 7-7.

Moreover, nationally, children and young adults are killed by firearms more frequently than almost any other cause of death. In 2004, firearm homicide was the second leading cause of injury death for persons 10 to 24 years of age, second only to motor vehicle crashes. Brady Campaign Publication, *Firearm Facts* (Apr. 2007), http://www.bradycampaign.org/facts/factsheets/pdf/firearm_facts.pdf (last visited Oct. 4, 2007) (citing U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Injury Prevention and Control, WISQARS, *Leading Causes of Death Reports, 2004*). Incredibly, in that same year, firearm homicide—not car accidents—was the leading cause of death for African American males between the ages of 15 and 34. *Id.* Children and youth are murdered with handguns more often than all other weapons combined. Violence Pol'y Ctr., *Kids in the Line of Fire: Children, Handguns, and Homicide*, at Introduction (Nov. 2001), http://www.vpc.org/studies/firecont.htm. And, for every child killed by a gun, four are wounded. Diane Degette, *When The Unthinkable Becomes Routine*, 77 Denv. U. L. Rev. 615, 615 n.5 (2000) (citing U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention Nat'l Ctr. for Health Stats., *Health, United States, 1998*, Table 49, 256-58 (1998)).

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[10] URL: http://www.ojp.usdoj.gov/bjs/pub/pdf/fidc9397.pdf.

[11] URL: http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf.

[12] URL: http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_08.html.

[13] URL: http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_07.html.

Finally, firearms (particularly handguns) represent the leading weapon utilized by both children and adults in the commission of homicide. *See* Fox Butterfield, *Guns Blamed for Rise in Homicides by Youths in the 80's*, N.Y. Times, Dec. 10, 1998, at 29.[14] Between 1985 and 2002, the firearm homicide death rate increased 36 percent for teens aged 15 to 19 nationwide. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, WISQARS database, http://www.cdc.gov/ncipc/wisqars/ (last visited Oct. 3, 2007).[15] Not coincidentally, in each year after 1985, handguns have been the most used homicide weapon by juveniles (those age 17 and under) nationwide. Alfred Blumstein, *Youth, Guns, and Violent Crime*, 12 The Future of Children 39, at Fig. 5 (2002). Scholars note that the dramatic increases in the rate of homicide committed by juveniles are attributable largely to the increases in homicides in which a firearm is used. Alan Lizotte, *Guns & Violence: Patterns of Illegal Gun Carrying Among Young Urban Males*, 31 Val. U. L. Rev. 375, 375 (1998).[16] University of California, Berkeley law professor Frank Zimring has observed, "the most important reason for the sharp escalation in homicide [among offenders 13 to 17] was an escalating volume of fatal attacks with firearms." Franklin E. Zimring, *American Youth Violence* 35-36 (1998).

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[14] The article cites statistics from Professor James Alan Fox, Dean of the College of Criminal Justice at Northwestern University, saying that "the rate of homicide by juveniles 14 to 17 years old jumped from 8.5 per 100,000 in 1984 to 30.2 per 100,000 in 1993, then declined to 16.5 per 100,000 in 1997" and emphasizing that "virtually all the increase in homicides by juveniles in the late 1980's was attributable to crimes committed with handguns, not to a change in the nature of teen-agers."

Handgun bans alleviate the problem of firearm homicide. Researchers at the Institute of Criminal Justice and Criminology at the University of Maryland found that gun-related homicides in the District of Columbia dropped 25 percent after the enactment of the ban. Loftin et al., *supra*, at 1616 Table 1. In addition, the relatively low incidence of gun-related violence in America's schools proves that gun bans work. Thanks to the absolute prohibition of guns on the nation's elementary and secondary school campuses, fewer than one percent of school-aged homicide victims are killed on or around school grounds or on the way to and from school. Jill F. DeVoe et al., U.S. Dep't of Justice, Bureau of Justice Statistics and U.S. Dep't of Education, Nat'l Ctr. for Ed. Statistics, *Indicators of School Crime and Safety: 2004*, at iii, NCES 2005-002/NCJ 205290 (2005).[17] In each year between 1992 and 2000, children and youth aged five to 19 were at least 70 times more likely to be murdered away from school than at school. *Id.* at 1. College campuses also reflect similarly lower rates for on-campus as compared to off-campus violence, Katrina Baum & Patsy Klaus, U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Victimization of College Students 1995-2002*, at 1, NCJ 206836 (2005) (finding that 93 percent of violence against college students occurs off-campus),[18] and, not coincidentally, much lower rates of firearm ownership as compared to the general adult population, Matthew Miller et al., *Guns and Gun Threats at College*, 51 J. of Am. College Health 57, 63 (2002).

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[15] Compare search for homicide firearm deaths for 15-19 year olds in 1985 to search for homicide firearm deaths for 15-19 year olds in 2002, which shows increase in death rate from 5.68 deaths per 100,000 in 1985 to 7.69 deaths per 100,000 in 2002.

[16] Lizotte found that, "[s]ince the mid-1980s the homicide rate for those fifteen to twenty-one years of age has increased rather substantially ... This increase has, for the most part, been due to the dramatic rise in homicides in which a firearm was used."

II. *The District's Handgun Law Is A Reasonable Restriction Because of the Economic, Societal, and Psychological Costs of Handgun Violence Upon Children.*

As discussed above, handguns are directly responsible for increasing the number of deaths and injuries to children and families from violent crime, suicide and accidents. The most serious harm resulting from youth violence is caused by firearms; most firearm-related injuries, in turn, involve handguns.

The economic, societal and psychological costs of youth violence also are well established. According to Centers for

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[17] URL: http://nces.ed.gov/pubs2005/2005002.pdf.

[18] URL: http://www.ojp.usdoj.gov/bjs/pub/pdf/vvcs02.pdf.

Disease Control and Prevention statistics, the consequences of youth violence include:

- Direct and indirect costs of youth violence (e.g., medical, lost productivity, quality of life) in excess of $158 billion every year. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Youth Violence: Fact Sheet* (citing Children's Safety Network Econ. & Data Analysis Res. Ctr., *State Costs of Violence Perpetrated By Youth* (2000)).[19]

- In a nationwide survey of high school students, about six percent reported not going to school on one or more days in the 30 days preceding the survey because they felt unsafe at school or on their way to and from school. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Youth Violence: Fact Sheet*, *supra*, (citing U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States, 2003*, 53 Morbidity & Mortality Weekly Report 1 (2004)).

- In addition to causing injury and death, youth violence affects communities by increasing the cost of health care, reducing productivity, decreasing property values, and disrupting social services. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Youth Violence: Fact Sheet*, *supra*, (citing James A. Mercy et al., *Youth Violence*, *in The World Report on Violence and Health* 25

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[19] URL: http://www.cdc.gov/ncipc/factsheets/yvfacts.htm.

(World Health Org., James A. Mercy et al., eds. 2002)).

The public bears the majority of these costs. A recent study found that, in 2000, the average cost for each: (i) homicide was $4,906 in medical costs, and $1.3 million in lost productivity; (ii) non-fatal assault resulting in hospitalization was $24,353 in medical costs and $57,209 in lost productivity; (iii) suicide was $2,596 in medical costs and $1 million lost productivity; and (iv) non-fatal self inflicted injury was $7,234 in medical costs and $9,726 in lost productivity. Phaedra S. Corso et al., *Medical Costs and Productivity Losses Due to Interpersonal Violence and Self-Directed Violence*, 32 Am. J. of Preventive Med. 474 (2007); *see also* Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 281 JAMA 451, 451-52 (Aug. 4, 1999) (finding that private insurance pays less than 20 percent of the costs associated with gunshot injuries).[20]

Economic costs provide, at best, an incomplete measure of the toll of violence and injuries caused by handguns. Children, like all victims of violence, are more likely to experience a broad range of mental and physical health problems not reflected in these estimates from post-traumatic stress disorder to depression, cardiovascular disease, and diabetes. *See generally* Corso et al., *supra*; Carole Goguen, *The Effects of Community Violence on Children and Adolescents*, U.S. Dep't of Veterans Affairs, Nat'l Ctr. for Posttraumatic Stress Disorder, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_child_com_viol.html (last updated May 22, 2007).

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[20] URL: http://jama.ama-assn.org/cgi/reprint/282/5/447.

CONCLUSION

For all of the foregoing reasons, these amici urge the Court to grant the District of Columbia's Petition for Writ of Certiorari.

Respectfully submitted,

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CURIAE
BRIEF

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IN THE

Supreme Court of the United States

District of Columbia and
Adrian M. Fenty, Mayor of the District of Columbia,

Petitioners,

v.

Dick Anthony Heller,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF THE RESPONDENTS TO PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded by former Reagan White House Policy Advisor Robert B. Carleson in 1998, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This is exactly the kind of case that is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may be politically correct or advance a particular ideology. We want to ensure in this case in particular that the rights of gun owners not be overlooked because of political correctness or ideological bias.

Counsel of Record for all parties were timely notified of this brief under Rule 37 and have consented to its filing.

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. The letters of consent to the filing of this brief have been enclosed.

SUMMARY OF ARGUMENT

We join the Petitioners and Respondent in urging this Court to grant the requested Writ of Certiorari.

This case presents questions of the highest importance, involving the fundamental meaning of the Second Amendment. In over 200 years, this Court has still not resolved the basic questions regarding the Amendment's meaning. This case now presents a clear opportunity for the Court to do so.

Moreover, there is a widening split among the circuit courts over the basic meaning of the Second Amendment. Two circuits now agree that the Second Amendment does protect a right of individual citizens to keep and bear arms. Four circuits hold that the Amendment does not protect any individual right at all, but, rather, protects instead a power of each state to maintain its own militia. And four other circuits find that the Second Amendment does protect an individual right to keep and bear arms, but only in the case of a soldier serving in a state militia.

Consequently, there could not be a stronger case for granting the requested writ of certiorari.

However, Petitioners do not correctly state the Question Presented by this case. Petitioners Question Presented is:

> "Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns."

But that question is not consistent with the record in this case or the decision below.

This case actually presents two questions, as follows:

Does the Second Amendment protect the right of an individual citizen to keep and bear arms?

If so, do the legal provisions of the District of Columbia barring citizens from keeping and bearing handguns for self-defense and other uses violate the Second Amendment?

The decision below should be affirmed because, among many other reasons, the text of the Second Amendment plainly protects a right of each individual citizen to keep and bear arms, and there is no other logical interpretation of the Amendment.

Regardless of the District's policy arguments in favor of gun control, the Constitution and the Second Amendment govern. Nevertheless, the District's policy arguments are plain wrong. The District's ban on handguns has not been effective in reducing crime. The fundamental problem is that the District does not have the practical power to take guns away from criminals. At the same time, the District's ban on handguns and other gun control laws have taken guns for self defense out of the hands of law abiding citizens. As a result, the District's gun control restrictions have more likely increased crime.

The courts cannot treat the Second Amendment as a politically incorrect, disfavored stepchild of the Bill of Rights. Fidelity to the Constitution requires the courts to give it the same zealous protection as every other right stated in our founding document. The Amendment is not being read broadly to protect the rights and liberties of the people if it is somehow interpreted to allow the government to adopt a virtually complete ban on handguns, and an effective prohibition on the use of rifles and shotguns, as in this case.

ARGUMENT

I. THIS CASE EASILY SATISFIES ALL OF THE CLASSIC CRITERIA FOR GRANTING A WRIT OF CERTIORARI.

We join both the Petitioners and the Respondent in urging this Court to grant the requested Writ of Certiorari. We submit that there could be no case where granting the writ could be more justified.

First, this case presents questions of the highest importance, involving the fundamental meaning of one of the first ten Amendments to the Constitution, the Bill of Rights. Over 200 years has gone by since the Second Amendment was adopted. Yet this Court has still not had a clear opportunity to delineate the fundamental meaning of that Amendment. The lower courts, the legal community, legislators, and the general public remain deeply divided and uncertain as to whether the Amendment even protects any individual right at all, not to mention the contours of any such right.

Secondly, there is a widening split among the circuit courts over the fundamental meaning of the Second Amendment. The Fifth Circuit, in *United States v. Emerson,* 270 F.3d 203 (5th Cir. 2001), joins the District of Columbia Circuit in the decision below, *Parker v. District of Columbia,* 478 F.3d 370 (D.C. Cir. 2007) in finding that the Second Amendment does protect a right of individual citizens to keep and bear arms.

But the Fourth, Sixth, Seventh, and Ninth Circuits have held that the Amendment does not protect any individual right at all, but, rather, protects instead a power of each state to maintain its own militia.[2]

By contrast, the First, Third, Eighth and Eleventh Circuits find that the Second Amendment does protect an individual right to keep and bear arms, but only in the case of a soldier serving in a state militia.[3]

Consequently, this case presents questions of the highest importance on which the circuit courts are badly split. There could not be a stronger case for granting the requested writ of certiorari.

II. PETITIONERS DO NOT CORRECTLY STATE THE QUESTION PRESENTED BY THIS CASE.

Petitioners state that the Question Presented by this case is,

> "Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns."

But the record and reasoning of the Court below does not recognize this as the Question Presented by this case.

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[2] *United States v. Johnson*. 497 F.2d 548 (4th Cir. 1974): *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999); *Silveira v. Lockyer*, 312 F. 3d 1052 (9th Cir. 2003).

[3] *Cases v. United States*, 131 F. 2d 916 (1st Cir. 1942); *United States v. Rybar*, 103 F.3d 273 (3d. Cir. 1996); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997).

First, the word "possession" does not appear in the Second Amendment. What that Amendment protects is the right of individuals to "keep and bear" arms, not merely to possess them. The Amendment is not satisfied by a local ordinance that allows possession of firearms only disabled in a glass enclosed frame like a museum piece. The word "bear" in the Amendment indicates use of such firearms in self-defense or in other uses.

Secondly, the Court below did not find that the plaintiff Dick Anthony Heller was free under the laws of the District of Columbia to keep and bear rifles and shotguns for self-defense and other uses. So there is no factual foundation for including a phrase in that regard in the Question Presented.

Indeed, quite to the contrary, the Court below did find that D.C. Code Section 7-2507.02 requires "that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device." (App. 4a). This DC law prevents the plaintiff Heller from bearing rifles and shotguns as well for self defense or other uses. Indeed, the Court below found that this provision as applied to handguns prevents those weapons from being used for self-defense and other uses. (App. 55a).

Most importantly, as the Court below also found, once a weapon is determined to be covered by the Second Amendment, then the right of the people to keep and bear that weapon cannot be infringed, which means at a minimum that it cannot be banned completely. As the Court below said, "Once it is determined—as we have done—that handguns are 'arms' referred to in the Second Amendment, it is not open to the district to ban them." (App. 53a). Therefore, the District of Columbia cannot argue that it can infringe on the right to keep and bear some arms, such as handguns, because it allegedly has not infringed on the right to keep and bear other arms, such as rifles and shotguns. Yet, this is exactly what the District's Question Presented implies.

Therefore, the Question Presented offered by the District in this case must be rejected. This case actually presents two questions, as follows:

Does the Second Amendment protect the right of an individual citizen to keep and bear arms?

If so, do the legal provisions of the District of Columbia barring citizens from keeping and bearing handguns for self-defense and other uses violate the Second Amendment?

We respectfully submit that the Court should grant the requested Writ of Certiorari on these revised Questions Presented.

III. THE TEXT OF THE SECOND AMENDMENT PLAINLY PROTECTS A RIGHT OF EACH INDIVIDUAL CITIZEN TO KEEP AND BEAR ARMS

The decision below should be affirmed because, among many other reasons, the text of the Second Amendment plainly protects a right of each individual citizen to keep and bear arms, and there is no other logical interpretation of the Amendment.

The text of the Amendment states in part, "The right of the people to keep and bear arms shall not be infringed." This phrase clearly protects a right of each individual citizen to keep and bear arms. As a matter of plain English, there is nothing in the introductory phrase of the Amendment, "A well-regulated militia being necessary to the security of a free people," that puts any limitation on the right granted by the rest of the Amendment.

A well-regulated militia may well be necessary to the security of a free people. Where does that say in any way that a state, let alone the Federal government as in this case, can bar any individual citizen from the right to keep and bear arms, as promised in the rest of the Amendment? It does not. As Professor Nelson Lund has stated,

> If you parse the Amendment, it quickly becomes obvious that the first half of the sentence is an absolute phrase (or ablative absolute) that does not modify or limit any word in the main clause. The usual function of absolute phrases is to convey information about the circumstances surrounding the statement in the main clause, such as its cause. For example: "The teacher being ill, class was cancelled."

Nelson A. Lund, A Primer on the Constitutional Right to Keep and Bear Arms (Virginia Institute for Public Policy, 2002), at 6. See as well Lund, at 6-7.

Defendants and their *amici* want to read that prefatory language as not only limiting, but nullifying the individual right stated in the rest of the Amendment, leaving the government with the power to completely ban handguns, as in this case, or any other weapon. That interpretation would leave the Amendment textually incoherent, flatly stating an individual right in the second half of the sentence that is supposedly nullified in the first half of the sentence. As a matter of plain English, the Amendment cannot be read that way.

This individual rights interpretation of the Second Amendment is reinforced by the recognition that there is no logical alternative interpretation of the Amendment.

Petitioners and their *amici* advance a collective rights interpretation of the Amendment, which holds that it does not provide for any individual right, but only a collective right of each state to arm and maintain its own militia. But that interpretation contradicts not only the language of the Second Amendment, but the language of other provisions of the Constitution as well.

First, the Second Amendment says that the right belongs to the people, not to the states. The phrase "the right of the people" refers to individual rights, not states rights. The terms "keep" and "bear" also refer to individual actions. Moreover, the Second Amendment is placed second in a long list of individual rights, indicating not only that it is an individual right, but a very important one.

Secondly, Article 1, Section 10 of the Constitution prohibits the states from maintaining troops in times of peace without the consent of Congress. Reading the Second Amendment to provide for the right of the states to arm and maintain their own militias would flatly contradict this section.

Thirdly, Article I, Section 8 provides that Congress has the authority to provide for arming the militia. That section grants the states only the authority to train the militia and appoint its officers. The states are granted no other authority over the militia anywhere else in the Constitution. Reading the Second Amendment as providing for the right of the states to arm the militia would again flatly contradict this provision.

Fourthly, Article II, Section 2 states that "[T]he President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states…." If the President orders a state militia to stand down, abandon any arms provided by the state, and go home with any individually owned arms, are we to believe that the Second Amendment grants the states a constitutional right to disobey and refuse?

Would we really want a Second Amendment that says an openly rebellious state has a constitutional right to arm and maintain a militia, and the Federal government cannot order it to disband and leave all but personal weapons behind? If so, wouldn't the actions of the Federal government in the Civil War have been unconstitutional? Isn't such an interpretation far more dangerous than to interpret the Amendment to provide for an individual right of the Plaintiff in this case, sorely in need of individual self-defense, to keep and bear arms?

Petitioners and their *amici* offer another alternative interpretation. They argue that the Second Amendment does provide for an individual right, but only a right of citizens to keep and bear arms while serving in the militia.

But are we to believe that what the Framers were concerned about in the Second Amendment was to protect the right of citizens to be armed while serving in the military? Indeed, that they were so concerned about it that they listed it second in the sacred list of protected individual rights consecrated in the Bill of Rights? Were the Framers concerned that without the Second Amendment Americans might be sent into battle by the government unarmed?

And how exactly would this supposed right to unrestricted access to firearms while serving in the military work? If a commanding officer orders his troops to advance with rifles, could they insist on machine guns instead? Could the ACLU sue the commanding officer if their request for machine guns was not honored? Would soldiers have the constitutional right to ditch their military issue weapons in favor of weapons they brought from home that they preferred?

Quite clearly, a right to keep and bear arms while serving in the military could not be more meaningless, for surely those serving would be provided with weaponry, and they would be required to use the weapons their commanding officers ordered them to use. Indeed, in today's National Guard, the modern version of the state militias, all weapons are provided by the Federal government.

Reading the Second Amendment in this way again effectively just reads the entire Amendment out of the Constitution altogether. For these reasons, that could not be what the Framers meant. *See Emerson*, 270 F.3d at 232 n.30. The only possible interpretation of the Second Amendment is that it provides for an individual right to keep and bear arms.

The courts cannot treat the Second Amendment as a politically incorrect, disfavored stepchild of the Bill of Rights. Fidelity to the Constitution requires that the Judicial branch give it the same zealous protection as every other right stated in our founding document. The Amendment is not being read broadly to protect the rights and liberties of the people if it is somehow interpreted to allow the government to adopt a virtually complete ban on the right to keep and bear arms, or on any particular armament protected under the Amendment, as in this case.

IV. THE DISTRICT OF COLUMBIA'S GUN CONTROL LAWS HAVE NOT BEEN EFFECTIVE IN REDUCING CRIME, AND MAY HAVE BEEN COUNTERPRODUCTIVE.

Finally, Petitioners argue that regardless of what the Constitution says, the District of Columbia's prohibition on handguns, and its other gun control laws, have been effective in reducing crime and other harms. Therefore, they insist, these gun prohibitions cannot reasonably be found to infringe on the Constitutional right to keep and bear arms.

Regardless of the District's policy arguments, the Constitution and the Second Amendment govern. Nevertheless, the District's policy arguments are plain wrong. The District's ban on handguns has not been effective in reducing crime. The fundamental problem is that the District does not have the practical power to take guns away from criminals. At the same time, the District's ban on handguns and other gun control laws have taken guns for self defense out of the hands of law abiding citizens. As a result, the District's gun control restrictions have more likely increased crime.

In the five years before the District banned handguns in 1976, the murder rate fell from 37 to 27 per 100,000. In the five years after the ban, the murder rate rose back up to 35.[4] Indeed, the murder rate in D.C. has been higher than in 1976 in every year since then except one, 1985.[5] From 1977 to 2003, the District's violent crime rate was higher than before 1976 in every year but two.[6] Moreover, after adopting the 1976 handgun ban, the rate of murder and violent crime rose in the District relative to nearby Maryland and Virginia, and to other cities with more than 500,000 people.[7] Indeed, after the handgun ban, D.C. regularly ranked first in murder rates for cities over 500,000.[8]

The same experience with handgun bans has been suffered elsewhere. Chicago's murder rate was dropping before it banned handguns in 1982. The city's murder rate subsequently rose from 5.5 times as large as in the 5 neighboring counties to 12 times as large.[9]

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[4] Federal Bureau of Investigation Uniform Crime Reports.

[5] Id.

[6] Id.

[7] Id.

[8] Id.

Great Britain banned handguns in 1997. But deaths and injuries from gun crimes in England and Wales rose 340% from 1998 to 2005. Armed robberies, rapes, homicides, and other serious violent crimes also soared.[10]

Ireland banned all handguns and center fire rifles in 1972, but by 1974 murder rates had increased by 5 times. In the 20 years after 1972, the murder rate in Ireland averaged 114% higher than before.[11] Similarly, after Jamaica banned all guns in 1974, murder rates almost doubled from 11.5 per 100,000 in 1973 to 19.5 in 1977, doubling again to 41.7 in 1980.[12]

The reason for this was explained in the seminal, peer-reveiewed work, John R. Lott, Jr., *More Guns, Less Crime* (University of Chicago Press, 2d. ed. 2000). That book showed through extensive econometric analysis that more widespread ownership of guns among the law abiding public actually results in less crime, because criminals are deterred by the fear of encountering a gun owner, and because gun owners often stop crimes in progress.

Lott's position is extensively supported by other research showing that where the law has allowed for increased ownership and possession of functional firearms crime has been reduced. The refereed studies demonstrating this result include William Alan Bartley & Mark A. Cohen,

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[9] Federal Bureau of Investigation Uniform Crime Reports

[10] David Leppard, *Ministers 'Covered Up" Gun Crime*, Financial Times, August 26, 2007

[11] John R. Lott, Jr., "D.C.'s Flawed Reasoning," Washington Times, September 7, 2007.

[12] Id.

The Effect of Concealed Weapons Laws: An Extreme Bound Analysis, 36 Econ. Inquiry 258 (1998); Carlisle E. Moody, *Testing for the Effects of Concealed Weapons Laws: Specification Errors and Robustness,* 44 J.L. & Econ. 799 (2001); David B. Mustard, *The Impact of Gun Laws on Police Deaths,* 44 J.L. & Econ. 635 (2001); David E. Olsen & Michael D. Maltz, *Right-to-Carry Concealed Weapons Laws and Homicide in Large U.S. Counties: The Effect on Weapons Types, Victim Characteristics, and Victim-Offender Relationships,* 44 J.L. & Econ. 747 (2001); Florenz Plassmann & T. Nicholas Tideman, *Does the Right to Carry Concealed Handguns Deter Countable Crimes: Only A Count Analysis Can Say,* 44 J.L. & Econ. 771 (2001); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence and Right-to-Carry Concealed Handguns,* 26 Journal of Legal Studies (1997); Bruce L. Benson and Brent D. Mast, *Privately Produced General Deterrence,* 44 J. L. & Econ. 725 (2001); Eric Helland and Alexander Taborrak, *Using Placebo Laws to Test More Guns Less Crime,* 4 Advances in Economic Analysis and Policy 1 (2004); James Q. Wilson, *Appendix A Dissent,* Firearms and Violence: A Critical Review, National Academies Press (2005); John R. Lott, Jr. and John E. Whitley, *Abortion and Crime: Unwanted Children and Out-of-Wedlock Births,* Economic Inquiry, April, 2007; John R. Lott, Jr. and John E. Whitley, *A Note on the Use of County Level UCR Data,* Journal of Quantitative Criminology (2003); John R. Lott, Jr. & John E. Whitley, *Safe Storage Gun Laws: Accidental Deaths, Suicides, and Crime,* 44 J.L. & Econ. 659 (2001); Thomas B. Marvell, *The Impact of Banning Juvenile Gun Possession,* 44 J.L. & Econ. 691 (2001); Lott, *More Guns, Less Crime, supra..*

The bigger the increase in the percent of the adult population with conceal and carry permits that allow for the broader availability and presence of firearms among the law abiding, the bigger the drop in violent crime. Over time, as a state issues more conceal and carry permits, the drop in crime increases. Lott, *More Guns, Less Crime, supra.*

Crimes involving multiple victim public shootings show the largest drop with conceal and carry policies because, as compared to other violent crimes where only one or at most a few potential victims are present, there is a relatively large chance that one of the potential victims will have a weapon that can be used to defend all of them. John R. Lott, Jr. and William Landis, *The Bias Against Guns*, (2003).

If crime rates in neighboring counties on opposite sides of state borders are compared, the counties in conceal and carry states experience a drop in violent crime at the same time that their neighboring counties across state borders suffer an increase. Indeed, the drop in violent crime in the counties in conceal and carry states is generally four times as large as the increase in violent crime in the counties in other states. Stephen G. Bronars & John R. Lott, Jr., *Criminal Deterrence, Geographic Spillovers, and Right-to-Carry Laws,* Am. Econ. Rev., May, 1998.

Because of overwhelming, compelling evidence like this, 40 states now have conceal and carry permits. Only Wisconsin and Illinois, along with D.C., completely ban citizens from carrying concealed handguns. John R. Lott, Jr., *Freedomnomics, Why the Free Market Works and Other Half-Baked Theories Don't* (2007).

Moreover, while Petitioners assert that the nation's three largest cities follow the same gun control policies as the District, that is not true. Los Angeles does not ban handguns, New York City allows conceal and carry permits, and no city prohibits the effective use of rifles and shotguns in self-defense as the District does. Indeed, since 1976, the District of Columbia has had the most restrictive gun control laws anywhere in the country, and yet during that time it has become notorious as perhaps the nation's worst locus of gun violence.

Petitioners argue that Lott's work has somehow been "debunked", citing Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis,* 55 Stan. L. Rev. 1193 (2003). But the Ayres and Donohue article was not refereed and does not involve scientifically passable statistical analysis. For example, their flawed methodology in trying to fit a straight line to a data curve led them to find an initial increase in crime after conceal and carry laws are passed, when the actual plotted data show a decline from the start that only accelerates over time. Florenz Plassman and John E. Whitley, *Confirming 'More Guns, Less Crime',* 55 Stan. L. Rev. 1313, 1328 (2003). Moreover, to get their results they limited the time period of observations to 5 years and dropped states out of the sample. Even then, instead of "Shooting Down the More Guns, Less Crime Hypothesis", they had to confess that their results were ambigious, saying, "We're still not sure what the true impact is. It's very easy to get it wrong."[13]

Petitioners also cite Mark Duggan, *More Guns, More Crime,* 109 J. Pol. Econ. 1086 (2001), another study that was not refereed. But Duggan measured gun ownership distribution by sales of *Guns and Ammo* magazine, only the fourth largest gun magazine in the United States. As much as 20% of the distribution of that magazine each year is given away for free by the publisher in high crime areas where the publisher thought interest in the magazine might be increasing. That would naturally cause a distorted correlation between supposed gun ownership and crime.

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[13] Erin Grace, "Concealed-carry absolutes are a moving target," *Omaha World-Herald*, July 16, 2006.

Even so, of the 30 estimates of the impact of conceal and carry laws that Duggan provides, correcting 4 typing errors leaves 16 actually showing statistically significant decreases in crime, while only one shows a significant increase. Using any other gun magazine as the proxy for gun ownership leaves no significant increase in crime correlated with gun ownership.[14] Carlisle E. Moody and Thomas B. Marvel, "*Guns and Crime*", 71 So. Econ. J. 720 (2005); Florenz Plassmann and John R. Lott, Jr., *More Readers of Gun Magazines, But Not More Crimes,* American Enterprise Institute Working Paper (2006); Lott and Landis, *supra* (2003).

Petitioners cite as well Colin Loftin *et al., Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia,* 325 New Eng. J. Med. 1615 (1991) as showing that "the District's handgun ban... coincided with an abrupt decline in firearm-caused homicides in the District but no comparable decline elsewhere in the metropolitan area." (App.) But the authors of this study started counting firearm caused homicides from the date the District's handgun ban and other gun control laws were passed in 1976, rather than from the date the laws became effective 6 months later. When the study is redone with the corrected date, the supposed effect of the law disappears. Gary Kleck, *Targeting Guns,* (1997).

This study by Loftin *et al.* was also not peer reviewed. Indeed, not one peer reviewed study has ever shown that wider gun ownership among law abiding citizens is associated with an increase in crime.

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[14] Petitioner also cites Dan A. Black and Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?,* 27 J. Legal Stud. 209 (1998). That study disregarded all counties with fewer than 100,000 people, and the entire state of Florida. But it still found declines in robberies and aggravated assaults due to conceal and carry laws.

The gun control Lysenkoism represented by the studies Petitioners cite does not begin to compare with the avalanche of scholarly work cited above showing that more guns among law abiding citizens reduces crime, which has resulted in so many states adopting conceal and carry laws.

Since the District cannot show that its ban on handguns has reduced crime, and, indeed, it probably has increased crime based on the academic literature, the District cannot argue that the ban is a reasonable restriction on the right to keep and bear arms. Indeed, the District has not shown anywhere, and cannot show, that its handgun ban has reduced access to such guns by criminals. As a result, all of the statistics the District cites regarding use of handguns by criminals to commit crimes are irrelevant. They cannot justify the handgun ban if the ban does not reduce access to guns by criminals. And if the ban does not reduce access to guns by criminals, it cannot be a reasonable restriction on the right to keep and bear arms.

Petitioners also repeatedly argue that the handgun ban is reasonable because it only bans one type of weapon, and citizens are still free to utilize rifles and shotguns for self-defense and other uses. But this assertion contradicts the record and the decision below. Again, D.C. Code Section 7-2507.02 requires "that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device." (App. 4a). This section, by its very terms, prevents the use of rifles and shotguns as well for self-defense and other uses. Moreover, in any event, it denies citizens access to functional firearms for self-defense and possibly other uses. See Lott and Whitley (2001), *supra*. Even less extreme gun lock regulations in other states have been associated with more violent crime because locking the guns makes self defense difficult. *Id.*

Indeed, again the Court below ruled that this very provision as applied to handguns is unconstitutional because it prevents those weapons from being used for self-defense and other uses. (App. 55a). This provision applied to rifles and shotguns would have this same effect as well. Therefore, it cannot be said that under the District's gun control laws citizens are free to use rifles and shotguns for self-defense and other uses.[15]

Petitioners also argue that the handgun ban is reasonable because the availability of handguns results in accidents causing death, frequently involving children. But lethal handgun accidents are actually quite rare. With 100 million gun owners across the nation in 2004, there were only 649 reported cases of accidental gun deaths.[16]

Moreover, among the 40 million children in the U.S. under the age of 10, the Centers for Disease Control report 20 accidental gun deaths in 2003. Another 36 accidental gun deaths were reported for children between 10 and 14. Children are 41 times more likely to die from accidental suffocation, 32 times more likely to die from accidental drowning, and 20 times more likely to die due to accidental fires.[17] Of course, random accidents can never be used to justify abridgement of a constitutional right, all the more so when the incidence is so rare.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this

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[15] In addition, the Court below also again ruled in any event that the text of the Amendment does not allow a protected armament to be banned entirely even if other arms are not banned.

[16] Centers for Disease Control, National Center for Injury Prevention and Control, WISQARS Fatal Injuries: Mortality Reports, 1999-2004.

[17] Id.

Court should grant the requested Writ of Certiorari, and affirm the decision of the District of Columbia Circuit below.

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AMICUS
CURIAE
BRIEF

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA and ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE STATES OF NEW YORK, HAWAII, ILLINOIS, AND MARYLAND AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns.

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STATEMENT OF INTEREST OF THE AMICI CURIAE

This petition implicates the important interest of the amici States in protecting the safety of their residents by restricting access to certain types of particularly dangerous firearms. For more than two centuries, the States, as well as municipalities and the federal government, have banned certain weapons as too dangerous for general availability. Until the decision of the court of appeals in this case, such bans had been consistently upheld under the Second Amendment and under provisions of state constitutions guaranteeing the right to bear arms. The decision below is inconsistent with the decisions of this Court and every other court to consider the question. If permitted to stand, it will tend to destabilize the settled understanding of the federal and state constitutional provisions protecting the right to bear arms, and cast a cloud over all federal and state laws restricting access to firearms.

As the court of appeals recognized, any decision in this case, concerning the validity of a law of the District of Columbia, would not necessarily determine the outcome of challenges to laws enacted by individual States. Nonetheless, the decision below has the potential to influence judicial interpretation of both the Second Amendment and state constitutional provisions. Consequently, the amici States have a strong interest in the review of the court of appeals' decision, the rejection of its reasoning, and the reaffirmance by this Court of the States' traditional authority to protect public safety through the exercise of the police power to restrict access to certain types of firearms.

SUMMARY OF ARGUMENT

The decision of the court of appeals is so clearly inconsistent with this Court's settled interpretation of the Second Amendment as to warrant a grant of certiorari and summary reversal. The court of appeals has construed the Second Amendment as conferring an absolute right to own and use the firearm of an individual's choice, so long as the firearm is a "lineal descendant" of one that was common in the Eighteenth Century and remains in "common use" today. Pet. App. 51a. That ruling is flatly inconsistent with the holding and the rationale of this

Court's decision in *United States v. Miller*, 307 U.S. 174 (1939). In *Miller*, this Court upheld a federal law that effectively banned the ownership of a weapon determined to be particularly dangerous while allowing continued access to a wide variety of other firearms. In this case the court of appeals struck down, purportedly under the authority of *Miller* itself, Pet. App. 39a-44a, a District of Columbia law that did precisely the same thing.

Miller held that a law does not violate the Second Amendment "[i]n the absence of any evidence tending to show that possession or use" of any weapon affected by the law "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. Just as no such evidence was introduced with respect to the short-barreled shotgun at issue in *Miller*, so no such evidence has been introduced with respect to the handgun at issue here. Thus, *Miller* directly controls this case. This Court has given lower courts no reason to question the validity of its definitive holding in *Miller*, although it has had ample opportunity to do so. To the contrary, it reaffirmed that holding in *Lewis v. United States*, 445 U.S. 55, 65 & n.8 (1980), expressly stating that the Second Amendment does not confer a fundamental right that triggers heightened scrutiny for equal protection purposes. *Miller* and *Lewis* do not permit the rule set forth by the court of appeals, much less require it.

Moreover, although the court of appeals purported to incorporate into Second Amendment jurisprudence a state-law right to bear arms that predates the Second Amendment, Pet. App. 21a, instead the decision below ignores over a century of state-court jurisprudence that directly contradicts both its reasoning and its result. State courts that have considered similar questions have concluded that a right to bear arms does not preclude bans on machine guns, assault weapons, pistols, and other specific types of firearms that state and municipal legislatures have determined pose particular threats to public safety.

Finally, the court of appeals' "lineal descendant"/"common use" standard for determining which weapons a citizen has the absolute right to own not only is illegitimate, but is entirely unworkable as a standard for deciding cases in an objective manner. As a result, it amounts to nothing more than a way for a federal court to substitute its judgment for that of an elected legislature as to which weapons are unreasonably dangerous in light of local realities.

Rather than following the standards prescribed by this Court or state courts, the court of appeals devised its own Second Amendment test that lacks both a convincing rationale and manageable standards. Because of the manifest importance of this issue, the gross failure of the court of appeals to abide by this Court's precedents, and the unbridled judicial discretion its jurisprudence promises, summary reversal is appropriate here. Such a disposition would reaffirm the principle, unquestioned by any court until now, that the Second Amendment permits reasonable regulation of firearms to protect public safety and does not guarantee individuals the absolute right to own the weapons of their choice.

REASONS TO GRANT CERTIORARI

I. The Decision Below is Inconsistent with *Miller*.

Only by grossly distorting the holding of *Miller* and ignoring other precedents of this Court could the court of appeals reach the erroneous conclusion that "there is no unequivocal precedent that dictates the outcome of this case," Pet. App. 36a. Not only did *Miller*, this Court's leading Second Amendment decision, set forth the legal standard that governs Second Amendment challenges, but it upheld a federal weapon ban that cannot be meaningfully distinguished from the ban at issue here.

Any discussion of the Second Amendment must begin with *Miller* and other cases in which this Court has interpreted the Amendment. Instead, the court of appeals began with *de novo* consideration of the Amendment's text, various academic sources, and historical documents such as England's Bill of Rights of 1689 and Blackstone's Commentaries, as if it were free to interpret the Amendment unconstrained by prior pronouncements of this Court, Pet. App. 12a-27a. After fifteen pages of such discussion, it made its first passing reference to

Miller, not to ascertain its holding, but simply to quote *Miller*'s somewhat tangential statements regarding the history of militias, Pet. App. 27a-28a. It proceeded to formulate an unprecedented interpretation of the Second Amendment, acknowledging that its conclusions were difficult to reconcile with *Miller*, Pet. App. 36a. Finally, it adopted and applied a test, purportedly drawn from *Miller*, but inconsistent with *Miller* and finding no support in any of this Court's precedents. Pet. App. 48a-51a.

At issue in *Miller* was the constitutionality of the National Firearms Act of 1934, which instituted onerous taxation and registration requirements on the possession of machine guns and short-barreled shotguns, with the purpose and effect of banning their possession. *See* H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1 (1934) (purpose of law was to deprive the gangster "of his most dangerous weapon"; "there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun"). In *Miller*, this Court sustained an indictment for violating this law, holding that the Second Amendment did not guarantee the defendant the right to own a short-barreled shotgun, defined broadly as any "shotgun or rifle having a barrel of less than eighteen inches in length." 307 U.S. at 175, *quoting* Act of June 26, 1934, c. 757, 48 Stat. 1236.

Miller held that the Second Amendment must be interpreted *in pari materia* with the Militia Clause, which provides for joint federal/state governance and control of the State Militias. *See* U.S. Const. art. I, § 8. It explained that the guarantee of the Second Amendment was made "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of" the State militias, so the Amendment "must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178.

Accordingly, this Court ruled that

> [i]n the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and

> bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 2 Humphreys [21 Tenn.] 154, 158 (1840).

Id. Miller also pointed out that "[m]ost if not all of the States have adopted provisions touching the right to keep and bear arms," and it concluded that "none of them seem to afford any material support for" the asserted Second Amendment right to own a short-barreled shotgun. *Id.* at 182.

Miller incorporated into its holding, and drew much of its wording from, *Aymette*, a decision interpreting the Tennessee Constitution's guarantee of a right to bear arms. In *Aymette*, the Supreme Court of Tennessee rejected the argument that this provision "gives to every man the right to arm himself in any manner he may choose, however unusual or dangerous the weapon he may employ." 21 Tenn. at 156. It held, in a sentence reflected in *Miller*'s holding, that the right to bear arms "is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." *Id.* at 158 (emphasis and spelling in original). Given the "public nature" of the right, *Aymette* concluded, the legislature could freely regulate with respect to those weapons "which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin." *Id.*

In this manner, *Miller* aligned itself with the conclusion that *Aymette* had reached a century before, that a legislature may ban a type of weapon deemed particularly dangerous without infringing the right to bear arms if the weapon is meant for personal rather than military use. *Miller* also cited other "important" state-court decisions in the intervening hundred years that had reached similar conclusions. *See Miller*, 307 U.S. at 182 & n.2, *citing*, *inter alia*, *People v. Brown*, 235 N.W. 245, 246-47 (Mich. 1931) (upholding ban on blackjacks); *City of Salina v. Blaksley*, 72 Kan. 230, 233-34 (1905) (upholding law prohibiting the "carrying of firearms or other deadly weapons"); *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) (upholding concealed weapon ban); *Fife v. State*, 31 Ark. 455, 461-62 (1876) (upholding ban on pistols); *State v. Duke*, 42 Tex. 455, 458-59 (1874) (upholding prohibition on carrying pistols and other deadly weapons).

Even before *Miller*, this Court had held that the Second Amendment does not create a distinct federal right to keep and bear arms, but rather protects a right that predated the Constitution. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), declared that any right of "bearing arms for a lawful purpose" is not granted by the United States Constitution or "dependent upon that instrument for its existence."

Thus, *Miller* appropriately drew on state constitutional provisions in holding that no violation of the Second Amendment can be made out in the absence of evidence that the challenged federal gun regulation limits the use or ownership of a weapon that "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. In particular, *Miller* made clear, such a showing cannot be made where the banned weapon is not "part of the ordinary military equipment" or could not "contribute to the common defense." *Id.*; *cf. Printz v. United States*, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring) (stating that *Miller* "determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be 'ordinary military equipment' that could 'contribute to the common defense'").

This Court has never revisited its definitive holding in *Miller* and earlier cases, or otherwise curtailed legislative decisions regarding gun control, although plaintiffs have frequently challenged federal or state gun control laws on Second Amendment grounds. *See, e.g.*, *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2004), *cert. denied*, 546 U.S. 1174 (2006); *United States v. Lippman*, 369 F.3d 1039 (8th Cir. 2004), *cert. denied*, 543 U.S. 1080 (2005); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *United States* *v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Hickman v. Block*, 81 F.3d 98 (9th Cir.), *cert. denied*, 519 U.S. 912 (1996); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 1948 (1976); *Eckert v. Philadelphia*, 477 F.2d 610 (3d Cir.), *cert. denied*, 414 U.S. 839 (1973); *Cody v. United States*, 460 F.2d 34 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1972); *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), *dismissed for want of a substantial federal question*, 394 U.S. 812 (1969); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943). Indeed, this Court's dismissal of the appeal in *Burton*, which held both that the Second Amendment is not incorporated against the States and that it is not implicated by "regulation . . . which does not impair the maintenance of the State's active, organized militia," 248 A.2d at 528, should have been treated as binding precedent. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979).

This Court's only extended discussion of the Second Amendment since *Miller* arose not in the context of a Second Amendment challenge to the federal gun-control law at issue, but rather in an equal protection challenge to the law's application to a class of individuals. In *Lewis*, the Court rejected that equal protection challenge, and in so doing reaffirmed that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Lewis*, 445 U.S. at 65 n.8 (*quoting Miller*, 307 U.S. at 178)).

The court of appeals referred to *Lewis* only for the proposition that "convicted felons may be deprived of their right to keep and bear arms." Pet. App. 52a. But that proposition was not disputed in *Lewis*. Rather, *Lewis* has much broader application to this case, as it confirms that gun ownership is not a fundamental right of the sort that triggers strict scrutiny of a legislative decision.

The petitioner in *Lewis* had been convicted without counsel before *Gideon v. Wainright*, 372 U.S. 335 (1963), and thus his conviction was susceptible to collateral challenge, because of *Gideon's* retroactivity. *See Lewis*, 445 U.S. at 57-59. The petitioner argued, *inter alia*, that the federal ban on felons owning firearms violated the Equal Protection Clause as applied to someone whose underlying conviction was constitutionally invalid.

This Court reviewed the gun restriction only for its rationality, *id.* at 65-66, because the class of persons affected was not suspect and a restriction on gun ownership does not "trench upon any constitutionally protected liberties," *id.* at 65 n.8 (*citing Miller*, 307 U.S. at 178). The Court found that "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm," adding that convicted felons may be barred "from engaging in activities far more fundamental than the possession of a firearm," such as "holding office in a waterfront labor organization." *Id.* at 66. In short, after *Lewis* it is settled that legislative enactments limiting the possession of firearms receive considerable deference so long as they do not rely on a suspect classification, because the possession of firearms is not itself a fundamental right.

The holding of *Miller*, especially when combined with the deference required by *Lewis*, directly controls this case. There is no more evidence that ownership or use of a handgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia," 307 U.S. at 178, than there was with respect to ownership or use of the short-barreled shotgun at issue in *Miller*. Indeed, several courts have considered the precise argument advanced by plaintiffs and have concluded that, if a short-barreled shotgun lacked the requisite militia connection to satisfy *Miller*, so must a pistol or other handgun.[1]

---

[1] Similarly, pre-*Miller* state courts that applied such a weapon-based standard concluded that pistols were not protected "Arms," because they are designed for private rather than military use. *See, e.g.*, *Ex parte Thomas*, 21 Okla. 770, 774-81 (1908); *Fife*, 31 Ark. at 461.

See United States v. Parker, 362 F.3d 1279, 1284 (10th Cir. 2004), *cert. denied*, 543 U.S. 874 (2004); *Quilici*, 695 F.2d at 270; *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943). No evidence has been introduced in this case to refute that common-sense conclusion, and *Miller* counsels that a court may not take judicial notice of such matters.

Nor can any meaningful distinction be drawn between the purpose or effect of the ban at issue here and the one involved in *Miller*. Both are legislative efforts to take out of general circulation particular weapons that are highly correlated with criminal activity, without banning the possession of other firearms. *Compare* Pet. App. 111a (District determined that handguns "have no legitimate use in the purely urban environment of the District of Columbia") *with* H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1 (1934) (Congress determined that "there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun"). They are worded equally broadly, so as to cover a range of weapons. *Compare* D.C. Code § 7-2501.01 (defining banned "pistol" as "any firearm originally designed to be fired by use of a single hand") *with* Act of June 26, 1934, c. 757, 48 Stat. 1236, § 1(a) (defining restricted shotguns and rifles as those "having a barrel of less than eighteen inches in length").

Instead of distinguishing *Miller*, the Court of Appeals simply declined to apply *Miller*'s straightforward holding. The Court of Appeals interpreted *Miller* as holding that a weapon is protected by the Second Amendment if it is "lineally descended" from one that was in "common use" at the time of the Second Amendment's ratification. *See* Pet. App. 49a-51a. But *Miller* held nothing of the sort. To the contrary, it held that a weapon's connection to militia-related use must be examined "at this time," 307 U.S. at 178, rather than at the time of the Second Amendment's ratification. And it held that the relevant issue is not "common use" but use for militia-related purposes.

To be sure, before cataloguing the various colonial-era laws that required militamen to carry to duty very specific weapons and other provisions, *see id.* at 179-82, *Miller* observed that "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time," *id.* at 179. But *Miller* makes plain that the critical question for Second Amendment analysis is whether the weapon has a militia-related use "at this time" and not whether it had such a use in colonial times. And there is no basis, in *Miller* or elsewhere, for finding that a connection between common use and militia use exists today.

Thus, the Court of Appeals made a fundamental error in declaring that a weapon's constitutional status depends on its history, *i.e.*, whether it is "lineally descended" from a weapon used by militias in colonial times, or on its popularity, *i.e.*, whether it is in "common use."

Far from requiring a lengthy examination of the nature and scope of the Second Amendment right, this petition presents a simple case of a court of appeals' refusal to apply the precedents of this Court. Under any available reading, *Miller* and *Lewis* constitute "unequivocal precedent that dictates the outcome of this case," Pet. 36a. Respondent did not allege, much less establish with evidence, that use or possession of a handgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia,"[2] *Miller*, 307 U.S. at 178, and so the district court correctly concluded that he had failed to state a claim. In light of the court of appeals' clear error in its reading of precedent, summary reversal and reinstatement of the district court's judgment is appropriate.

II. The Court of Appeals' Absolute Protection of a Particular Weapon is Without Precedent.

The rule announced by the court of appeals in this case not only squarely contradicts *Miller*, but also is unprecedented under federal or state law. Indeed, federal and state courts have many times rejected the proposition that undergirds the court of appeals' holding: that "[o]nce it has been determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them," Pet. App. 53a.

---

[2] The only evidence that could be read to support such a proposition is respondent's conclusory statement in his declaration that not having access to a handgun "limits . . . my ability to act in concert with others for the common good." Heller Decl. ¶ 5. This statement neither mentions a militia nor demonstrates that the handgun law has any relationship to the efficiency of one.

The court of appeals constructed from whole cloth the theory that the constitutionality of a law banning a certain type of weapon turns on whether the weapon at issue is a "lineal descendent" of a weapon in "common use" during the founding era, and is a weapon that is in common use today. Pet. App. 51a. If so, according to the court of appeals, ownership of the weapon is absolutely protected by the Second Amendment and cannot be banned, although the court of appeals would apparently permit the weapon's use to be regulated in some respect. *See* Pet. App. 51a-53a. Whether other weapons are available is irrelevant. Pet. App. 53a. On the other hand, if the weapon was not and is not in common use, ownership of the weapon receives no Second Amendment protection at all. Pet. App. 42a. Far from acknowledging that the doctrine it created is novel, the court of appeals suggested that it was merely reading the Second Amendment to function analogously to state provisions guaranteeing the right to bear arms. *See* Pet. App. 23a-24a, 52a-53a.

In fact, this doctrine is utterly unprecedented. Until now, it has been well settled that the right to bear arms does not include the right to possess the weapon of one's choice. State and federal courts have routinely upheld restrictions on the ownership of particularly dangerous weapons, including pistols, pursuant not only to the Second Amendment, but also to state constitutional provisions that provide an individual right to ownership of firearms for private purposes. They have done so regardless of whether the weapon at issue is considered a protected "Arm." *See, e.g.*, *Quilici*, 695 F.2d at 261; *Benjamin v. Bailey*, 662 A.2d 1226 (Conn. 1995); *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994) (en banc); *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993). No federal court has ever questioned Congress's power to ban particularly dangerous weapons, a power it has exercised on multiple occasions,[3] that was confirmed in *Miller*, and that is not challenged by respondent, *see, e.g.*, Brief in Response to Pet. for Certiorari ("Br. in Resp.") at 19.

In support of its rule that any "Arm" covered by the Second Amendment cannot be banned, the court of appeals invoked a single North Carolina case. *See* Pet. App. 53a (citing *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921)). But even that case explicitly stated that it would be permissible to enact a ban limited to pistols of small sizes, "which are easily and ordinarily carried as concealed," *Kerner*, 107 S.E. at 225, and struck down the law in question only after concluding that it functioned as a total ban on all arms within the means of its citizenry, *id.*[4] In just this fashion, state courts have carefully and consistently drawn the very distinction that the court of appeals dismissed out of hand as "frivolous," *see* Pet. App. 53a — the distinction between laws that ban *all* firearms, which violate some state constitutions,[5] and those such as the District's that merely ban particularly dangerous *types* of firearms, which are upheld.

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[3] For example, the federal government has largely banned access to machine guns, *see* 18 U.S.C. §§ 922(a)(4), (b)(4), (o)(1), after considering "the relationship between the availability of machine guns, violent crime, and narcotics trafficking," and this ban has been upheld by every court to consider it. *See, e.g.*, *United States v. Hale*, 978 F.2d at 1018. Similarly, the federal government's ban on the possession of submachine guns has been upheld. *See, e.g.*, *United States v. Warin*, 530 F.2d at 106-07. Courts have also upheld federal restrictions on certain types of switchblade knives that Congress found "were increasingly being used for criminal purposes," *United States v. Nelson*, 859 F.2d 1318, 1319-20 (8th Cir. 1988). The federal government also has banned possession of firearms that cannot be detected by airport metal detectors. 18 U.S.C. § 922(p)(1).

[4] North Carolina has since upheld a ban on short-barreled shotguns. *State v. Fennell*, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989).

[5] *See, e.g.*, *City of Las Vegas v. Moberg*, 485 P.2d 737, 738-39 (N.M. Ct. App. 1971) (striking down city ordinance that banned all "deadly weapons," including all firearms); *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903) (striking down city law that barred the possession

(Cont'd)

State courts are led to this distinction through application of a "reasonable regulation" standard for evaluating the constitutionality of gun regulations, including those that ban specific types of weapon. This standard has been adopted virtually unanimously by the state courts. *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (collecting cases); *Robertson*, 874 P.2d at 329-30 (same). Although the court of appeals' interpretation purported to permit "reasonable regulation[]" of weapons, Pet. App. 51a, thus alluding to this well-established state standard, the actual "reasonable regulation" state standard bears no resemblance to the rule applied by the court of appeals.

Applying the "reasonable regulation" standard, the state courts strike down a gun-control law only if the extent of its "impinge[ment] upon the constitutional right to bear arms" is unreasonable in relation to its purpose of protecting the "health, safety and welfare of the public." *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1223 (N.H. 2007). Thus, state courts "must balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State to exercise its police power to protect the health, safety, and welfare of its citizens." *State v. Hamdan*, 665 N.W.2d 785, 800 (Wisc. 2003).

Under this standard, it is generally held that a state constitutional "right to bear arms" is not the right to bear *any* weapon. *See Quilici*, 695 F.2d at 267 (Illinois constitution "grants only the right to bear arms, not handguns"). So long as the regulation is reasonable and "there are ample weapons available for citizens to fully exercise their right," a ban on particularly dangerous weapons does not "significantly interfere with this right." *Robertson*, 874 P.2d at 333; *accord Mosby*,

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(Cont'd)
within city limits of *any* dangerous weapon); *In re Brickey*, 70 P. 609 (Ida. 1902) (invalidating law that banned the possession of firearms within city or village limits).

851 A.2d at 1045 (upholding a "restriction on the type of firearms one may lawfully possess"); *Benjamin*, 662 A.2d at 1232 (right is "to possess a weapon of reasonably sufficient firepower to be effective for self-defense," not "to possess any weapon of the individual's choosing"). Accordingly, under state law, while "the right to bear arms may not be denied by the legislature" outright, the legislature may "prescribe the kind or character of arms that may or may not be kept, carried or used." *State v. Woodward*, 74 P.2d 92, 95 (Ida. 1937). It is up to the state legislatures, not the courts, to "take account of the character and ordinary use of weapons and interdict those whose customary employment by individuals is to violate the law." *People v. Brown*, 235 N.W. 245, 246-47 (Mich. 1931).

For example, state bans on the possession of "assault weapons" are routinely upheld, because these firearms are used in a disproportionate number of crimes. *See, e.g.*, *Benjamin*, 662 A.2d at 1235; *Robertson*, 874 P.2d at 331-32; *Arnold*, 616 N.E.2d at 171-73. In like fashion, state courts have followed this Court's lead in *Miller* and have upheld restrictions and outright bans on the possession of short-barreled shotguns, citing legislative determinations that these weapons are powerful, easily concealed, and "associated with violent crime," *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976); *accord State v. LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990); *Fennell*, 382 S.E.2d at 233. Washington's highest court has upheld Seattle's ban on carrying certain kinds of knives, in deference to "the reality of life in our state's largest city," where "street crime involving knives is a daily risk," *see City of Seattle v. Montana*, 919 P.2d 1218, 1223 (Wash. 1996). And a ban on handguns enacted by Morton Grove, Illinois, that is very similar to the one involved here has been upheld by both federal and state courts as not violating the Illinois constitution (as well as the Second Amendment). *See Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 278 (Ill. 1984); *Quilici*, 695 F.2d at 267.

The District's ban on handguns was motivated by the same concerns and cannot be distinguished in any meaningful respect from these other bans on particularly dangerous weapons. The District, facing a crime wave and data that showed that handguns were by far the weapon of choice in local crimes, concluded that handguns similarly had become associated with violent crime rather than lawful purposes. Accordingly, it concluded that whatever infringement a ban on handguns constituted on residents' right to bear arms was outweighed by the need to protect public safety. These conclusions are not unreasonable, and should have been upheld even if the Second Amendment were to be interpreted — contrary to this Court's jurisprudence – as limiting the federal government to the same extent as state provisions generally limit the various state governments.

State courts do not closely scrutinize the merits of legislative decisions to ban particularly dangerous weapons, but rather uphold them unless they deprive a plaintiff of any reasonable means by which to exercise his right to bear arms. Such a showing of effective disarmament has not been made here with respect to the handgun ban. To the contrary, respondent explicitly acknowledges in his declaration — one of the very few pieces of evidence in the sparse record — that he owns other firearms that may be legally possessed in the District.[6]

Indeed, plaintiffs' own theory of the case has not been that the handgun ban standing alone violated the Second Amendment, but rather that the combination of the handgun ban and the two other District laws at issue deprived them of their "fundamental right to possess a functional, personal firearm, such as a handgun *or ordinary long gun (shotgun or rifle)* within the home," Complaint ¶ 12 (emphasis added). In response to the petition, respondent makes no attempt to defend the court of appeals' holding that the District cannot ban any weapon determined to be an "Arm." Instead, he asks this Court to grant certiorari and then confine its review to the abstract question of whether a handgun is such an "Arm," without considering at all what consequences should flow from such a determination. Br. in Resp. 26.

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[6] Respondent is a special police officer, *see* D.C. Code § 5-129.02, who owns multiple "long guns" that are not subject to the District's ban on handguns. Heller Decl. ¶¶ 2-3. He states in conclusory fashion that not having access to a handgun "limits my ability to defend myself . . . as a handgun could often be better suited for such uses than a rifle or shotgun." *Id.* ¶ 5. It is doubtful that such a conclusory statement even creates a triable issue of fact that any Second Amendment right has been meaningfully burdened, let alone that it warrants summary judgment for the respondent, as directed by the court of appeals.

As respondent notes, *id.* at 3, his argument before the court of appeals was that the District's laws amounted to a total disarmament in combination. But the court of appeals did not adopt respondent's theory of the case, and instead went much further, holding that the handgun ban in isolation (as well as each of the other two laws in isolation) violated the Second Amendment.[7]

In short, the court of appeals did not simply read the Second Amendment as limiting the federal government in the same manner as the state right to bear arms limits the States. Rather, it ventured far beyond the States' well-established test, fashioning a hitherto unknown *per se* rule that was not asked for and is not defended by the respondent, and that is so broad as to render irrelevant the fact that the respondent has produced no evidence that the District's handgun ban burdens his right to bear arms in any meaningful way. This rule is not consistent with the reasonable regulation standard adopted by the state courts, nor can it be squared with this Court's admonition that Second Amendment challenges to such enactments must be based on evidence, *see Miller*, 307 U.S. at 178, and so the court of appeals' decision should be summarily reversed.[8]

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[7] Moreover, the court of appeals improperly reached the conclusion that the statutes at issue amounted to a total disarmament. Given the extreme disagreement between the parties as to the statutes' meaning and operation, the federal court of appeals should have certified the question to the local D.C. Court of Appeals for an authoritative interpretation before reaching out to decide what may be an entirely unnecessary question of federal constitutional law. *See* D.C. Code § 11-723 (permitting certification from a variety of courts, including this Court).

III. Granting Absolute Protection to "Lineal Descendants" of Founding-Era Weapons in "Common Use" Today Creates an Unmanageable Standard.

Nor is there any legitimate rationale for the court of appeals' "lineal descendant"/"common use" standard for determining which weapons a citizen has the absolute right to own. This standard, which appears to have been constructed to fit the facts of a challenge to a handgun ban, attempts to avoid the fundamental problem encountered by any court inclined to interpret the Second Amendment as providing the right to a choice of weaponry: how to cabin that right so as to avoid the absurd result of a right to own a tank or bazooka. *See Cases*, 131 F.2d at 922 (discussing how *Miller* cannot reasonably be interpreted as providing right to military-grade equipment). But it has no grounding in the Amendment's text and history or this Court's precedent, nor is it the sort of manageable standard that can describe the contours of a constitutional right. In the end, it is nothing more than an open-ended invitation for federal courts to second guess the determinations of elected legislatures as to which weapons are unreasonably dangerous in light of local realities, without ever acknowledging that they are doing so. *Cf. Rybar*, 103 F.3d at 294 n.6 (Alito, J., dissenting) (appellate judges "are not experts on firearms," nor on "crime in general").

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[8] Further support for summary reversal is provided by a recent order of the court of appeals, confirming that it improperly placed the burden on the District, rather than on the challengers, on the issue of whether the law disarmed the citizenry or merely prohibited particular types of weapons. In denying the plaintiffs' motion to lift the stay of its mandate, the court of appeals stated that the District had not "presented in our court" the argument the District now advances before this Court that its "ban on handguns can be justified so long as rifles and shotguns can be utilized in the home for self protection." *See* Order of Sept. 25, 2007, *available at* http://dcguncase.com/blog/wp-content/uploads/2007/09/dc-circuit-order-denying-motion-to-lift-stay.pdf. The order also stated that the District never "suggested that a rifle or shotgun, as opposed to a handgun, could be legally employed in self defense." *Id.* These statements show that the court of appeals incorrectly placed the burden on the District to demonstrate that other weapons could feasibly substitute for the banned ones rather than requiring the plaintiffs to demonstrate that they could not defend themselves with other weapons. *See Miller*, 307 U.S. at 178 (putting burden on law's challenger to come forward with evidence); *cf. Lewis*, 445 U.S. at 65-66 (rejecting strict scrutiny of laws affecting gun ownership). This error provides further support for summary reversal.

For example, it cannot be that an individual has a Second Amendment entitlement to own a weapon that waxes as a weapon gains in popularity and wanes as that weapon falls into disuse. The popularity of a weapon has no bearing on the degree to which a law banning that weapon infringes upon any one individual's rights. Rather, it simply indicates how many individuals would have standing to challenge such a law.

Similarly, there is no more rationale for limiting the "Arms" encompassed by the Second Amendment to those that are "lineally descended" from a weapon known to the founders than there is for limiting the property protected by the Fifth Amendment to that which is "lineally descended" from Eighteenth Century property.[9] Instead, like the "common use" standard, the "lineally descended" test is a limitation that purports to be neutral but in fact selects certain favored weapons for protection while excluding others, thereby substituting a judicial determination for the carefully considered judgment of a local legislature.

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[9] As the court of appeals itself recognized, there is rarely justification for limiting the protections of a constitutional right to the technology that would have been foreseeable by the founders. Pet. App. 51a. For similar reasons, the court of appeals' suggestion that the only permissible infringements on the Second Amendment are those that were known to common law at the time of the Amendment's ratification and thus expressly contemplated by the ratifiers, *see* Pet. App. 51a-52a, has no justification in this Court's jurisprudence.

Ironically, the result of the "common use"/"lineal descendant" test is the exclusion from the Second Amendment right of *only* those new and powerful weapons that "at this time" are "part of the ordinary military equipment" or "could contribute to the common defense," *Miller*, 307 U.S. at 178. Thus, while purporting to follow *Miller*, the "common use"/"lineally descended" construction of the Second Amendment directly rejects what the court of appeals itself viewed as the key distinction drawn by *Miller* — between those weapons that could contribute to the common defense and those that could not, Pet. App. 50a-51a. To accomplish this result, the court of appeals selectively quoted *Miller*'s holding, leaving out the words "at this time," Pet. App. 42a. *Miller* itself asks whether the use or possession of a weapon "at this time" has a relationship to the preservation of a militia, and so squarely rejects the historical inquiry embodied in the "lineal descendant" test.

Nor does the "common use"/"lineal descendant" test represent the sort of "workable standard[]" that can support judicial intervention, *see Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring). The court of appeals did not specify how common a weapon would have to be (either presently or in the Eighteenth Century) to earn Second Amendment protection. Indeed, it made little showing that handguns were, in fact, common in the Eighteenth Century.[10] The court of appeals also did not specify whether a weapon must be common within the jurisdiction in question, or within the entire United States, or both — an important distinction here, since the District's three-decades-old ban on handguns presumably has made handgun use for other than criminal purposes very rare. It did not explain how close "a lineal descendant" a weapon must be to one that was common among militiamen, or why the short shotguns involved in *Miller* are not similarly descended from Eighteenth Century weaponry.

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[10] The Militia Act of 1792, the only source upon which the court of appeals relied, *see* Pet. App. 49a-50a, actually counsels the opposite conclusion. The Militia Act required ordinary militiamen to outfit themselves with a variety of longer firearms, including muskets, bayonets, and rifles, but not including pistols. *See* Act of May 8, 1792, ch. XXXIII, § 1, 1 Stat. 271. Instead, the only militiamen expected to carry pistols were members of specialized horse-mounted units (the "dragoons"). *Id.* § 4, 1 Stat. 272.

Nor, finally, did the court of appeals explain how the constitutional inquiry into a particular weapon's commonality or ancestry could apply to the District's broad statutory definition at issue here, "any firearm originally designed to be fired by use of a single hand." The law bans multiple types of gun, most of which individually are no more common than were short-barreled shotguns at the time of *Miller*. Under the court of appeals' test, it would appear that the District could ban each relatively uncommon model or type of gun individually, but it could not achieve the same result with one broad definition. The impossibility of drawing such lines in an objective manner only highlights the futility of the enterprise upon which the D.C. Circuit would set the federal courts — and explains why other courts have consistently rejected the court of appeals' misreading of *Miller*, as somehow guaranteeing the absolute right to own any weapon "capable of being used in military action," *Warin*, 530 F.2d at 106; *see, e.g.*, *Cases*, 131 F.2d at 922.

This Court should summarily reverse the court of appeals' decision and reaffirm the well-settled principle that the Second Amendment does not guarantee the right to own the weapon of a citizen's choice. Given the egregiousness of the court of appeals' error, this Court's review is warranted not only to correct the error below but also to ensure that the decision below does not mislead other courts into unsound Second Amendment jurisprudence.

CONCLUSION

For the reasons stated above, as well as those that are stated in the petition, this Court should grant certiorari in this case and summarily reverse the decision below.

Respectfully submitted,

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JOINT APPENDIX

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No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

JOINT APPENDIX

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APPENDIX A

CHRONOLOGICAL LIST OF DOCKET ENTRIES

I. U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-00213-EGS

Date Filed	Docket Text
02/10/2003	COMPLAINT against DISTRICT OF COLUMBIA (Filing fee $ 150.), filed by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE.(td) (Entered: 02/19/2003)
02/10/2003	Summons Issued as to DISTRICT OF COLUMBIA (2) and Anthony Williams (1). (td) (Entered: 02/19/2003)
03/03/2003	MOTION to Dismiss by DISTRICT OF COLUMBIA. (Attachments: # 1 Memorandum in Support of Defendant's Motion to Dismiss# 2 Motion for Judgment on the Pleadings and the Memorandum) (Potter, Jonathan) (Entered: 03/03/2003)
03/14/2003	Memorandum in opposition to motion re

	2 *dismiss the complaint* filed by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. (Attachments: # 1 Text of Proposed Order)(Gura, Alan) (Entered: 03/14/2003)
03/14/2003	MOTION for Summary Judgment by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. (Attachments: # 1 Memorandum of Points and Authorities in Support of Motion for Summary Judgment# 2 Text of Proposed Order # 3 Separate Statement of Undisputed Material Facts# 4 Declaration of Shelly Parker# 5 Declaration of Dick Heller# 6 Declaration of Tom G. Palmer# 7 Declaration of Gillian St. Lawrence# 8 Declaration of Tracey Ambeau# 9 Declaration of George Lyon# 10 Exhibit Exhibit A# 11 Request for Judicial Notice)(Gura, Alan) (Entered: 03/14/2003)
04/03/2003	MOTION for Extension of Time to File Response/Reply *To Plaintiff's Motion for Summary Judgment and Plaintiff's Opposition to D.C.s Motion to Dismiss* by DISTRICT OF COLUMBIA. (Rezneck, Daniel) (Entered: 04/03/2003)
04/14/2003	Memorandum in opposition to motion re

	5 *Enlargement of Time by Defendants to File Opposition and Reply Memoranda* filed by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. (Attachments: # 1 Text of Proposed Order # 2 Declaration of Alan Gura)(Gura, Alan) (Entered: 04/14/2003)
04/17/2003	ORDER granting 5 Motion for Extension of Time to File Response/Reply re 2 MOTION to Dismiss, 4 MOTION for Summary Judgment. Responses due by 6/3/2003 Replies due by 6/3/2003. Signed by Judge Emmet G. Sullivan on April 17, 2003. (lcegs1) (Entered: 04/17/2003)
04/18/2003	ENTERED IN ERROR. . . .MOTION to Consolidate Case 03-834 RBW SEEGERS, et al., vs. ASHCROFT, et al., filed by plaintiff's attorneys in the above case. (td,) Modified on 5/19/2003 (td,). (Entered: 04/22/2003)
05/01/2003	Memorandum in opposition to motion re 7 *Consolidate and in Support of Motion for Recusal of Counsel* filed by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. (Attachments: # 1 Exhibit A# 2 Declaration of Alan Gura# 3 Declaration of Robert Levy# 4 Text of Proposed Order)(Gura, Alan) (Entered:

	05/01/2003)
05/01/2003	MOTION for Recusal *of Counsel* by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. (Gura, Alan) (Entered: 05/01/2003)
05/22/2003	REPLY to opposition to motion re 9 *Motion for Recusal of Counsel* filed by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. (Attachments: # 1 Declaration of Robert Levy# 2 Declaration of Alan Gura# 3 Declaration of Clark Neily# 4 Declaration of Dick Heller# 5 Declaration of Tom G. Palmer# 6 Exhibit B# 7 Exhibit C)(Gura, Alan) (Entered: 05/22/2003)
06/03/2003	REPLY to opposition to motion re 2 *Motion to Dismiss/Summary Judgment* filed by DISTRICT OF COLUMBIA. (Attachments: # 1 Supplement Statement of Disputed Facts# 2 Exhibit New England Journal of Medicine)(Mullen, Martha) (Entered: 06/03/2003)
06/04/2003	NOTICE by DISTRICT OF COLUMBIA re 11 Reply to opposition to Motion *To Dismiss/Summary Judgment - (Supplemental Exhibits)* (Attachments: # 1 Exhibit Exhibit A - Offenses

	Reported to the Metropolitan Police# 2 Exhibit Exhibit B - Bureau of Alcohol, Tobacco, and Firearms News)(Mullen, Martha) (Entered: 06/04/2003)
06/10/2003	REPLY to opposition to motion re 4 *summary judgment* filed by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. (Gura, Alan) (Entered: 06/10/2003)
06/12/2003	MOTION to Strike plaintiffs' declarations or, in the alternative, for leave to file a response to plaintiffs' reply to opposition to motion for recusal of counsel by plaintiffs in 03cv834 (RBW); (FIAT. Judge Sullivan "Leave to file is granted."). (td,) (Entered: 06/24/2003)
06/16/2003	RESPONSE to *Seegars' Plaintiffs' Motion to Strike or for Leave To File Sur-Reply* filed by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. (Gura, Alan) (Entered: 06/16/2003)
06/19/2003	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. DISTRICT OF COLUMBIA served on 2/10/2003, answer due 3/3/2003 (td,) (Entered: 06/25/2003)
07/02/2003	ORDER granting 15 Motion for Leave

	to File a Response to Plaintiffs' Reply to Opposition to Motion for Recusal of Counsel. Signed by Judge Emmet G. Sullivan on June 12, 2003. (GK,) (Entered: 07/02/2003)
07/08/2003	ORDER denying the motion to consolidate this cse with CA 03-834; granting the motion for leave to file a sur-reply to plaintiff's motion for recusal of counsel;. Signed by Judge Emmet G. Sullivan on 7/2/03. (clv,) (Entered: 07/08/2003)
07/25/2003	MOTION for Leave to Participate Amicus Curiae by BRADY CENTER TO PREVENT GUN VIOLENCE. (Attachments: # 1 EXHIBIT(AMICUS BRIEF)(jf,) (Entered: 07/30/2003)
08/04/2003	ORDER setting status hearing for August 14, 2003. Signed by Judge Emmet G. Sullivan on August 4, 2003. (lcegs1) (Entered: 08/04/2003)
08/05/2003	Memorandum in opposition to motion re 18 *Brady Center for Leave to File Amicus Brief* filed by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. (Attachments: # 1 Text of Proposed Order # 2 Declaration of Robert Levy# 3 Declaration of Alan Gura)(Gura, Alan) (Entered: 08/05/2003)
08/11/2003	MOTION for Leave to Participate as

	Amicus Curiae by VIOLENCE POLICY CENTER. (Attachments: # 1 EXHIBIT (AMICUS BRIEF)# 2 Exhibit to Brief 1# 3 Proposed Order)(mpt,) (Entered: 08/14/2003)
08/14/2003	Minute Entry for proceedings held before Judge Emmet G. Sullivan : Status Conference held on 8/14/2003. Motion Hearing set for 10/14/2003 10:00 AM in Courtroom 1 before Emmet G. Sullivan. chambers to submit order (Court Reporter Crystal Pilgrim.) (clv,) (Entered: 08/14/2003)
08/14/2003	REPLY to opposition to motion re 18 for Leave to Participate Amicus Curaie filed by BRADY CENTER TO PREVENT GUN VIOLENCE. (Attachments: # 1 Exhibit A# 2 Exhibit B)(nmw,) (Entered: 08/15/2003)
08/15/2003	ORDER granting 18 Brady Center's Motion to Participate as Amicus, granting 21 Violence Policy Center's Motion to Participate as Amicus, approving the participation of the American Civil Rights Union and the Heartland Institute as Amici, and scheduling filing deadlines and motions hearing. Signed by Judge Emmet G. Sullivan on August 15, 2003. (lcegs1) (Entered: 08/15/2003)

08/15/2003	MEMORANDUM of Amicus Curiae by MOVANT BRADY CENTER TO PREVENT GUN VIOLENCE. (jf,) (Entered: 01/02/2004)
08/28/2003	Memorandum in opposition to defendants motion re 2 to Dismiss and Brief in Support of Plaintiff's Motion for Summary Judgment filed by AMERICAN CIVIL RIGHTS UNION. (mpt,) (Entered: 08/29/2003)
08/28/2003	MEMORANDUM in Support of Plaintiff's Motion for Summary Judgment from Heartland Institute. (mpt,) (Entered: 08/29/2003)
09/11/2003	MEMORANDUM *In Response to Amici per Court's Order of August 15, 2003* from Plaintiffs Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon. (Gura, Alan) (Entered: 09/11/2003)
10/01/2003	MEMORANDUM *Supplemental in Support of Dismissal Motion* from Defendant District of Columbia. (Mullen, Martha) (Entered: 10/01/2003)
10/08/2003	MINUTE ORDER finding as moot 9 Motion for Recusal. In light of the Court's decision denying consolidation, the Plaintiff's Motion for Recusal is moot. Signed by Judge Emmet G. Sullivan on October 8, 2003. (lcegs1) (Entered: 10/08/2003)

10/14/2003	Minute Entry for proceedings held before Judge Emmet G. Sullivan : Motion Hearing held on 10/14/2003 re 4 MOTION for Summary Judgment filed by SHELLY PARKER, DICK ANTHONY HELLER, TOM G. PALMER, GILLIAN SAINT LAWRENCE, TRACEY AMBEAU, GEORGE LYON, 2 MOTION to Dismiss filed by DISTRICT OF COLUMBIA. heard and taken under advisement; chambers to issue an order (Court Reporter Frank Rangus.) (clv,) (Entered: 10/14/2003)
10/16/2003	ORDER directing further briefing on the issue of standing. Signed by Judge Emmet G. Sullivan on October 16, 2003. (lcegs1) (Entered: 10/16/2003)
10/20/2003	MEMORANDUM *re: Standing* from Plaintiffs Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon. (Gura, Alan) (Entered: 10/20/2003)
10/27/2003	REPLY in support of motion re 2 *Dissmiss for lack of standing* filed by DISTRICT OF COLUMBIA. (Rezneck, Daniel) (Entered: 10/27/2003)
10/28/2003	NOTICE OF TRANSCRIPT FILED for dates 10/14/03; Court Reporter: Frank J. Rangus. (td,) (Entered: 10/31/2003)
10/30/2003	MINUTE ORDER By November 7, 2003, Plaintiff is directed to respond to

	Defendant's Reply in Support of their Motion to Dismiss for Lack of Standing 30. The response shall be limited to 5 pages. Signed by Judge Emmet G. Sullivan on October 30, 2003. (lcegs1) (Entered: 10/30/2003)
11/07/2003	MEMORANDUM *in Reply to Defendants' Standing Arguments* from Plaintiffs Shelly Parker, Dick Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon. (Gura, Alan) (Entered: 11/07/2003)
03/31/2004	ORDER granting 2 Defendants' Motion to Dismiss, denying as moot 4 Plaintiffs' Motion for Summary Judgment. Signed by Judge Emmet G. Sullivan on March 31, 2004. (lcegs1) (Entered: 03/31/2004)
03/31/2004	MEMORANDUM AND OPINION. Signed by Judge Emmet G. Sullivan on March 31, 2004. (lcegs1) (Entered: 03/31/2004)
03/31/2004	FINAL JUDGMENT entered in favor of defendants against plaintiffs. Signed by Deputy Clerk by direction of the Court on 3/31/2004. (bm) (Entered: 03/31/2004)
04/06/2004	NOTICE OF APPEAL as to 35 Memorandum & Opinion, 36 Judgment by TRACEY AMBEAU, DICK ANTHONY HELLER, GEORGE LYON, TOM G. PALMER, SHELLY PARKER, GILLIAN SAINT LAWRENCE. Filing fee $ 255, receipt number 122917. (td,)

	(Entered: 04/09/2004)
04/09/2004	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 37 Notice of Appeal (td,) (Entered: 04/09/2004)
04/13/2004	USCA Case Number 04-7041 for 37 Notice of Appeal filed by SHELLY PARKER, DICK ANTHONY HELLER, TOM G. PALMER, GILLIAN SAINT LAWRENCE, TRACEY AMBEAU, GEORGE LYON. (td,) (Entered: 04/14/2004)
05/02/2007	Consent MOTION for Extension of Time to *File Bill of Costs and Motion for Attorney Fees* by TRACEY AMBEAU, GEORGE LYON, SHELLY PARKER, DICK ANTHONY HELLER, TOM G. PALMER, GILLIAN SAINT LAWRENCE (Attachments: # 1 Text of Proposed Order)(Gura, Alan) (Entered: 05/02/2007)

05/03/2007	MINUTE ORDER granting 38 Consent Motion for Extension of Time. Plaintiffs shall file their bill of costs and motion for fees and related expenses within sixty days from the date of (1) the denial of a timely petition for writ of certiorari by the Supreme Court, (2) the expiration of the time for filing a petition for writ of certiorari to the Supreme Court if no timely petition is filed, or (3) a decision in this case by the Supreme Court. Signed by Judge Emmet G. Sullivan on May 3, 2007. (lcegs1) (Entered: 05/03/2007)

APPENDIX B

CHRONOLOGICAL LIST OF DOCKET ENTRIES

II. U.S. Court of Appeals for the D.C. Circuit
Docket #: 04-7041

Date Filed	Docket Text
4/13/04	CIVIL-PRIVATE CASE docketed. Notice of Appeal filed by Appellant Shelly Parker, Appellant Dick Anthony Heller, Appellant Tom G. Palmer, Appellant Gillian Saint Lawrence, Appellant Tracey Ambeau, Appellant George Lyon. [815807-1] (sha)
4/13/04	CLERK'S ORDER filed [815919] directing Appellant to file [815919-1]: docketing statement, certificate of counsel, statement of issues, lower court decision, any procedural motions, transcript status notice, deferred appendix notice, appearance form due 5/13/04; any dispositive motions due 5/28/04. Directing Appellee to file [815919-2]: certificate of counsel, any procedural motions, appearance form due 5/13/04; any dispositive motions due 5/28/04. [Entry Date: 4/13/04] (sha)

5/12/04	ENTRY OF APPEARANCE filed by Attorney Alan Gura for the Appellants George Lyon, Tracey Ambeau, Dick Anthony Heller, Gillian Saint Lawrence, Tom G. Palmer, and Shelly Parker [821924-1]. (jth)
5/12/04	INITIAL SUBMISSIONS filed by Appellants Shelly Parker, et al., [821928-1]: the docketing statement; certificate of counsel; statement of issues; the lower court decision; deferred appendix notice (Deferred Appendix needed = n). (jth)
5/12/04	NOTICE filed by the Appellants Shelly Parker, et al., FINAL transcript status report filed [821929-1]. All transcripts have been both completed and received. (Certificate of mail service dated 5/12/04). (jth)
5/12/04	ENTRY OF APPEARANCE filed by Attorneys Edward E. Schwab, Lutz Alexander Prager, and Robert James Spagnoletti for Appellee the District of Columbia [821998-1]. (jth)
5/12/04	INITIAL SUBMISSIONS filed by Appellee District of Columbia [822000-1]: 28(a)(1) certificate of counsel. (jth)
5/12/04	MOTION filed (5 copies) by Appellee DC (certificate of mail service dated 5/12/04) to hold this appeal in

	abeyance pending a decision by this Court in Nos. 04-5016 & 04-5081 (Seegars v. Ashcroft) [822003-1]. Response due by 5/27/04. (Styled as "Motion by DC To Stay Briefing"). (jth)
5/12/04	NOTICE filed of intention to participate as amicus curiae in support of appellants seeking reversal [822087-1] by Amicus Curiae National Rifle Association Civil Rights Defense Fund. (Certificate of mail service dated 5/11/04). (jth)
5/12/04	STATEMENT filed by Amicus Curiae for Appellant Natl Rifle Assn Civ Defense Fund pursuant to FRAP 26.1 providing the corporate disclosure statement [822090-1]. Certificate of service dated 5/11/04. [THE FUND IS NOT-FOR-PROFIT CORP. THAT HAS NOT ISSUED STOCK OR DEBT SECURITIES TO THE PUBLIC] (jth)
5/17/04	NOTICE filed of intention to participate as amicus curiae [822644-1] by Vlnc Plcy Ctr. Certificate of mail service date 5/17/04. (sha)
5/17/04	NOTICE filed of intention to participate as amicus curiae [824056-1] by Second Amendment Fdn, Ctzn Com Right Keep, Madison Scty, Keep Bear Arms Corp. Certificate of service date 5/13/04 . (mam)

5/17/04	STATEMENT filed by Amicus Curiae for Appellant Second Amendment Fdn, Amicus Curiae for Appellant Ctzn Com Right Keep, Amicus Curiae for Appellant Madison Scty, Amicus Curiae for Appellant Keep Bear Arms Corp pursuant to FRAP 26.1 providing corporate disclosure listing [824057-1] Certificate of Service date 5/13/04 (contained within notice to participate as amicus) (mam)
5/17/04	MOTION (styled "request to be allowed to file amicus brief in excess of 15 pages") filed (5 copies) by Amicus Curiae for Appellant Second Amendment Fdn, Ctzn Com Right Keep, Madison Scty and Keep Bear Arms Corp (certificate of service by mail dated 5/13/04) to exceed the page limits [824059-1] on an amicus brief. (mam)
5/26/04	OPPOSITION filed [824401-1] (5 copies) by Appellee DC (certificate of mail service dated 5/26/04) to a motion exceed page limits [824059-1]. (sha)
5/26/04	OPPOSITION filed [824402-1] (5 copies) by Appellant Shelly Parker, et al. (certificate of personal service dated 5/26/04) to a motion hold case in abeyance pending decision by this Court [822003-1]. (sha)
5/27/04	NOTICE filed of intention to

	participate as amicus curiae [827592-1] by Brady Ctr Prevent. Certificate of mail service date 5/27/04. (sha)
5/28/04	REPLY filed [824828-1] (5 copies) by Appellee DC (certificate of mail service dated 5/28/04) to a response to the motion hold case in abeyance pending decision by this Court [822003-1]. (sha)
6/1/04	AMENDED NOTICE filed of intention to participate as amicus curiae [827605-1] by Second Amendment Fdn, Ctzn Com Right Keep, Madison Scty, Keep Bear Arms Corp, Heartland Inst . Certificate of mail service date 5/27/04. (sha)
6/2/04	BRIEF filed by Amicus Curiae for Appellant Natl Rifle Assn Civ [829188-1] . Copies: 15. Certificate of service date 6/2/04 . (mam)
6/4/04	NOTICE filed of intention to participate as amicus curiae 827587-1] by Amer Civ Rights Un. Certificate of mail service date 6/3/04. (sha)
6/7/04	RECORD ON APPEAL filed. (tap) 6/10/04 Letter sent Attorney Non-Member letter. Application for admission - due 8/9/04 for Peter Ferrara. Documents sent: letter aty appl for adm [827731-1]. (sha)
6/10/04	MOTION filed (5 copies) (certificate of

	mail service dated 6/10/04) to allow amicus curiae [827736-1]. Motion filed by Cong Racial Equl Inc. (sha)
6/10/04	STATEMENT filed by Movant-Amicus Curiae-Appellant Cong Racial Equl Inc pursuant to FRAP 26.1 providing corporate disclosure listing [827737-1]. Certificate of mail service date 6/10/04. (Statement included in motion filed above) (sha)
6/14/04	REPLY LODGED [829280-1] (5 copies) by Amicus Curiae in support of the Appellant (Second Amendment Fdn, Ctzn Com Right Keep, Madison Society, Keep Bear Arms Corp, and the Heartland Inst (certificate of mail service dated 6/7/04) to the District of Columbia's response to the motion to exceed page limits in Amicus Curiae Brief [824059-1]. (jth)
6/17/04	MOTION filed (5 copies) by Amicus Curiae for Appellant Heartland Inst, et al. (certificate of mail service dated 6/16/04) for leave to file [80446-1] a reply [829280-1]. (sha)
6/17/04	CLERK'S ORDER filed [830449] granting motion leave to file filed by Heartland Inst, et al. [830446-1]. Directing Clerk to file lodged reply [829280-1]. [Entry Date: 6/17/04] (sha)
6/17/04	PER ABOVE ORDER lodged reply

	[829280-1] is filed. (sha)
6/17/04	NOTICE filed of intention to participate as amicus curiae in support of Plaintiff/Appellants [830631-1] filed by Amicus Curiae (for Appellants) State of Texas. Certificate of mail service dated 6/14/04. (jth)
7/28/04	CLERK'S ORDER filed [839103] of the Congress of Racial Equality, Inc.'s motion for leave to participate as amicus curiae in support of appellants, and it appearing that the motion is unopposed, it is ORDERED that the motion be granted [827736-1]. [Entry Date: 7/28/04] (lvs)
8/25/04	RECORD On APPEAL returned . (tap)
8/25/04	PER CURIAM ORDER filed [844619] denying motion exceed page limits [824059-1]; granting motion hold case in abeyance pending decision by this Court in No. 04-5016, Seegars v. Ashcroft (to be argued 11/19/04). [822003-1]. Before Judges Sentelle, Henderson, Garland. [Entry Date: 8/25/04] (lej)
8/25/04	NONPARTY MOTION lodged (5 copies) (certificate of service dated 8/25/04, by mail) to allow amicus curiae [846053-1]. Motion submitted by Movant-Amicus Potowmack Institute Inc. (lvs)

8/25/04	MOTION filed (5 copies) by Movant-Amicus Potowmack Insti Inc (certificate of service dated 8/25/04, by mail) for leave to file [846059-1] LODGED non-party motion to allow amicus [846053-1]. (lvs)
9/2/04	CLERK'S ORDER filed [846064] of Potowmack Institute's motion for leave to file motion for leave to participate as amicus curiae out of time, and the lodged motion for leave to participate as amicus curiae in support of appellee, and it appearing that the lodged motion for leave to participate as amicus curiae is unopposed, it is ORDERED that the motion for leave to file be granted [846059-1]. The Clerk is directed to file the lodged motion for leave to participate as amicus curiae in support of appellee [846053-1]. It is FURTHER ORDERED that the motion for leave to participate as amicus curiae be granted [846053-1], [Entry Date: 9/2/04] (lvs)
9/2/04	PER ABOVE ORDER lodged non-party motion to allow amicus [POTOWMACK INSTITUTE, INC.] [846053-1] is filed. (lvs)
9/2/04	SECOND Letter sent Attorney Non-Member letter. Application for admission - due 11/1/04 for Peter

	Ferrara. Documents sent: letter aty appl for adm [846093-1]. (lvs)
2/16/05	INITIAL SUBMISSIONS filed by Appellants Shelly Parker, et al., [878466-1]: Certificate of Counsel (Parties only). (jth)
2/16/05	STATEMENT filed by the Appellants Shelly Parker, et al., pursuant to FRAP 26.1 providing the corporate disclosure listings [878467-1]. [ALL APPELLANTS ARE INDIVIDUALS]. Certificate of mail service dated 2/16/05. (jth)
2/16/05	MOTION filed (5 copies) by Appellants Shelly Parker, et al. (certificate of service by hand on the Appellee and by mail dated 2/16/05 on Amicus Curiae) to issue briefing schedule [878471-1], and set oral argument on the merits [878471-2]. (jth)
2/17/05	SECOND Letter sent Attorney Non-Member letter. Application for admission due 3/18/05 for Peter Ferrara. Document sent: letter attorney application for admission [878474-1]. (jth)
2/23/05	OPPOSITION filed [879738-1] (5 copies) by Appellee D.C. (certificate of mail service dated 2/23/05) to appellants motion to set briefing schedule [878471-1]; MOTION filed

	for summary affirmance [879738-2]. Reply/Response due on 3/10/05. (jth)
3/2/05	RECORD ON APPEAL filed . one file and one accordian file (tap)
3/3/05	REPLY filed [889606-1] (5 copies) by the Appellants Shelly Parker, et al., (certificate of service by hand dated 3/3/05 on appellee and by first class mail on all the other parties) to the response to the motion to issue briefing schedule [878471-1], and to set oral argument on the merits [878471-2]; OPPOSITION filed to appellee's (DC) motion for summary affirmance [879738-2]. [04-7041] (jth)
3/8/05	REPLY filed [882961-1] (5 copies) by Appellee DC (certificate of mail service dated 3/8/05) to a response to the motion for summary affirmance [879738-2]. (wmw)
4/25/05	CLERK'S ORDER filed [890599] to hold case in abeyance pending resolution of the rehearing proceedings in 04-5016, Seegars v. Gonzales. Consideration of the pending motions be deferred pending further order of the court. The parties shall file motions to govern further proceedings in this case within 30 days after resolution of the rehearing proceedings in Seegars [890599-1]. [Entry Date: 4/25/05] (lej)

6/1/05	CLERK'S ORDER TO SHOW CAUSE filed [897500] that upon consideration of the notice of the American Civil Rights Union of intent to participate as amicus curiae filed on June 4, 2004, by attorney Peter Ferrera, the court's June 10, 2004, September 2, 2004, and February 17, 2005 letters to attorney Ferrera concerning admission to bar of this court, and attorney Ferrera's failure to respond the American Civil Rights Union show cause why its notice of intent to participate as amicus curiae should not be stricken from the docket of this case. Answer due 7/1/05 for Amer Civ Rights Un [897500-1]. The Clerk is directed to send a copy of this order to counsel for amicus by certified mail, return receipt requested, and by first class mail. [Entry Date: 6/1/05] (sha)
6/1/05	FIRST CLASS MAIL SENT [897504-1] of clerk order to show cause [897500-1]. (sha)
6/1/05	CERTIFIED MAIL [897507-1] SENT with return receipt requested (Receipt #: 70011940000598810924) of clerk order to show cause terminate party [897500-1] Certified mail receipt due 7/1/05 for Peter Ferrara. (sha)
6/22/05	CLERK'S ORDER filed [901735] directing the parties to file motions to

	govern future proceedings within 30 days of the date of this order. [901735-1] Motions to govern future proceedings due 7/22/05. [Entry Date: 6/22/05] (lej)
6/28/05	CERTIFIED MAIL [905988-1] addressed to Peter Ferrara RETURNED marked "unclaimed". Mail was in response to a to the court's 6/1/05 order to show cause. [897500-1] . . (lej)
6/30/05	ANSWER filed [904419-1] (5 copies) by Amicus Curiae for Appellant Amer Civ Rights Un to the court's 6/1/05 order to show cause [897500-1]. [04-7041] (lej)
7/5/05	FIRST CLASS MAIL [908636-1] RETURNED marked "NO SUCH STREET, UNABLE TO FORWARD". Mail was in response to a clerk order govern future proceedings [901735-1]. (lvs)
7/5/05	CLERK'S ORDER filed [904422] discharging the court's order to show cause filed June 1, 2005. Attorney Peter Ferrara was admitted to the bar of this court on June 30, 2005. [Entry Date: 7/7/05] (lej)
7/14/05	MOTION filed (5 copies) by Appellants (certificate of mail service dated 7/14/05) establishing the initial briefing schedule [907121-1] and oral

	argument. [907121-2] . (lej)
7/15/05	MOTION filed (5 copies) by Appellee DC (certificate of mail service dated 7/15/05) to remand case to the to district court with instructions to dismiss [907047-1] or, alternatively, for summary affirmance [907047-2]. Response due 8/1/05. (lej)
7/22/05	OPPOSITION filed [915828-1] (5 copies) by Appellants (certificate of mail service dated 7/22/05) to a motion to remand case [907047-1] or, alternatively, to a motion for summary affirmance [907047-2] . (lej)
7/26/05	OPPOSITION filed [915826-1] (5 copies) by Appellee DC (certificate of mail service dated 7/26/05) to a motion establishing the initial briefing schedule [907121-1] . (lej)
7/28/05	REPLY filed [915830-1] (5 copies) by Appellee DC (certificate of mail service dated 7/28/05) to a response to the motion to remand case [907047-1] or, alternatively, to a response to the motion for summary affirmance [907047-2] . (lej)
8/4/05	REPLY filed [915832-1] (5 copies) by Appellants (certificate of service dated 8/4/05) to a response to the motion establishing the initial briefing schedule [907121-1] and to schedule

	oral argument [907121-2] . (lej)
11/2/05	PER CURIAM ORDER filed [929164] denying motion to remand case [907047-1] filed by DC; denying motion for summary affirmance [907047-2] filed by DC; denying motion for summary affirmance [879738-2] filed by DC; granting motions to issue a briefing schedule and set oral argument. [907121-1] 907121-2] [878471-1] [878471-2] The Clerk is instructed to calendar this case for presentation to a merits panel, and the parties are instructed to address both standing and the merits of the case in their briefs. Before Judges Henderson, Randolph, Brown . [Entry Date: 11/2/05] (lej)
11/9/05	CLERK'S ORDER TO SHOW CAUSE filed [930863], on the court's own motion, that amici curiae show cause, within 30 days of the date of this order, (responses due 12/9/05) why they should not be limited to one joint brief, not to exceed 7,000 words, on the side of the party they support. [SEE ORDER FOR MORE COMPLETE DETAILS REGARDING THE PARTIES SUBMISSIONS TO THIS ORDER REQUESTING ADDITIONAL BRIEFS OR EXTENDED WORD LIMITS]. [Entry Date: 11/9/05] (jth)
11/23/05	MOTION (styled "consent motion to

	correct court's docket") filed (5 copies) by Appellants Shelly Parker et al. (certificate of service by mail dated 11/22/05) regarding adding Mayor Williams as a new party to the case. (mam)
11/23/05	STATEMENT filed by Appellants Shelly Parker et al. pursuant to FRAP 26.1 providing corporate disclosure listing [939653-1] Certificate of Service date 11/22/05 (mam)
11/23/05	INITIAL SUBMISSIONS filed by Appellant Shelly Parker [939656-1]: 28(a)(1) certificate . (mam)
12/1/05	ANSWER filed [935514-1] (5 copies) by Amicus Curiae for Appellant St TX (certificate of service dated 11/30/05) to a clerk order to show cause briefing format [930863-1] . [04-7041] (lej)
12/7/05	ANSWER filed [936366-1] (5 copies) by Amicus Curiae for Appellant Cong Racial Equl Inc (certificate of service dated 12/6/05) to a clerk order to show cause briefing format [930863-1] . [04-7041] (lej)
12/7/05	ANSWER filed [936634-1] (5 copies) by Amicus Curiae for Appellant Natl Rifle Assn Civ (certificate of service dated 12/6/05) to a clerk order to show cause briefing format [930863-1] . [04-7041] (lej)

12/7/05	MOTION filed (5 copies) by Appellee DC (certificate of service dated 12/7/05, by mail) to extend time to file [936717-1] a response to the November 9th clerk's order [930863-1] until 1/4/06. (lvs)
12/8/05	ANSWER filed [936636-1] (5 copies) by Amicus Curiae for Appellant Amer Civ Rights Un (certificate of service dated 12/8/05) to a clerk order to show cause briefing format [930863-1] . [04-7041] (lej)
12/8/05	MOTION (styled "motion for leave to participate as amicus curiae independent of other amici") filed (5 copies) by Amicus Curiae for Appellee Potowmack Insti Inc (certificate of service by mail dated 12/8/05) to file separate brief(s) [939659-1]. (mam)
12/9/05	CLERK'S ORDER filed [936719] of appellee's motion for extension of time to file reply to responses to order to show cause filed November 9, 2005, it is ORDERED that the motion for extension of time be granted [936717-1]. Any reply is now due January 4, 2006. [Entry Date: 12/9/05] (lvs)
12/9/05	ANSWER filed [939665-1] (5 copies) by Amicus Curiae for Appellee Brady Ctr Prevent and Amicus Curiae for Appellee Vlnc Plcy Ctr (certificate of

	service by mail dated 12/9/05) to a clerk order to show cause briefing format [930863-1] . [04-7041] (mam)
12/13/05	SUPPLEMENT to [939672-1] answer (OTSC response) [935514-1] filed by Amicus Curiae for Appellant St TX . (mam)
12/14/05	SUPPLEMENT (duplicate of motion) to [939681-1] motion add party [939647-1] filed by Appellants Shelly Parker et al. (mam)
12/29/05	CLERK'S ORDER TO SHOW CAUSE filed [939739] directing amicus curiae Powtomack Institute Inc. to either (1) have counsel enter an appearance, or (2) show cause why it should not be dismissed as amicus curiae in this case. Answer due 1/30/06. Failure to comply with this order will result in dismissal of the Powtomack Institute, Inc. as amicus curiae in this case for lack of prosecution. Clerk directed to send copy of order to Powtomack Institute, Inc. by certified mail and by first-class mail. [Entry Date: 12/29/05] (mam)
12/29/05	CLERK'S ORDER filed [939747] granting motion add party filed by Shelly Parker [939647-1] and directing Clerk to correct docket to include Mayor Anthony Williams as a defendant/appellee in this case . [Entry Date: 12/29/05] (mam)

12/29/05	CERTIFIED MAIL [940149-1] SENT with return receipt requested (Receipt #: 7099-3400-0012-2875-4928): clerk order to show cause adding a new attorney [939739-1] certified mail receipt due 1/30/06 for Potowmack Insti Inc . (mam)
12/29/05	FIRST CLASS MAIL SENT [940150-1] to Potowmack Institute: clerk order to show cause adding a new attorney [939739-1] . (mam)
1/3/06	CERTIFIED MAIL RECEIPT [945407-1] RECEIVED by Potowmack Insti Inc for Amicus Curiae for Appellee Potowmack Insti Inc (signed for on 12/31/05) in response to a clerk order to show cause adding a new attorney [939739-1]. (lvs)
1/4/06	REPLY filed [941944-1] (5 copies) by Appellee DC (certificate of mail service dated 1/4/06) to responses by Amici Curiae to order to show cause re: briefing. (lej)
1/30/06	MOTION filed (5 copies) by Amicus Curiae for Appellee Potowmack Insti Inc (certificate of mail service dated 1/30/06) to convert from corporate to individual [946482-1] (lej)
3/17/06	PER CURIAM ORDER filed [956962] discharging order to show cause,

	directing that Ernest McGill be substituted as amicus curiae in lieu of Powtomack Institute; establishing briefing format: brief for appellants, 14,000 wds; joint appendix; brief for amici (St TX, 7,000 wds; briefs for non-Governmental amici in support of appellants, 7,000 wds); brief for appellees, 14,000 wds; briefs for amici (joint brief for Brady Center to Prevent Gun Violence and Violence Policy Center, 7,000 wds; brief for Ernest McGill, 7,000 wds); reply brief for appellants, 7,000 wds. Any additional government amici supporting appellants will be expected to join in brief of St TX. Parties will be notified by separate order of briefing schedule, date of oral argument and composition of merits panel. Before Judges Randolph, Tatel, Brown . [Entry Date: 3/17/06] (mam)
4/7/06	SUPPLEMENT to [965944-1] brief [829188-1] filed by Amicus Curiae for Appellant Natl Rifle Assn Civ. (hts)
4/14/06	CLERK'S ORDER filed [962744] establishing the initial briefing schedule [962744-1]: Appellant's brief due on 6/1/06; Appellant's appendix due on 6/1/06; Amicus Curiae's brief due on 6/16/06; Appellee's brief due on 7/17/06; Amicus Curiae's brief due on 8/1/06; Appellant's reply brief due on 8/15/06. [Entry Date: 4/14/06] (cwc)

6/1/06	BRIEF filed by Appellants Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian Saint Lawrence, Tracey Ambeau and George Lyon [974256-1] . Copies: 15 . Certificate of service date 6/1/06 . (mam)
6/1/06	APPENDIX filed by Appellant Shelly Parker [974258-1] . Copies: 10 . Certificate of service date 6/1/06 . (mam)
6/5/06	ENTRY OF APPEARANCE filed by Attorney John Andrew Valentine for Amicus Curiae for Appellee Brady Ctr Prevent [973578-1] . (tag)
6/7/06	Supplement to Joint APPENDIX filed by Appellants Shelly Parker, et al. [974773-1]. Copies: 10. Certificate of mail service date 6/6/06. (hts)
6/15/06	BRANDEIS BRIEF lodged by Amicus Curiae for Appellants Second Amendment Fdn, Ctzn Com Right Keep, and Madison Scty [975075-1]. Copies: 16. Certificate of mail service date 6/15/06. (krm)
6/16/06	BRIEF lodged by Amicus Curiae for Appellant Amer Civ Rights Un [975928-1]. Copies: 15. Certificate of mail service date 6/16/06. (krm)
6/16/06	BRIEF filed by Amicus Curiae for

	Appellant Cong Racial Equl Inc [980634-1]. Copies: 15. Certificate of mail service date 6/16/06. (krm)
6/19/06	CORRECTED BRIEF filed by Amicus Curiae for Appellant Amer Civ Rights Un [975926-1]. Copies: 15. Certificate of mail service date 6/16/06. (krm)
6/19/06	BRIEF filed by Amicus Curiae for Appellant St TX, Amicus Curiae for Appellant St AL, Amicus Curiae for Appellant St AR, Amicus Curiae for Appellant St CO, Amicus Curiae for Appellant St FL, Amicus Curiae for Appellant St GA, Amicus Curiae for Appellant St MI, Amicus Curiae for Appellant St MN, Amicus Curiae for Appellant St NE, Amicus Curiae for Appellant St ND, Amicus Curiae for Appellant St OH, Amicus Curiae for Appellant St UT, Amicus Curiae for Appellant St WY [980622-1]. Copies: 15. Certificate of mail service date 6/16/06. (krm)
6/22/06	SUPPLEMENT/ERATTA (TABLE OF AUTHORITIES - NO CASES WHICH WE CHIEFLY RELY UPON) to [980641-1] brief of amicus curiae [980634-1] filed by Amicus Curiae for Appellant Cong Racial Equl Inc. (krm)
6/29/06	MOTION filed (5 copies) by Amici Professors (certificate of mail service dated 6/23/06) regarding adding Amici

Professors as new parties to the case. Added: Frederick Bieber, David J. Burdua, John J. Furdedy, Edward Leddy, Joseph Magaddino, Gary Mauser, Glen Meyer, Jeffrey Miron, Michael Munger, Carol K. Oyster, Gary R. Pearlstein, Jeremy Rabkin, Lance Stell, Lawrence Southwick, and Thomas Velk. Styled as "Unopposed Motion to file Amicus Brief with names of Individual Amici included". (hts)

7/7/06 MOTION filed (5 copies) by Appellee DC (certificate of mail service dated 7/7/06) to extend time to file [979565-1] Apellee's Brief [962744-1] until 7/21/06. Appellant's do not oppose provided other briefing deadlines are extended accordingly: amici briefs due 8/7/06 and reply brief due on 8/21/06. (hts)

7/11/06 CLERK'S ORDER filed [979689] of the unopposed motion for leave to file amicus brief with names of individual amici included, and appellees' unopposed motion for extension of time to file brief, it is ORDERED that the motion for leave to file amicus brief be granted [979565-1] . The Clerk is directed to file the lodged brief [975075-1]. It is FURTHER ORDERED that appellees' motion for extension of time be granted. The balance of the briefing schedule is revised as follows: Appellee's brief due

	on 7/21/06; Amicus Curiae's brief due on 8/7/06; Appellant's reply brief due on 8/21/06. [Entry Date: 7/11/06] (lvs)
7/11/06	PER ABOVE ORDER lodged brief [975075-1] is filed. (lvs)
7/11/06	MOTION filed (5 copies) (certificate of service dated 7/6/06) to allow amicus curiae [985700-1]. Motion filed by City NY (Note: this motion was replaced 7/31/06 with an amended motion, ID 985703) (mam)
7/21/06	BRIEF filed by Appellees DC and Anthony A. Williams [982451-1]. Copies: 15. Certificate of mail service date 7/21/06. (krm)
7/21/06	APPENDIX (Styled as "Statutory Addendum to Brief for the District of Columbia") filed by Appellees DC and Anthony A. Williams [982453-1]. Copies: 10. Certificate of mail service date 7/21/06. (krm)
7/25/06	BRIEF filed by Amicus Curiae for Appellee Ernest McGill [982457-1]. Copies: 15. Certificate of mail service date 7/25/06. (krm)
7/25/06	APPENDIX lodged by Amicus Curiae for Appellee Ernest McGill [982630-1]. Copies: 10. Certificate of mail service date 7/25/06. (krm)

7/25/06	MOTION filed (5 copies) by Amicus Curiae for Appellee Ernest McGill (certificate of mail service dated 7/25/06) for leave to file [982633-1] lodged appendix [982630-1]. (krm)
7/31/06	AMENDED MOTION filed (5 copies) (certificate of service by mail dated 7/31/06) to allow amicus curiae [985703-1]. Motion filed by City NY (Note: this motion replaces the motion submitted 7/11/06, ID 985700. It was filed by fax with permission). (mam)
8/3/06	SUPPLEMENT/CORRECTED TABLE OF AUTHORITIES AND TABLE OF CONTENTS to [984926-1] appellees brief [982451-1] filed by Appellees DC and Anthony A. Williams. [ONE COPY PLACED IN EACH BRIEF] (krm)
8/3/06	SUPPLEMENT (original hard copy) of [985708-1] non-party motion to allow amicus [985703-1] filed by Movant-Amicus Curiae City NY . (attached to back of faxed copy) (mam)
8/3/06	MOTION filed (5 copies) (certificate of service dated 8/3/06) to allow amicus curiae [985709-1] in support of appellee DC . Motion filed by City Boston (filed by fax with permission) (mam)
8/3/06	MOTION filed (5 copies) (certificate of service dated 8/3/06) to allow amicus

	curiae [985716-1] in support of appellee DC. Motion filed by City Chicago (filed by fax with permission) (mam)
8/4/06	SUPPLEMENT (original hard copy) of [985718-1] non-party motion to allow amicus [985716-1] filed by Movant-Amicus Curiae-Appellee City Chicago . (attached to back of faxed motion) (mam)
8/7/06	NOTICE filed of intention to participate as amicus curiae [984425-1] by Cm MA, St ID, St MD, St NJ . Certificate of service date 8/4/06 . (mam)
8/7/06	SUPPLEMENT (original hard copy) of [985719-1] non-party motion to allow amicus [985709-1] filed by Movant-Amicus Curiae-Appellee City Boston . (attached to back of faxed copy of motion) (mam)
8/7/06	BRIEF filed by Amicus Curiae for Appellee Cm MA, Amicus Curiae for Appellee St ID, Amicus Curiae for Appellee St MD, Amicus Curiae for Appellee St NJ, Movant-Amicus Curiae City NY, Movant-Amicus Curiae-Appellee City Boston, Movant-Amicus Curiae-Appellee City Chicago [985722-1] . Copies: 15. Certificate of service date 8/7/06 . (mam)

8/7/06	MOTION filed (5 copies) (certificate of service dated 8/4/06) to allow amicus curiae [985821-1] in support of appellee. Motion filed by City Cty SF (mam)
8/7/06	BRIEF filed by Amicus Curiae for Appellee Vlnc Plcy Ctr, Amicus Curiae for Appellee Brady Ctr Prevent, Movant-Amicus Curiae-Appellee City Cty SF [985828-1] . Copies: 15 . Certificate of service date 8/7/06 . (mam)
8/9/06	ERRATA [TABLE OF AUTHORITIES] to [987131-1] brief [985722-1] filed by Amicus Curiae for Appellees Cm MA, Amicus Curiae for St MD, Amicus Curiae for Appellee St NJ, Amicus Curiae for Appellee City NY, Amicus Curiae for Appellee City Boston, Amicus Curiae for Appellee City Chicago. (lvs)
8/10/06	NOTICE (styled "State of Idaho's notice of withdrawal of amici curiae in support of defendant-appellee District of Columbia") filed by Amicus Curiae for Appellee St ID regarding terminating their involvement in this case. Certificate of service date 8/9/06 . (mam)
8/10/06	ERRATA to [987140-1] brief [980622-1] filed by Amicus Curiae for Appellant St TX, Amicus Curiae for Appellant St

AL, Amicus Curiae for Appellant St AR, Amicus Curiae for Appellant St CO, Amicus Curiae for Appellant St FL, Amicus Curiae for Appellant St GA, Amicus Curiae for Appellant St MI, Amicus Curiae for Appellant St MN, Amicus Curiae for Appellant St NE, Amicus Curiae for Appellant St ND, Amicus Curiae for Appellant St OH, Amicus Curiae for Appellant St UT, Amicus Curiae for Appellant St WY. (lvs)

8/14/06 CLERK'S ORDER filed [985860] granting motions to allow amicus filed by City Boston, City of Chicago and City of NY. [Entry Date: 8/14/06] (mam)

8/21/06 REPLY BRIEF filed by Appellant Shelly Parker [987483-1] . Copies: 15 . Certificate of mail service date 8/21/06 . (smc)

8/21/06 FIRST CLASS MAIL addressed to Glenn Kaplan [987725-1] RETURNED marked return to sender, unable to forward . Mail was in response to an order granting motions for participation of amicus curiae. (smc)

8/23/06 FIRST CLASS MAIL [987727-1] RESENT to Glenn Kaplan; order granting motions to participate as amicus curiae. Reason mail resent: correct address on brief. (smc)

8/25/06	CLERK'S ORDER filed [988280] granting motion leave to file filed by Ernest McGill [982633-1]. The Clerk is directed to file the lodged document [982630-1] . [Entry Date: 8/25/06] (mcm)
8/25/06	PER ABOVE ORDER lodged appendix null [982630-1] is filed. (mcm)
9/6/06	ERRATA/CORRECTED TABLE OF AUTHORITIES to [990312-1] brief [985828-1] filed by Amicus Curiae for Appellee Vlnc Plcy Ctr, Amicus Curiae for Appellee Brady Ctr Prevent, and Movant-Amicus Curiae-Appellee City Cty SF. [ONE COPY PLACED IN EACH BRIEF] (krm)
9/11/06	CLERK'S ORDER filed [990693] to schedule oral argument [990693-1] before Judge Initials: KLH TBG LHS on 11/13/06 at 9:30 AM . [Entry Date: 9/11/06] (cwc)
9/21/06	MOTION (styled "motion to be granted one minute of time at oral arguments") filed (5 copies) by Amicus Curiae for Appellee Ernest McGill (certificate of service by mail dated 9/21/06) to allocate oral argument times [996805-1]. (mam)
10/4/06	OPPOSITION in part filed [996855-1] (5 copies) by Appellee DC (certificate of

	service by mail dated 10/4/06) to a motion allocate oral arg time [996805-1]. (mam)
10/11/06	CLERK'S ORDER filed [996857] granting non-party motion to allow amicus filed by City Cty SF [985821-1] . [Entry Date: 10/11/06] (mam)
10/24/06	LETTER filed by Appellee DC pursuant to FRAP 28j advising of additional authorities [1001166-1] . Certificate of service date 10/24/06 . (cwc)
10/25/06	MOTION filed (5 copies) by Amicus Curiae for Appellee Ernest McGill (certificate of mail service dated 10/25/06) to supplement [1001265-1] brief [982457-1] . (tag)
11/1/06	PER CURIAM ORDER filed [1001891] to allocate oral argument times: APET minutes- 15 ERES minutes- 15. [1001891-1], one counsel per side to argue. [1001891-2] Oral argument scheduled for 11/13/06, Form 72 notice of attorney arguing case - [1001891-3] due 11/7/06. [Entry Date: 11/1/06] (cwc)
11/2/06	LETTER filed by Appellants Shelly Parker, et al. in response to appellee's 10/24/06 letter filed pursuant to FRAP 28j. [1002673-1] Certificate of service date 10/31/06. (cwc)

11/2/06	OPPOSITION filed [1002863-1] (5 copies) by Appellants Shelly Parker, et al. (certificate of mail service dated 10/31/06) to a motion supplement brief [1001265-1]. (hts)
11/2/06	FORM 72 filed by Attorney Lutz Alexander Prager on behalf of appellee District of Columbia [1006926-1] [1006926-2] . (set)
11/3/06	FORM 72 filed by Attorney Alan Gura on behalf of appellant Shelly Parker, et al. [1006924-1] [1006924-2] . (set)
11/6/06	PER CURIAM ORDER filed [1002693] denying motion for one minutes of oral argument time [996805-1] filed by Ernest McGill. [Entry Date: 11/6/06] (cwc)
11/7/06	LETTER filed by Appellee DC pursuant to FRAP 28j advising of additional authorities [1003177-1] . Certificate of service date 11/7/06 . (cwc)
11/8/06	RESPONSE filed [1003495-1] (5 copies) by Appellants Shelly Parker, et al. (certificate of service dated 11/8/06) to appellees' November 7, 2006 letter submitted pursuant to Fed.R.App.P. 28(j). (lej)
11/13/06	MOTION filed (5 copies) by Appellee

	DC (certificate of service dated 11/13/06) to postpone oral argument scheduled for 11/13/06 [1003987-1] . (lej)
11/13/06	PER CURIAM ORDER filed [1003991] granting unopposed emergency motion to continue oral argument filed by DC [1003987-1]; Removing case from the 11/13/06 and rescheduling oral argument for 12/7/06 at 9:30 in Courtroom 22 in the Courthouse Annex [1003991-1] Case now scheduled before Judge Initials: KLH TBG LHS. Before Judges Henderson, Griffith, Silberman . [Entry Date: 11/13/06] (cwc)
11/15/06	PER CURIAM ORDER filed [1004571] granting motion to add additional source to amicus curiae brief's table of authorities filed by Ernest McGill [1001265-1]. Before Judges Henderson, Griffith, Silberman. [Entry Date: 11/15/06] (cwc)
11/30/06	LETTER filed by Appellants Shelly Parker, et al. pursuant to FRAP 28j advising of additional authorities [1007989-1] . Certificate of service date 11/28/06 . (lej)
12/1/06	FORM 72 filed by Attorney Todd Sunhwae Kim on behalf of appellee District of Columbia, et al. [1008902-1] [1008902-2] . (set)

12/7/06	ORAL ARGUMENT HELD before Henderson, Griffith, Silberman . (rb)
12/11/06	LETTER filed by Appellants Shelly Parker, et al. providing a citation as requested during oral argument. [1010564-1] . Certificate of service date 12/9/06 . (cwc)
1/12/07	LETTER filed by Appellants Shelly Parker, et al. pursuant to FRAP 28j advising of additional authorities [1016563-1] . Certificate of service date 1/11/07 . (cwc)
1/22/07	LETTER filed by Appellee DC in response to appellant's letter filed pursuant to FRAP 28j advising of additional authorities [1018151-1] . Certificate of date 1/22/07 . (cwc)
3/9/07	JUDGMENT that the judgment of the district court is reversed and remanded for the reasons in the accompanying opinion. Before Judges Henderson, Griffith, Silberman. [Entry Date: 3/9/07] (mcm)
3/9/07	OPINION filed [1027236] (58 pgs) for the Court by Judge Silberman, DISSENTING OPINION (17 pgs) filed by Judge Henderson (mcm)
3/9/07	CLERK'S ORDER filed [1027238] The Clerk is directed to withhold issuance

	of the mandate [1027238-1] pending disposition of any timely petition for rehearing. [Entry Date: 3/9/07] (mcm)
4/9/07	PETITION filed Copies: 19 by Appellee DC (certificate of mail service dated 4/9/07) for rehearing en banc [1033620-1]. (smc)
5/4/07	LETTER filed by Appellee DC pursuant to FRAP 28j advising of additional authorities - decision by the District of Columbia Court of Appeals in Andrews v. United States, No. 02-CF-1043 (D.C. May 3, 2007) [1038879-1]. (smc)
5/8/07	PER CURIAM ORDER, In Banc, filed [1039073] denying petition rehearing en banc [1033620-1] filed by DC. (Mandate may issue on or after 5/16/07). Before Judges Ginsburg, Sentelle, Henderson, Randolph,* Rogers,* Tatel,* Garland,* Brown, Griffith, Kavanaugh. [Entry Date: 5/8/07] (Circuit Judges Randolph, Rogers, Tatel, and Garland would grant the petition for rehearing en banc) (mcm)
5/15/07	UNOPPOSED MOTION filed (5 copies) by Appellees DC, et al. (certificate of service dated 5/15/07) to stay issuance of the mandate. (smc)
5/24/07	PER CURIAM ORDER (w/ statement)

	filed [1042482] granting motion stay mandate filed by DC [1042447-1] The Clerk is directed to withhold issuance of the mandate [1042482-1] until 8/7/07. Before Judges Henderson, Griffith, Silberman.* [Entry Date: 5/24/07] (Senior Circuit Judge Silberman issued a separate statement along with the order) (mcm)
6/5/07	TRANSCRIPT of oral argument held on 12/7/06 . [815802-1] (smc)
7/20/07	UNOPPOSED MOTION filed (5 copies) by Appellees DC, et al. (certificate of service dated 7/20/07) to stay issuance of the mandate for an additional 30 days. (smc)
7/20/07	LETTER dated 7/18/07 received from S.Ct. advising that the application for an extension of time to file a petition for a writ of certiorari has been presented to the Chief Justice, who on 7/18/07 extended the time to and including 9/5/07 [1056606-1]. (krm)
7/26/07	CLERK'S ORDER filed [1056464] granting motion stay mandate filed by DC [1055437-1] until 9/6/07. [Entry Date: 7/26/07] (mcm)
9/4/07	LETTER filed by Appellee DC advising the court that a petition for certiorari was filed with the US Supreme Court on 9/4/07 [1064917-1]. (mcm)

9/4/07	LETTER dated 9/4/07 received from the DC Office of the Attorney General advising that the appellee filed a petition for a writ of certiorari with the S.Ct. under the name of DC v. Heller [1065276-1] (see letter for further details). (krm)
9/7/07	LETTER dated 9/5/07 received from S. Ct. advising that petition for writ of certiorari was filed 9/4/07 and placed on docket 9/5/07 as S. Ct. No. 07-290. (tag)
9/12/07	MOTION filed (5 copies) by Appellant Dick Anthony Heller (certificate of service dated 9/12/07, by hand-delivery) to lift stay of mandate. (lvs)
9/17/07	NOTICE filed by the Supreme Court. The petition for writ of certiorari was filed on 9/10/07 and placed on the docket 9/12/07 as No. 07-335. (smc)
9/24/07	OPPOSITION filed [1070061-1] (5 copies) by Appellee DC (certificate of service dated 9/24/07, by mail) to motion to lift stay of mandate. (lvs)
9/25/07	PER CURIAM ORDER filed [1069215] that appellant's motion to lift (partially) the motion to stay the mandate be denied. [1066863-1]. (SEE ORDER FOR DETAILS) Before Judges Henderson,* Griffith,

Silberman . [Entry 9/25/07] (Circuit Judge Henderson concurs in the denial of the motion) (mcm)

11/23/07 SUPREME COURT NOTICE that the petition for a writ of certiorari is granted limited to the following question: Whether the following provisions - D.C. Code Sections 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 -. violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes? relief> [1082390-1] . Certificate of service date . (lej)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER,) Case No.
71 2 14th Place, N.E.)
Washington, DC 20002) **COMPLAINT**
)
DICK ANTHONY HELLER,)
263 Kentucky Avenue, S.E.)
Washington, DC 20003)
) CASE NUMBER
TOM G. PALMER,) 1:03CV00213
1935 17th Street, N.W., Apt. 2)
Washington, DC 20009) JUDGE: Emmet
) G. Sullivan
GILLIAN ST. LAWRENCE,)
3100 N Street, N.W., Apt. 5) DECK TYPE:
Washington. DC 20007) General Civil
)
TRACEY AMBEAU,) DATE STAMP:
76 Seaton Place. N.W.) 02/10/2003
Washington, DC 20001)
)
and)
)
GEORGE LYON,)
1929 Biltmore Court, N.W.)
Washington. DC 20009)
)
Plaintiffs,)
)

v.)
)
DISTRICT OF COLUMBIA,)
Serve:)
Mayor Anthony Williams)
c/o Office of Corporation)
Counsel)
1 Judiciary Square)
441 4th Street, N.W.,)
6th Fl. South)
Washington, D.C. 20001)
)
and)
)
ANTHONY WILLIAMS,)
1350 Pennsylvania Avenue,)
N.W.)
Washington, DC 20004)
)
Defendants.)
)

COME NOW the Plaintiffs, Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon, by and through undersigned counsel, and complain of the defendants as follows:

THE PARTIES

1. Plaintiff Shelly Parker is a natural person and a citizen of the United States and of the District of Columbia. Ms. Parker resides in a high-crime neighborhood and is active in community affairs. As a consequence of trying to make her neighborhood a better place to live, Ms. Parker has

been threatened by drug dealers. Ms. Parker presently intends to possess a functional handgun within her home for self-defense, but is prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in thus action. Ms. Parker fears arrest, criminal prosecution, incarceration, and fine if she were to possess a functional handgun within her home.

2. Plaintiff Dick Anthony Heller is a natural person and a citizen of the United States and of the District of Columbia. Mr. Heller resides in a high-crime neighborhood and is a Special Police Officer of defendant District of Columbia. As a Special Police Officer, Mr. Heller is licensed to and does carry a handgun in the course of his employment at the Thurgood Marshall Judicial Center in Washington, D.C., providing security for the federal judiciary. Mr. Heller lawfully owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in this action. Mr. Heller applied to defendant District of Columbia for permission to possess a handgun within his home but was refused. Mr. Heller fears arrest, criminal prosecution, incarceration, and fine if he were to possess a functional handgun and/or long gun within his home.

3. Plaintiff Tom G. Palmer is a natural person and a citizen of the United States and of the District of Columbia. A gay man, Mr. Palmer has

been assaulted on account of his sexual orientation and successfully warded off the assault with a handgun. Mr. Palmer lawfully owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in this action. Mr. Palmer fears arrest, criminal prosecution, incarceration, and fine if he were to possess a functional handgun and/or long gun within his home.

4. Plaintiff Gillian St. Lawrence is a natural person and a citizen of the United States and of the District of Columbia. Ms. St. Lawrence lawfully owns a registered long gun, specifically a shotgun, at her home in the District of Columbia. Ms. St Lawrence presently intends to keep the shotgun assembled and unlocked, and presently intends to use the gun if necessary in lawful self-defense within her home, but is prevented by defendants' active enforcement of unconstitutional policies from rendering the fun useful and from ever using the gun in lawful self-defense within the home as otherwise permitted by District of Columbia law. Ms. St. Lawrence fears arrest, criminal prosecution, incarceration, and fine if she were to render her gun operational and to use the gun within her home for self-defense.

5. Plaintiff Tracey Ambeau is a natural person aid a citizen of the United States and of the District of Columbia. Ms. Ambeau would like to possess a functional handgun for self-defense within

her own home, but is prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in this action. Ms. Ambeau fears criminal prosecution, incarceration. and fine if she were to possess a functional handgun within her home.

6. Plaintiff George Lyon is a natural person and a citizen of the United States and of the District of Columbia. Mr. Lyon lawfully owns various firearms located outside the District of Columbia, including handguns and long guns. and would like to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in this action. Mr. Lyon fears arrest, criminal prosecution, incarceration, and fine if he were to possess a functional handgun and/or long gun within his home.

7. Defendant District of Columbia is a municipal entity organized under the Constitution and laws of the United States.

8. Defendant Anthony Williams is the Mayor of the District of Columbia, and as such is responsible for executing and administering the District of Columbia's laws, customs, practices, and policies. In that capacity. Mr. Williams is presently enforcing the unconstitutional laws, customs, practices and policies complained of in this action, and is sued in both his individual and official capacities.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343.2201, 2202 and42 U.S.C. § 1983.

10. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

STATEMENT OF FACTS

11. The Second Amendment to the United States Constitution provides: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

12. At a minimum, the Second Amendment guarantees individuals a fundamental right to possess a functional, personal firearm, such as a handgun or ordinary long gun (shotgun or rifle) within the home. Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies which operate to deprive individuals, including the plaintiffs, of this important right. Any such exercise of their Second Amendment rights would subject plaintiffs to criminal prosecution, and would lead to incarceration and/or fine.

13. D.C. Code § 7-2502.01(a) provides that "no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm."

14. Although registration certificates are available for certain long arms, such as ordinary rifles and shotguns, D.C. Code § 7-2502.02(a) provides in pertinent part, "A registration certificate shall not be issued for a . . . (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976." – "'Pistol' means ally firearm originally designed to be fired by use of a single hand." D.C. Code § 7-2501.01(12).

15. Accordingly, defendants maintain a complete ban on the home ownership and possession of handguns by private citizens (non-law enforcement officers) who did not register a handgun prior to September 24, 1976.

16. D.C. Code § 7-2507.02 provides:

> Except for law enforcement personnel described in § 7-2502.01 (b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

17. Accordingly, defendants prohibit the possession of lawfully owned firearms for self-defense within the home, even in instances where self-defense would be lawful by other means under District of Columbia law. Indeed, the prohibition on the possession of firearms extends so far as to deprive a licensed firearms dealer from keeping firearms "for such person's private use or protection,

or for the protection of his business." D.C. Code § 7-2502.01(b)(2)(C).

18. A first violation of the District of Columbia's ban on the ownership or possession of handguns or other functional firearms within the home for lawful purposes is punishable as a misdemeanor by a fine of up to $1,000, imprisonment of up to one year, or both. A second offense is punishable as a felony by a fine of up to $5.000, imprisonment of up to five years, or both in the case of a handgun or other non-registerable firearm. D.C. Code § 7-2507.06.

19. Even the movement of a handgun from one location to another on one's property carries a criminal penalty. Former D.C. Code § 22-3204 (emphasis added) provided:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house of place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided . . .
>
> However, defendants now maintain and actively enforce D.C. Code § 22-4504, which provides:
>
> (a) No person shall carry within the District of Columbia either openly or concealed on or about their person a pistol, without a license issued pursuant to District of Columbia law . . . Whoever violates this section shall

> be punished as provided in § 22-4515, except that:
>
> (1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than $5,000 or imprisoned for not more than 5 years, or both;

20. Thus, while the penalty for carrying a handgun in public is five years imprisonment and/or $5,000, any person who carries a handgun on his or her own property is subject to one year imprisonment and/or a fine of $1,000 as set forth in D.C. Code § 22-4515 even if the handgun could be legally registered. Licenses to carry a handgun are rarely, if ever, issued to private citizens (non-law enforcement officers).

FIRST CAUSE OF ACTION
U.S. CONST., AMEND. II, 42 U.S.C. § 1983
AGAINST ALL DEFENDANTS

21. Paragraphs 1 through 20 are incorporated as though fully stated herein.

22. By maintaining and enforcing a set of laws banning the private ownership and possession of handguns and functional firearms within the home, forbidding otherwise lawful self-defense usage of arms, and forbidding the movement of a handgun on an individual's property, defendants are

propagating customs, policies, and practices that violate the plaintiffs' individual rights under the Second Amendment to the United States Constitution, damaging plaintiffs in violation of 42 U.S.C. § 1983. Plaintiffs are therefore entitled to permanent injunctive relief against such customs, policies, and practices.

SECOND CAUSE OF ACTION DECLARATORY JUDGEMENT ACT, 28 U.S.C. §§ 2201, 2202 AGAINST ALL DEFENDANTS

23. Paragraphs 1 through 22 are incorporated as though fully stated herein.

24. Plaintiffs are entitled to declaratory relief holding that by maintaining and enforcing a set of laws banning the private ownership and possession of handguns and functional firearms within the home, forbidding otherwise lawful self-defense usage of arms, and forbidding the movement of a handgun an individual's property, defendants are violating the plaintiffs' individual rights under the Second Amendment to the United States Constitution. Plaintiffs are therefore further entitled to injunctive relief barring continued enforcement and maintenance of defendants' unconstitutional customs, policies, and practices.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that judgment be entered in their favor and against defendants as follows:

ON THE FIRST AND SECOND CAUSES OF ACTION:

1. An order permanently enjoining defendants, their officers, agents, servants employees, and all persons in active concert or participation with them who receive actual notice of the injunction. from enforcing D.C. Code § 7-2502.02(a)(4), barring registration of handguns; permanently enjoining defendants from enforcing D.C. Code § 7-2507.02 in such a manner as to bar the possession of functional firearms within the home or on possessed land; and permanently enjoining defendants from enforcing D.C. Code § 22-4504 and 4515 in such a manner as to forbid the carrying of a firearm within one's home or possessed land without a license.

ON THE FIRST CAUSE OF ACTION:

2. Attorney Fees and Costs pursuant to 42 U.S.C. § 1988;

ON THE SECOND CAUSE OF ACTION:

3. Declaratory relief consistent with the injunction;

ON ALL CAUSES OF ACTION:

4. Costs of suit; and

5. Any other further relief as the Court deems just and appropriate.

Dated: February 10, 2003

Respectfully Submitted,

Alan Gura (D.C. Bar No. 453449)
Gura & Day, LLC
Robert A. Levy (D.C. Bar No. 447137)
Clark M. Neily, III (D.C. Bar No. 475926)
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By: /s/ Alan Gura
Alan Gura

Attorneys for Plaintiffs

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.,) Case No.
) 03-CV-0213-EGS
Plaintiffs,)
) **SEPARATE**
) **STATEMENT OF**
v.) **UNDISPUTED**
) **MATERIAL**
DISTRICT OF) **FACTS IN SUPPORT**
COLUMBIA, et al.,) **OF PLAINTIFFS'**
) **MOTION FOR**
Defendants.) **SUMMARY**
) **JUDGMENT**
) **[LCvR 7.1(h), 56.1]**

SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINITFFS' MOTION FOR SUMMARY JUDGEMENT

COME NOW the Plaintiffs, Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon, by and through undersigned counsel, and submit their Separate Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment.

Dated: March 14, 2003

Respectfully Submitted,

Alan Gura (D.C. Bar No. 453449)
Gura & Day, LLC
Robert A. Levy (D.C. Bar No. 447137)
Gene Healy D.C. Bar No. 468839)
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By: /s/ Alan Gura
Alan Gura

Attorneys For Plaintiffs'

SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

FACT		**RECORD**
1.	Plaintiff Parker resides in a high crime area of the District of Columbia	1. Parker Decl., ¶ 1.
2.	Plaintiff Parker is very active in community affairs, organizing her community against drug dealers.	2. Parker Decl., ¶ 2.
3.	Drug dealers have identified	3. Parker

	plaintiff Parker as being adverse to their interests and have threatened her and her neighbors.	Decl., ¶ 3.
4.	On June 12, 2002, the back window of plaintiff Parker's car was broken. Her front window has been broken, a security camera was stolen from the outside of her home, and a drug user who acts as a lookout for the drug dealers on Parker's block smashed his car into her back fence.	4. Parker Decl., ¶ 4.
5.	On the night of February 12, 2003, the date on which the *Washington Times* carried a front-page article about this lawsuit and Parker's role in it, a drug dealer she knew as "Nanook" started banging on Parker's door and tried to pry his way into her house, repeatedly yelling, "bitch, I'll kill you, I live on this block, too."	5. Parker Decl., ¶ 5.
6.	"Nanook" was eventually arrested and may be prosecuted. However, it has become apparent to Parker that her local police lieutenant is not going to do very much about the drug problem on her	6. Parker Decl., ¶ 6.

	block.	
7.	Parker presently intends to possess a functional handgun within her home for self-defense, but is prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in this action. Parker is aware that she faces criminal penalties if she possesses a handgun, or any other functional firearm, at home.	7. Parker Decl., ¶ 7.
8.	Being deprived of a handgun limits Parker's ability to defend herself and her ability to act in concert with others for the common good. While Parker can use a handgun to defend herself, she cannot use a rifle or shotgun nearly as effectively as she could use a handgun, as a rifle or shotgun would be too unwieldy for her to use.	8. Parker Decl., ¶ 8.
9.	Plaintiff Dick Heller resides in a high-crime neighborhood of the District of Columbia, on Kentucky Avenue, S.E. There are two open-air drug markets in the immediate vicinity of his home.	9. Heller Decl., ¶ 1.

10.	Plaintiff Heller is a Special Police Officer of defendant District of Columbia. As a Special Police Officer, he is licensed to and does carry a handgun in the course of his employment at the Thurgood Marshall Federal Judicial Center in Washington, D.C., providing security for the federal judiciary.	10. Heller Decl., ¶ 2.
11.	Plaintiff Heller owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so by the defendants' active enforcement of unconstitutional policies complained of in this action. Heller is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home.	11. Heller Decl., ¶ 3.
12.	Plaintiff Heller applied to defendant District of Columbia for permission to possess a handgun within his home but was refused.	12. Heller Decl., ¶ 4; Exh. A.

13.	Being deprived of a handgun limits Heller's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Heller's ability to defend himself and his ability to act in concert with others for the common good.	13. Heller Decl., ¶ 5.
14.	Plaintiff Tom G. Palmer resides in the District of Columbia.	14. Palmer Decl., ¶ 1.
15.	Plaintiff Palmer owns various firearms located outside the District of Columbia, including handguns, and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Palmer is aware that he faces criminal penalties if he possesses a handgun or any other functional firearm, at home.	15. Palmer Decl., ¶ 2.

16.	**In 1982, Palmer was assaulted by a group of men on account of his sexual orientation. He successfully warded off the assault with a handgun.**	16. Palmer Decl., ¶ 3.
17.	**Being deprived of a handgun limits Palmer's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Palmer's ability to defend himself and his ability to act in concert with others for the common good.**	17. Palmer Decl., ¶¶ 3, 4.
18.	**Plaintiff Gillian St. Lawrence resides in the District of Columbia.**	18. St. Lawrence Decl., ¶ 1.
19.	**Plaintiff St. Lawrence lawfully owns a registered shotgun, which she keeps in her home. She presently intends to keep the shotgun assembled and unlocked, and presently intends to use the gun if necessary in lawful self-defense within her home, but is prevented by defendants' active enforcement of**	19. St. Lawrence Decl., ¶ 2.

	unconstitutional policies from rendering the gun useful and from ever using the gun in lawful self-defense within the home as otherwise permitted by the District of Columbia law. She is aware that she faces criminal penalties if she assemble and unlocks her shotgun at home under and circumstances.	
20.	Even if she were allowed to piece together, unlock and load the shotgun in self-defense, she may not always be able to do so effectively in response to a sudden home invasion.	20. St. Lawrence Decl., ¶ 3.
21.	Being deprived of a functional firearm limits St. Lawrence's ability to defend herself and her ability to act in concert with others for the common good.	21. St. Lawrence, Decl., ¶ 4.
22.	Plaintiff Tracey Ambeau resides in the District of Columbia.	22. Ambeau Decl., ¶ 1.
23.	Plaintiff Ambeau presently intends to possess a functional handgun for self-defense within her home, but is prevented from doing so only by the defendants' active	23. Ambeau Decl., ¶ 2.

	enforcement of unconstitutional policies complained of in this action. She is aware that she faces criminal penalties if she possesses a handgun, or any other functional firearm, at home.	
24.	Being deprived of a handgun limits Ambeau's ability to defend herself and her ability to act in concert with others for the common good. While she can use a handgun to defend herself, she cannot use a rifle or shotgun nearly as effectively as she could use a handgun, as a rifle or shotgun would be too unwieldy.	24. Ambeau Decl., ¶ 3.
25.	Plaintiff George Lyon resides in the District of Columbia.	25. Lyon Decl., ¶ 1.
26.	Plaintiff Lyon owns various firearms located outside the District of Columbia, including a handgun, and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action.	26. Lyon Decl., ¶ 2.

	Lyon is aware that he faces criminal penalties if he possesses a handgun or any other functional firearm, at home.	
27.	Being deprived of a handgun limits Lyon's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits his ability to defend himself and his ability to act in concert with others for the common good.	27. Lyon Decl., ¶ 3.
28.	Defendants maintain a complete ban on the home ownership and possession of handguns by private citizens who did not register a handgun prior to September 24, 1976.	28. D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4); 7-2501.01(12)
29.	Defendants prohibit the possession of lawfully owned firearms for self-defense within the home, even in instances when self-defense would be lawful by other means under District of Columbia law.	29. D.C. Code § 7-2507.02

30.	A first violation of the District of Columbia's ban on the ownership or possession of handguns or other functional firearms within the home for lawful purposes is punishable as a misdemeanor by a fine of up to $1,000, imprisonment of up to one year, or both. A second offense is punishable as a felony by a fine of up to $5,000, imprisonment of up to five years, or both, in the case of a handgun or other non-registerable firearm.	30. D.C. Code § 7-2507.06.
31.	Any person who carries a handgun on his or her own person without a license is subject to one year imprisonment and/or a fine of $1,000.	31. D.C. Code §§ 22-4504, 22-4515
32.	"With very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable."	32.Bsharah v. United States, 646 A.2d 993, 996 n. 12 (D.C. 1994)
33.	Defendants provide handguns to District of Columbia police officers.	33. Heller Decl., ¶ 2; Request for Judicial Notice 1

34.	Defendants actively enforce D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02, and 22-4504.	34. Heller Decl., ¶ 2; Exh. A; Request for Judicial Notice 2

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.,) Case No.
) 03-CV-0213-EGS
Plaintiffs,)
) **DECLARATION OF**
v.) **SHELLY PARKER**
)
DISTRICT)
OF COLUMBIA, et al.,)
)
Defendants.)

DECLARATION OF SHELLY PARKER

I, Shelly Parker, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. I reside in a high-crime neighborhood of the District of Columbia.

2. I am very active in community affairs. When I moved into the neighborhood, I soon noticed my block was constantly beset by drug dealing and drug use. I started calling the police frequently and encouraging my neighbors to call the police as well. I organized block meetings to discuss the neighborhood's response to the drug activity at a church on my street, at which Lt. Smith of Police

Service Area 512 would show up and listen to our concerns.

3. The drug dealers would also show up to the meetings and complain that we were harassing them. They identified me as an anti-drug activist and began threatening me whenever they would see me walking around the neighborhood. They also started threatening my neighbors very loudly.

4. On June 12, 2002, the back window of my car was broken. The following month, a large rock came through my front window. I've also had a security camera stolen from the outside of my house. On one occasion, a drug user who sometimes acts as a lookout for the drug dealers drove his car into the back fence of my house.

5. On the night of February 12, 2003, the date on which the *Washington Times* carried a front-page article about this lawsuit and my role in it, a drug dealer I knew as "Nanook" started banging on my door and tried to pry his way into my house, repeatedly yelling, "bitch, I'll kill you, I live on this block, too."

6. "Nanook" was eventually arrested and may be prosecuted. However, it has become apparent to me that Lt. Smith is not going to do very much about the drug problem on my block.

7. I presently intend to possess a functional handgun within my home for self-defense, but am prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in this action. I am aware that I face

criminal penalties if I possess a handgun, or any other functional firearm, at home.

8. Being deprived of a handgun limits my ability to defend myself and my ability to act in concert with others for the common good. While I can use a handgun for these purposes, I could not use a rifle or shotgun nearly as effectively as I could use a handgun, as a rifle or shotgun would be too unwieldy for me to use.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 14 day of March 2003

/s/ Shelly Parker
Shelly Parker

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.,) Case No.
) 03-CV-0213-EGS
Plaintiffs,)
) **DECLARATION OF**
v.) **DICK ANTHONY**
) **HELLER**
DISTRICT)
OF COLUMBIA, et al.,)
)
Defendants.)
)

DECLARATION OF DICK ANTHONY HELLER

I, Dick Anthony Heller, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. I reside in a high-crime neighborhood of the District of Columbia, on Kentucky Avenue, S.E. There are two open-air drug markers in the immediate vicinity of my home.

2. I am a Special Police Officer of defendant District of Columbia. As a Special Police Officer, I am licensed to and do carry a handgun in the course of my employment at the Thurgood

Marshall Federal Judicial Center in Washington, D.C., providing security for the federal judiciary.

3. I own various firearms located outside the District of Columbia, including handguns and long guns and presently intend to possess a functional handgun and long gun for self-defense within my own home, but I am prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. I am aware that I face criminal penalties if I possess a handgun, or any other functional firearm, at home.

4. I applied to defendant District of Columbia for permission to possess a handgun within my home but was refused. A true and correct copy of my refused application for handgun registration is attached hereto as Exhibit A.

5. Being deprived of a handgun limits my ability to defend myself and my ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits my ability to defend myself and my ability to act in concert with others for the common good.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 13 day of March, 2003

/s/ Dick Heller
Dick Anthony Heller

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.,	Case No. 03-CV-02 13-EGS
Plaintiffs,	
	DECLARATION OF TOM G. PALMER
v.	
DISTRICT OF COLUMRIA, et al.,	
Defendants.	

DECLARATION OF TOM G. PALMER

I, Tom G. Palmer, am competent to state, and if called upon would testify to the following basis on my personal knowledge:

1. I reside in the District of Columbia.

2. I own various firearms located outside the District of Columbia, including handguns and long guns, and presently intend to possess a functional handgun and long gun for self-defense within my own home, but I am prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. I am aware that I face criminal penalties if I

possess a handgun, or any other functional firearm, at home.

3. In the summer of 1982, when I was living in California, I was assaulted because I am gay. I successfully warded off the assault with a handgun. I was walking with a co-worker to dinner when a group of young men started yelling at us, "faggot," "homo," "queer," "we're going to kill you," and "they'll never find your bodies." and so on. After they had followed us for about 100 feet, we started running. Fortunately I was able to pull my handgun out of my backpack, and our assailants backed off. This experience has confirmed for me that I can defend myself with a handgun, and that I am far less effective in my ability to defend myself and act in concert for the common good without the use of a handgun.

4. Being deprived of a handgun limits my ability to defend myself and my ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits my ability to defend myself and my ability to act in concert with others for the common good.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 13th day of March, 2003

/s/ Tom G. Palmer
Tom G. Palmer

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.,) Case No.
) 03-CV-02 13-EGS
Plaintiffs,)
) **DECLARATION OF**
v.) **GILLIAN ST.**
) **LAWRENCE**
DISTRICT)
OF COLUMRIA, et al.,)
)
Defendants.)
)

DECLARATION OF GILLIAN ST. LAWRENCE

I, Gillian St. Lawrence, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. I reside in the District of Columbia.

2. I lawfully own a registered long gun, specifically, a shotgun, which I keep in my home. I presently intend to keep the shotgun assembled and unlocked, and presently intend to wield the gun if necessary in lawful self-defense within my home, but am prevented by defendants' active enforcement of unconstitutional policies from rendering the gun useful and from ever using the gun in lawful self-

defense within the home as otherwise permitted by District of Columbia law. I am aware that I face criminal penalties if I assemble and unlock my shotgun at home under any circumstance.

3. Even if I were allowed to piece together, unlock, and load the shotgun in self-defense, I do not believe that I would always be able to do so effectively in response to a sudden home invasion.

4. Being deprived of a functional firearm limits my ability to defend myself and my ability to act in concert with others for the common goad.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 13 day of March, 2003

/s/ Gillian St. Lawrence
Gillian St. Lawrence

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.,) Case No.
) 03-CV-02 13-EGS
Plaintiffs,)
) **DECLARATION OF**
v.) **TRACEY AMBEAU**
)
DISTRICT)
OF COLUMRIA, et al.,)
)
Defendants.)
)

DECLARATION OF TRACEY AMBEAU

I, Tracey Ambeau, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. I reside in the District of Columbia.

2. I presently intend to possess a functional handgun for self-defense within my own home, but I am prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. I am aware that I face criminal penalties if I possess a handgun, or any other functional firearm at home.

3. Being deprived of a handgun limits my ability to defend myself and my ability to act in concert with others for the common good While I can use a handgun to defend myself, I do not believe I could use a rifle or shotgun nearly as effectively as I could use a handgun because a rifle or shotgun would be too unwieldy.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 13th day of March, 2003

/s/ Tracey Ambeau
Tracey Ambeau

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al.,)	Case No.
)	03-CV-02 13-EGS
Plaintiffs,)	
)	**DECLARATION OF**
v.)	**GEORGE LYON**
)	
DISTRICT)	
OF COLUMRIA, et al.,)	
)	
Defendants.)	
)	

DECLARATION OF GEORGE LYON

I, George Lyon, am competent to state, and if called upon would testify to the following:

1. I reside in the District of Columbia.

2. I own various firearms located outside the District of Columbia, including a handgun and long guns, and presently intend to possess a functional handgun and long gun for self-defense within my own home, but I am prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. I am aware that I face criminal penalties if I

possess a handgun, or any other functional firearm, at home.

3. Being deprived of a handgun limits my ability to defend myself and my ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits my ability to defend myself and my ability to act in concert with others for the common good.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 13 day of March, 2003

/s/ George Lyon
George Lyon

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, *et al.*,	:	
Plaintiffs,	:	Case No. 03-CV-0213 (EGS)
v.	:	
DISTRICT OF COLUMBIA, *et al.*,	:	
Defendants.	:	

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE

Pursuant to Rule LCvR 7.1(h) of this Court, defendants submit that there is a genuine issue of material fact as to the following statements in Plaintiff's Separate Statement of Undisputed Material Facts in Support of Plaintiffs Motion for Summary Judgment dated March 14, 2003:

7. Parker presently intends to possess a functional handgun within her home for self-defense, but is prevented from doing so only by defendant's active enforcement of unconstitutional policies complained of in this action. Parker is aware that

she faces criminal penalties if she possesses a handgun, or any other functional firearm, at home. (Parker Dec.,¶ 7.)

11. Plaintiff Heller owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so by the defendants' active enforcement of unconstitutional policies complained of in this action. Heller is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home. (Heller Dec., ¶ 3.)

13. Being deprived of a handgun limits Heller's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Heller's ability to defend himself and his ability to act in concert with others for the common good. (Heller Dec., ¶ 5.)

15. Plaintiff Palmer owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Palmer is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home. (Palmer Dec., ¶ 2.)

17. Being deprived of a handgun limits Palmer's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Palmer's ability to defend himself and his ability to act in concert with others For the common good. (Palmer, Dec., ¶¶ 3, 4.)

19. Plaintiff St. Lawrence lawfully owns a registered shotgun, which she keeps in her home. She presently intends to keep the Shotgun assembled and unlocked, and presently intends to use the gun if necessary in lawful self-defense within her home. but is prevented by defendants' active enforcement of unconstitutional policies from rendering the gun useful and from ever using the gun in lawful self-defense within the home as otherwise permitted by District of Columbia law. She is aware that she faces criminal penalties if she assembles and unlocks her shotgun at home under any circumstance. (St. Lawrence Dec., ¶ 2.)

21. Being deprived of a functional firearm limits St. Lawrence's ability to defend herself and her ability to act in concert with others for the common good. (St. Lawrence Dec., ¶ 4.)

23. Plaintiff Ambeau presently intends to possess a functional handgun for self-defense within her own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. She is aware that she faces criminal penalties if she possesses a

handgun, or any other functional firearm, at home. (Ambeau Dec., ¶ 2.)

24. Being deprived of a handgun limits Ambeau's ability to defend herself and her ability to act in concert with others for the common god. While she can use a handgun to defend herself, she cannot use a rifle or shotgun nearly as effectively as she could use a handgun because a rifle or shotgun would be too unwieldy. (Ambeau Dec., ¶ 3.)

26. Plaintiff Lyon owns various firearms located outside the District of Columbia, including a handgun and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Lyon is aware that he faces criminal penalties if he possesses a handgun, or any other Functional firearm at home. (Lyon Dec., ¶ 2.)

27. Being deprived of a handgun limits Lyon's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits his ability to defend himself and his ability to act in concert with others for the common good. (Lyon Dec., ¶ 3.)

The record references relied on to support this Statement of Material Facts as to which There Exists a Genuine Issue relating to these paragraphs are Exhibits A, B, and C to Defendants' Reply Memorandum in Support of their Motion to Dismiss.

Dated: June 3, 2003

Respectfully submitted,

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PETITIONER'S BRIEF

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No. 07-290

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~~SUPREME COURT~~, U.S.

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

PARTIES TO THE PROCEEDING

Petitioners District of Columbia and Mayor Adrian M. Fenty were defendants-appellees below. Mayor Fenty was substituted automatically for the previous Mayor, Anthony A. Williams, under Federal Rule of Appellate Procedure 43(c)(2).

Respondent Dick Anthony Heller was the only plaintiff-appellant below held by the court of appeals to have standing. The other plaintiffs-appellants were Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon.

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DECISIONS BELOW

The decisions below are reported at 478 F.3d 370 and 311 F. Supp. 2d 103 and reprinted in the Appendix to the Petition for Certiorari (PA) at PA1a and PA71a.

JURISDICTION

The court of appeals entered judgment on March 9, 2007, and denied *en banc* review on May 8, 2007. PA89a. A petition for certiorari was filed on September 4, 2007, and granted on November 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Militia Clauses of the Constitution, art. I, § 8, cls. 15-16, empower Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Relevant portions of the D.C. Code provide:

> § 7-2502.02. Registration of certain firearms prohibited.
>
> (a) A registration certificate shall not be issued for a:
>
> (1) Sawed-off shotgun;

(2) Machine gun;

(3) Short-barreled rifle; or

(4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has retired from the Metropolitan Police Department.

(b) Nothing in this section shall prevent a police officer who has retired from the Metropolitan Police Department from registering a pistol.

* * *

§ 7-2507.02. Firearms required to be unloaded and disassembled or locked.

Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

* * *

§ 22-4504. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty.

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. . . .

STATEMENT OF THE CASE

This case involves a Second Amendment challenge to the District of Columbia's longstanding gun-control laws. The divided court below was the first federal court of appeals ever to invalidate a law under that Amendment. Its decision is wrong for three separate reasons, each of which independently warrants reversal and entry of judgment for the District.

1. The Nation's capital has regulated guns for two centuries. In 1801, the then-Town of Georgetown forebade firing guns in its "inhabited parts." Town of Georgetown Ordinance of Oct. 24, 1801. In 1809, the City of Washington similarly made it unlawful to fire guns "within four hundred yards of any house . . . or on the Sabbath." Act of the Corporation of the City of Washington ("City Act") of Dec. 9, 1809. The city later exempted militiamen "on days of mustering, training or rejoicing, when ordered so to shoot or fire by their commanding officer." City Act of Mar. 30, 1813.

In 1857, the city made it unlawful to carry "deadly or dangerous weapons, such as . . . pistol[s]." City Act of Nov. 8, 1857; *see* City Act of Nov. 18, 1858. In 1892, Congress similarly barred persons throughout the District from having such weapons "concealed about their person" outside of the person's "place of business, dwelling house, or premises." Act of July 13, 1892, ch. 159, 27 Stat. 116. In 1932 and 1943, Congress prohibited possession of machine guns and sawed-off shotguns in the District and required licenses for carrying pistols and other concealable weapons outside one's home or place of business. Act of July 8, 1932, ch. 465, 47 Stat. 650; Act of Nov. 4, 1943, ch. 296, 57 Stat. 586.

Police regulations subsequently required registration of all firearms, including pistols. D.C. Police Regs. art. 50-55 (1968).

In 1976, the Council of the District of Columbia concluded that existing laws did not adequately curb gun-related violence. As a consequence, it enacted a comprehensive new law regulating firearms. The principal provision at issue here prohibits most residents from registering (and thus possessing) any pistol not registered before the law became effective. D.C. Code §§ 7-2502.01, 7-2502.02. "Pistol" is defined as a gun "originally designed to be fired by use of a single hand." *Id.* § 7-2501.01(12). As Mayor Walter Washington emphasized in signing the law, it "does not bar ownership or possession of shotguns and rifles." PA116a. Resolutions to disapprove the act were introduced in the House of Representatives but were unsuccessful. *See McIntosh v. Washington*, 395 A.2d 744, 747 (D.C. 1978).

The Council targeted handguns because they are disproportionately linked to violent and deadly crime. In its report accompanying the bill, the Council cited national statistics showing that "handguns are used in roughly 54% of all murders, 60% of robberies, 26% of assaults and 87% of all murders of law enforcement officials." PA102a. Handguns were also particularly deadly in other contexts: "A crime committed with a pistol is 7 times more likely to be lethal than a crime committed with any other weapon." *Id.*

These dangers were even more pronounced in the District, where handguns were used in 88% of armed robberies and 91% of armed assaults. PA102a, 104a. In 1974, handguns were used to commit 155 of 285 murders in the District. PA102a. In the same year, every rapist in the District who used a firearm to facilitate his crime used a handgun. Evening Council Sess. Tr. 11:4-5, June 15, 1976.

The Council also recognized that the dangers of handguns extend beyond acts of determined criminals. It found that guns "are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities," and that many "murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion, or intoxication." PA102a. The Council also focused on the link between handguns and accidental deaths and injuries, particularly to young children who can wield only smaller weapons: of the "[c]lose to 3,000 accidental deaths . . . caused by firearms" annually, children were particularly vulnerable—"1/4 of the victims are under 14 years of age." PA101a-02a.

In enacting the handgun ban, the Council found that less restrictive approaches would not be adequate. Safe-storage provisions standing alone would be insufficient to accomplish the District's goal of reducing gun injuries and deaths. Guns stolen from even the most law-abiding citizens enable criminal gun violence. Afternoon Council Sess. Tr. 35:10-20, 42:4-10, May 3, 1976. Ready availability of guns in the home also made them "easy for juveniles to obtain." PA103a.

The legislature concluded that "the ultimate resolution of the problems of gun created crimes and gun created accidents . . . is the elimination of the availability of handguns." Afternoon Council Sess. Tr. 3:22-24, May 18, 1976. The Council thus chose to "freez[e] the pistol . . . population within the District of Columbia." PA104a. As the Council summed up, "the bill reflects a legislative decision" that handguns "have no legitimate use in the purely urban environment of the District of Columbia." PA112a.

As part of its gun-control program, the Council also enacted a trigger-lock provision to promote gun safety at home. D.C. Code § 7-2507.02. A firearm must be kept "unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes." The provision's author noted not only that 3,000 deaths resulted annually from firearm accidents, but also that loaded weapons are often misused against family members in moments of passion. Evening Council Sess. Tr. 21:1-15, Jun. 15, 1976. He explained that trigger locks may be unlocked in less than a minute. *Id.* at 42:11-18, 49:8-16.

In 1994, the Council extended the prior requirement that those who "carry" concealable weapons in public be licensed. A license is now required regardless of where such a weapon is carried. D.C. Code § 22-4504(a). The licensing requirement, which enables the District to prevent felons and other dangerous persons from keeping concealable weapons, is separate from the registration requirement applicable to all firearms. Absent the handgun ban, District residents could register handguns and then apply for licenses to "carry" them.

2. Respondent Heller owns handguns and long guns (*i.e.*, rifles and shotguns) but stores them outside the District. Joint Appendix 77a. He and five other individuals challenged the District's longstanding laws as infringements of their asserted right to pos-

sess guns for self-defense. Because they did not assert membership in any organized militia, the district court granted the District's motion to dismiss the complaint. "[I]n concert with the vast majority of circuit courts," it concluded that this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939), "reject[s] an individual right to bear arms separate and apart from Militia use." PA75a. The district court also noted that this Court "has twice been presented with the opportunity to re-examine *Miller* and has twice refused to upset its holding." PA75a.

3. A divided panel of the court of appeals reversed. After finding that only respondent had standing, the majority held that "the Second Amendment protects a right of individuals to possess arms for private use." PA14a-17a, 44a. The majority also rejected the District's argument that the Second Amendment is not implicated by local legislation governing only the Nation's capital. PA44a-48a.

The court then held that, because a handgun is an "Arm" under the Amendment, banning handguns is *per se* invalid. PA53a. The majority dismissed as "frivolous" the District's contention that its regulatory scheme is reasonable because other weapons, such as shotguns and rifles, fully vindicate residents' interests in self-defense. PA53a.

The majority also invalidated the licensing law. It ruled that individuals have not only a constitutional right to possess a handgun, but also an ancillary right to move it about their homes for self-defense. PA54a. Although the District construes D.C. Code § 22-4504(a) as a licensing provision, not a flat prohibition on the use ("carrying") of handguns, the majority held it facially unconstitutional on its contrary reading.

The majority further invalidated the trigger-lock requirement. The District construes D.C. Code § 7-2507.02, which has never been interpreted by local courts and appears never to have been enforced, to permit a lawfully owned gun to be used for self-defense. The majority nevertheless read it to forbid that use and on that reading held the provision facially unconstitutional. PA55a.

Judge Henderson dissented. In her view, *Miller*—"the only twentieth-century United States Supreme Court decision that analyzes the scope of the Second Amendment"—compels the conclusion that "the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States." PA57a-60a (footnote omitted). She also emphasized that the Amendment was intended to guard against a perceived threat to the states from the federal government. PA65a. She noted that if the District's militia is treated as a state militia, then the Amendment would not apply because it "does not apply to gun laws enacted by the States." PA66a n.13.

SUMMARY OF ARGUMENT

1. The text and history of the Second Amendment conclusively refute the notion that it entitles individuals to have guns for their own private purposes. Instead, it protects the possession and use of guns only in service of an organized militia.

The first clause—"[a] well regulated Militia, being necessary to the security of a free State"—speaks only of militias, with not a hint about private uses of firearms. A well-regulated militia is the antithesis of an unconnected group of individuals, each choosing unilaterally whether to own a firearm, what kind to own, and for what purposes.

The second clause—"the right of the people to keep and bear Arms, shall not be infringed"—equally addresses the possession and use of weapons in connection with militia service. In 1791, "Arms" and "bear Arms" were military terms describing the use of weapons in the common defense, and the word "keep" was used in connection with militiamen's possession of the arms necessary for militia service.

Taken together, the two clauses permit only a militia-related reading. To conclude that the Framers intended to protect private uses of weapons, the majority below read the entire first clause to be extraneous and the second to be in tension with the natural, military meaning of "bear Arms." If that had been the Framers' intent, they would have omitted the first clause and used non-military language in the second.

History confirms the District's reading. The primary concerns that animated those who supported the Second Amendment were that a federal standing army would prove tyrannical and that the power given to the federal government in the Constitution's Militia Clauses could enable it not only to federalize, but also to disarm state militias. There is no suggestion that the need to protect private uses of weapons against federal intrusion ever animated the adoption of the Second Amendment. The drafting history and recorded debate in Congress confirm that the Framers understood its military meaning and ignored proposals to confer an express right to weapon possession unrelated to militia service.

2. The court of appeals erred for the independent reason that the Second Amendment does not apply to

District-specific legislation. Such legislation cannot implicate the Amendment's purpose of protecting states and localities from the federal government.

That conclusion follows from the history underlying the Constitution's Seat of Government Clause. In 1783, disgruntled soldiers surrounded the State House in Philadelphia, causing the Continental Congress to flee because the local authorities would not protect it. The Framers created a federal enclave to ensure federal protection of federal interests. They could not have intended the Second Amendment to prevent Congress from establishing such gun-control measures as it deemed necessary to protect itself, the President, and this Court when similar state legislative authority was not constrained.

3. Finally, the judgment must be reversed for the separate reason that the laws at issue here are reasonable and therefore permissible. This Court has long recognized that constitutional rights are subject to limitations. Indeed, the majority below purported to recognize that gun-control laws are constitutional if they are "reasonable regulations."

The majority nevertheless found that the Council's findings regarding handguns' unique dangers in an urban environment were irrelevant because, in its view, a ban on handguns is *per se* unreasonable under the Second Amendment. Equally irrelevant was the fact that the District allows residents to keep rifles and shotguns for private purposes. The majority instead concluded that the Second Amendment precludes the District from limiting a resident's choice of firearms so long as the firearm chosen is in common use, has a military application, and is a lineal descendant of a type of arm used in 1791. That test is unworkable. It also has no basis in the Second Amendment and would implausibly give the right to keep and bear arms a uniquely privileged position in the Bill of Rights.

The District's gun-control measures should be upheld under a proper reasonableness analysis. In enacting the laws at issue here, the Council responded to the serious dangers created by ownership of guns, considered various alternatives, and sensibly concluded that the handgun ban, plus trigger-lock and licensing requirements, would reduce crime, suicide, domestic violence, and accidental shootings. Preventing those harms is not just a legitimate goal; it is a governmental duty of the highest order. Moreover, those regulations do not disarm the District's citizens, who may still possess operational rifles and shotguns. The laws at issue, adopted after extensive debate and consideration, represent the District's reasoned judgment about how best to meet its duty to protect the public. Because that predictive judgment about how best to reduce gun violence was reasonable and is entitled to substantial deference, it should be upheld.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS ONLY MILITIA-RELATED FIREARM RIGHTS.

Almost seventy years ago, this Court held that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [the state-regulated militias] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178. The text and history of the Second Amendment confirm that the right it protects is the right to keep and bear arms as part of a well-regulated militia, not to possess guns for private purposes. The Second Amendment does not support respondent's claim of entitlement to firearms for self-defense.

A. The Language Of The Entire Amendment Is Naturally Read To Protect The Keeping And Bearing Of Arms Only In Service Of A Well-Regulated Militia.

1. Both clauses of the Second Amendment, read separately or together, establish the Amendment's exclusively military purpose.

"A well regulated Militia, being necessary to the security of a free State, . . . "

Unique in the Bill of Rights, the Second Amendment begins by stating the reason for its existence: to support a "well regulated Militia." Militias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, § 8, cls.15-16). Their function is to safeguard the states and to be available "to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Id.*; *Miller*, 307 U.S. at 178; *see also* U.S. Const. art. II, § 2 (President commands "the Militia of the several States, when called into the actual Service of the United States"), amend. V (cases arising in "the Militia, when in actual service in time of War or public danger" excepted from grand jury requirement).

The words "well regulated" underscore that the "Militia" contemplated by the Framers were organized and trained fighting forces. As *Miller* explained, a militia is a "body of citizens enrolled for military discipline." 307 U.S. at 179. The language chosen in the Second Amendment was not new. The Articles of Confederation had required "every State" to "keep up a well-regulated and disciplined militia, sufficiently armed and accoutered." Articles of Confederation art. VI. Most states passed detailed laws setting forth requirements for membership and discipline, generally requiring men of certain ages to appear periodically for muster and training under the supervision of state-appointed officers.[1] The laws called for highly organized bodies, specifying company and regiment size, number and rank of commissioned and noncommissioned officers, and the like. *E.g.*, Georgia Militia Law 4-5. Those men were expected to obtain specified weaponry, normally muskets and rifles, and present them when directed. *See Miller*, 307 U.S. at

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[1] Prior to the drafting of the Second Amendment, twelve of the thirteen original colonies and Vermont had enacted legislation regulating their state militia along similar lines. *See* An Act for forming, regulating, and conducting the military Force of this State (1786) (Connecticut) [hereinafter Connecticut Militia Law, with subsequent citations similarly abbreviated]; Act for Establishing a Militia, 1785 Laws of Delaware 57 (June 4, 1785); Act for Regulating the Militia of the State, and for Repealing the Several Laws Heretofore Made for That Purpose, 1786 Georgia Session Laws (Aug. 15, 1786); Act to Regulate the Militia, 1777 Maryland Laws Chap. XVII (June 16, 1777); Act of Nov. 3, 1783, 1783 Maryland Laws Chap. I; Act of Mar. 10, 1785, 1785 Mass. Acts 1; Act of June 24, 1786, 1786 N.H. Laws 1; Act of Jan. 8, 1781, 1781 N.J. Laws, Chap. CCXLII; Act to Regulate the Militia of New York, 1786 N.Y. Laws 1 (Apr. 4, 1786); Act for Establishing a Militia, N.C. Sess. Laws, Chap. XXII (Nov. 18, 1786); Act for the Regulation of the Militia, 1780 Pa. Laws 1 (Mar. 20, 1780); Act for the Regulation of the Militia, 1784 S.C. Acts 68 (1784); Act Regulating the Militia, 1787 Vt. Acts & Resolves 1 (Mar. 8, 1787); Act of Oct. 17, 1785, 1785 Va. Acts, Chap. I.

179-82. Failure to appear for training, properly armed, was punishable. *E.g.*, Georgia Militia Law 1; New Hampshire Militia Law 8.

The Second Militia Act, enacted by Congress a year after the Second Amendment's ratification, shows that the Framers similarly understood a "well regulated Militia" to be an organized and trained military force, led by state-chosen officers. It called for musters and training, and it specified particular weaponry all militia members were required to possess. *See* Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. It placed special emphasis on military discipline. *See id.* §§ 6-7, 10-11.[2]

The remaining words of the first clause further support the point that the Second Amendment contemplates service in a military organization. The Framers specified that a well-regulated militia exists for the common defense—"being necessary" (not optional) "to the security of a free State." This language recognizes that the militia forces exist not only to help the federal government "execute the Laws of the union, suppress Insurrections and repel invasions" (art.

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[2] Congress's power under the Militia Clauses to "organiz[e]" the militias buttresses the point that the Second Amendment applies to participants in organized military entities. Since 1903, the militia has consisted of two parts, the National Guard and an "unorganized militia" including all able-bodied males, and some females, of certain ages. *Perpich v. Dep't of Defense*, 496 U.S. 334, 341-46 (1990); 10 U.S.C. § 311. The unorganized militia has no duties and receives no training, discipline, or supervision by state-appointed officers. *Id.*; *see also* D.C. Code § 49-401 (District militia law). If language is to have meaning, membership in an unorganized militia is not membership in a "well regulated" militia. Because he is sixty-six (PA120a), respondent is not a member of any statutory militia.

I, § 8, cl.15), but also to serve as the primary protectors of the states. Nothing about this language or the opening clause as a whole so much as hints that the Amendment is about protecting weapons for private purposes.[3]

". . . the right of the people to keep and bear Arms, shall not be infringed."

The second clause standing alone also has a distinctly military cast. The crucial words are those that define the "right of the people" that the Amendment protects: "to keep and bear Arms."

"Arms" are military weapons. The term historically meant "[i]nstruments of offence used in war; weapons," and the Oxford English Dictionary notes a 1794 dictionary that understood "arms" as "those instruments of offence generally made use of in war." 1

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[3] Some read the "free State" language to mean that the Amendment was intended to ensure that people could rise up outside the context of any governmental organization against a tyrannical federal army in order to be "free." Fear of federal abuse animated some opponents of the Constitution, but construing the Second Amendment as a right to rebel is inconsistent with the Treason Clause and the Militia Clauses, which specifically authorize the use of militias to "suppress Insurrections." The Framers of this "more perfect Union" did not include the Second Amendment to "undo [their] hard work at Philadelphia." Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 Chi.-Kent L. Rev. 195, 222 (2000). The reference to "State" in the Amendment is to a governmental unit, as elsewhere in the text of the Constitution, including its amendments. It was also common in that era for legislatures to declare the need for a militia to secure a "free government," "the Commonwealth," or a "free State." See Delaware Militia Law; Maryland Militia Law; Virginia Militia Law.

Oxford English Dictionary 634 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

In *Miller*, this Court held that a weapon is not a protected "Arm" absent proof that "at this time [it] has some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. The Court rejected a Second Amendment challenge to an indictment for possession of a short-barreled shotgun because the defendant had not provided that proof. At a minimum, the weapon must be "part of the ordinary military equipment" or have the potential to "contribute to the common defense." *Id.* The Court discussed eighteenth-century militias at length (*id.* at 179-82) but made no mention of weapons for personal uses.

Moreover, "bear Arms" refers idiomatically to using weapons in a military context. This was the only sense in which the young Congress and its predecessors ever used the phrase. Paragraph 28 of the Declaration of Independence notably castigated George III for "constrain[ing] our fellow citizens . . . to bear arms against their country." And in recorded congressional debates from 1774 through 1821, *every* one of the thirty uses of the phrase matched the idiomatic meaning of the day. David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 Mich. L. Rev. 588, 618-21 (2000). For decades after the adoption of the Second Amendment, the military sense of "bear arms" was "overwhelmingly dominant." *Id.*

The word "keep" is consistent with that military sense. As noted above, the expectation of the Framers was that members of militias would bring the weapons required for service. When the Second Amendment was ratified, numerous state militia laws used the word "keep" to refer to the *requirement* that militiamen have arms so they could bring them to musters. *E.g.*, Delaware Militia Law at 3; New Jersey Militia Law at 169; Virginia Militia Law at 2. Securing their right to "keep" those arms would ensure that they could "bear" them. *See, e.g.*, Mass. Const., art. XVII ("The people have a right to keep and to bear arms for the common defense.").

2. In concluding that the Second Amendment protects a right to gun ownership for private uses, the majority below misread the Amendment's text in multiple ways.

First, the majority read the opening clause out of the Amendment. But "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). That is particularly true for this clause, which is unique in the Bill of Rights. The Framers plainly expected it to give meaning to the whole Amendment. *See* 1 William Blackstone, *Commentaries on the Laws of England* 60 (1765) ("If words happen to be still dubious, we may establish their meaning from the context . . . . Thus the proeme, or preamble, is often called in to help the construction . . . ."); *see also* David T. Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Bear Arms"*, 22 Law & Hist. Rev. 119, 154-57 (2004) (discussing eighteenth-century uses of preambles). The majority nevertheless proposed that the first clause merely states "the right's most salient political benefit." PA35a. Treating the Amendment's first clause as merely stating *a* benefit of the Amendment—as opposed to *the* benefit the Amendment was enacted to realize—is both ahistorical and inconsistent with *Miller*'s directive that the "declaration *and* guarantee of the Second Amendment" be read in light of its "obvious purpose." 307 U.S. at 178 (emphasis added).

Second, despite the contemporaneous evidence of what the Framers understood a "well regulated Militia" to be, the majority below implausibly asserted that a well-regulated militia can consist of people who are merely "*subject* to organization by the states (as distinct from actually organized)." PA33a. Everyone is *potentially* subject to organization, but an unorganized group is not regulated at all, let alone well-regulated. Under the majority's understanding, even those who refused to appear for muster would still be part of a well-regulated militia. That is not how the words were understood. *See, e.g.*, The Federalist No. 29, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citizens must "go[] through military exercises and evolutions" before "acquir[ing] the degree of perfection which would entitle them to the character of a well-regulated militia"). Indeed, states that set forth the discipline and organization required of their militias did so while specifically invoking their need for "well regulated" militias. *E.g.*, Maryland Militia Law Chap. I ("Whereas a well regulated militia is the proper and natural defence of a free government . . . .").

Third, the majority read the phrase "bear Arms" unnaturally. "[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824), and "[o]ne does not bear Arms against a rabbit" or an intruder, Garry Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995, at 63; *see Aymette v. State*, 21 Tenn. (1 Hum.) 154, 157 (1840).

The majority did not dispute that in 1791 this phrase normally meant carrying weapons in military service; rather, it stated that this usage was not "exclusive[]" or "absolute." PA23a. The majority then held that the words should not be read based on their common meaning because of supposed tension with the word "keep" in the second clause. PA26a-27a. But the notion that these capable draftsmen meant to create an Amendment with such internal tensions that it could not be read naturally and harmoniously as a whole is unpersuasive.

There is no tension in the text if "bear Arms" is read in its military sense. The District does not contend that individuals may not "keep" their "Arms," but that they may keep them only if they have a militia-related reason for doing so. The majority's assertion that "keep" must mean "keep for private use," *id.*, simply begs the question of whether the Second Amendment protects only militia-related rights.

Fourth, the majority below also emphasized that the Second Amendment protects a "pre-existing right" and that guns were used in the founding era for private purposes. PA20a-22a. There is no persuasive reason, however, to believe that the Amendment protects all such uses, rather than retaining that role for the common law or state constitutions. *See United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (the right to bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.").

Fifth, the majority relied on the words "right of the people" (PA18a-19a, 27a), but recognizing such a right does not define its scope. The question is not whether individuals can enforce the right protected by the Second Amendment. The question instead is whether this right is limited to the possession of militia-related weapons.[4]

The majority suggested that the language chosen was "passing strange" if the "sole concern [was] for state militias." PA14a. Far "strange[r]," however, was the majority's supposition that the Framers would have written the Amendment this way to protect private uses of weapons. Respondent seeks to own a handgun for self-defense in his home. If the Framers had intended the Amendment to protect that use beyond whatever rights existed at common law or in state constitutions, they would have omitted the opening clause entirely and used non-military language rather than "bear Arms."

The Framers' phrasing of the Second Amendment was in fact a natural way to protect a militia-related right. As the majority itself emphasized, the surrounding amendments are part of "a catalogue of cherished individual liberties." PA22a. Given the context, it made perfect sense to speak of "the right of the people" to describe what rights the people held against the federal government. Entitling individuals to exercise this right only as part of a state-regulated militia was consistent with the Framers' recognition that the states and the people would defend each others' interests. *See* The Federalist No. 29 (Hamilton), No. 45, (James Madison), No. 46 (Madison).

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[4] As the majority noted, this Court has on several occasions referred to the Second Amendment in passing when construing other constitutional provisions and statutes. PA37a-39a. The District's position is fully consistent with the dicta cited to the effect that the Amendment protects a "right of the people." The dicta do not speak to the nature of the right.

That understanding is also consistent with the Militia Clauses in the body of the Constitution, Art. I, § 8, cls.15-16. Clause 15 allows Congress to call forth the militia into federal service, while Clause 16 makes clear that the federal government shall provide for "organizing, arming [as in "bear Arms"], and disciplining, the Militia [so that they will be well-regulated]." They further reserve to the states the appointment of officers and the training of the Militia "according to the discipline prescribed by Congress." The natural reading of the Second Amendment in light of these clauses is that it ensures that, despite the broad powers given to Congress, it could not disarm the people serving in state militias.

The history discussed next confirms that reading. The Bill of Rights limited the federal government to protect both individual liberty and states' rights. In the context of the Second Amendment, both causes were served by establishing a check on a powerful new federal government that might otherwise disarm the people serving in state militias under the powers granted by the Militia Clauses. Of equal significance, history also shows that the Framers made deliberate drafting choices to address this particular concern, while evidencing no support for any other purpose.

B. The Historical Context And Drafting History Of The Second Amendment Confirm The Framers' Military Purpose.

Reading the text of the Second Amendment as a unified whole to protect only militia-related firearm rights reflects the concerns expressed by the Framers from the time of the Constitutional Convention through adoption of the Amendment by the First Congress. The Amendment was a response to related fears raised by opponents of the Constitution: that Congress would use its powers under the Militia Clauses to disarm the state militias; and that states and their citizens would be forced to rely for protection on a national standing army, widely feared as a potential oppressor.

The District focuses on the development of the Amendment's language. It traces the Amendment from proposals by the Virginia ratifying convention through James Madison's adaptation of that language and later revisions in the First Congress. This approach avoids the unsound use of remote events and widely scattered expressions by individuals not directly involved in drafting the language. This properly focused review of the history confirms that the Second Amendment is only a militia-related provision.

1. The Second Amendment was a response to the Constitutional Convention's decision to permit Congress both to establish a standing army and to exert substantial control over state militias. The Confederation militia system had proven to be a source of instability, most notably during Shays's Rebellion in 1786. Angry farmers, joined by militia units drawn

from the area, threatened civil war in Massachusetts. The rebellion was suppressed using state-officered militia units, but it gravely concerned the men at the Constitutional Convention in 1787. *See* Finkelman, *supra*, at 211-12; 1 *Records of the Federal Convention of 1787*, at 18-19 (Max Farrand ed., Yale Univ. Press 1937) (1911); 2 *id.* at 332; *cf.* The Federalist No. 21, at 140 (Hamilton) (citing rebellion as forerunner of ruin of law and order). Accordingly, the Framers provided that the national government would have a professional army and gave Congress powers over state militias, including the power to "provide for organizing, arming, and disciplining" them. U.S. Const. art. I, § 8, cls.12-16; *see Perpich*, 496 U.S. at 340 (Framers "recogni[zed] . . . the danger of relying on inadequately trained [militia] soldiers as the primary means of providing for the common defense").

The Militia Clauses were denounced by Anti-Federalist delegates to the Constitutional Convention and produced a "storm of violent opposition" at state ratifying conventions. Frederick B. Wiener, *Militia Clauses of the Constitution*, 54 Harv. L. Rev. 181, 185 (1940); 1 Records, *supra*, at 330-31, 385, 387, 388; 3 *id.* at 209. One particular concern was that a federal standing army would prove tyrannical, especially if the state militias became ineffective counterweights. Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 41-50 (Oxford Univ. Press 2006). American experiences under the Crown had made standing armies objects of fear and revulsion. *Id.* at 9-13; *see* The Declaration of Independence para. 13 ("He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures."). The shift from total state control of the militias to concurrent control with federal preeminence disturbed convention delegates, but "there is precious little evidence that advocates of local control of the militia shared an equal or even secondary concern for gun ownership" for personal uses. R. Don Higginbotham, *The Federalized Militia: A Neglected Aspect of Second Amendment Scholarship*, 55 Wm. & Mary Q. 39, 40 (1998); *see* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 153-54 (2000); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 480-95 (2000).

The fear that the Militia Clauses give Congress *exclusive* power to arm the militias and thus the power to "disarm" them, by failing to provide arms, engendered particularly contentious debates at the Virginia ratifying convention. George Mason warned that Congress could use its militia powers to compel reliance on a standing army:

> The militia may be here destroyed . . . by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them . . . . Should the national government wish to render the militia useless, they may neglect them and let them perish . . . .

3 John Elliot, *Debates in the Several State Conventions on the Adoption of the Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 379 (2d ed. 1836). Patrick Henry con-

curred (*id.* at 51-52, 257) and Mason asked for "an express declaration that the state governments might arm and discipline them." *Id.* at 380. When Madison responded that Congress's power to provide for arming the militias posed no threat to the militia because the states shared authority to arm the militia under the Militia Clauses (*id.*), Henry disagreed. *Id.* at 386.

To deflect demands to convene a second constitutional convention before ratification, the Virginia Federalist delegates agreed to append proposals for changes to the Constitution for Congress to consider at the first opportunity. Kenneth R. Bowling, "*A Tub to the Whale*": *The Founding Fathers and the Adoption of the Federal Bill of Rights*, 8 J. Early Republic 223, 227 (1988); 3 Elliot, *supra*, at 657-62. Without debate, the convention unanimously adopted forty additions and changes presented by a committee (to which Madison, Mason, and Henry belonged) including:

> 17th. That the people have a right to keep and bear arms; that a well regulated militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free state; that standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.
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> * * *
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> 19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon

> payment of an equivalent to employ another to bear arms in his stead.

Id. at 659. Separately, the convention proposed amending the Militia Clauses directly: "11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same." *Id.* at 660.[5]

No one at the Virginia ratifying convention mentioned a need to protect weapons for personal use from federal (or state) regulation. Instead, the persistent Anti-Federalist theme concerned arms to protect the state and its citizens against domestic and foreign enemies, including (in 1789) a potentially oppressive federal government using a standing army.

2. When the Anti-Federalists failed to prevent ratification of the Constitution, they shifted tactics and urged the addition of a Bill of Rights that they hoped would limit federal power, including the power over state militias. The Federalists in control of the First Congress were unwilling to undo what they had achieved, but were willing to make clear that the federal government could not violate certain rights or trump reserved state powers. With respect to the Second Amendment, that meant clarifying that the federal government could not deny the people the right to keep and bear arms in service of state militias.

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[5] The Virginia convention's concerns with arms for the militia and the perceived threat from a standing army were mirrored at the North Carolina and New York conventions, which suggested similarly worded amendatory language. 4 *id.* at 242-47; *The Bill of Rights: A Documentary History* 912 (Bernard Schwartz ed., 1971).

The language used in the Second Amendment originated from the amendments proposed at the Virginia ratifying convention, but the wording changed during the drafting process in the First Congress. Madison, the initial drafter of the Amendment, made several changes to the Virginia proposals, notably merging the conscientious objector provision (19th) with the right to bear arms and militia provisions (17th):

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

1 *Gales & Seaton's History of Debates in Congress* ("Debates") 451 (1789). Although the conscientious-objector clause did not survive, the initial inclusion of the "bear arms" phrase in both the first and third clauses strongly supports the conclusion that Madison understood the Amendment as a whole to relate to military service alone.

Madison's draft was revised to make the Amendment's exclusively military focus even clearer. A select House committee meeting in executive session transposed the first two clauses, making the reference to a "well regulated Militia" more prominent, and substituted a comma for the semi-colon, underscoring the connection between the two clauses. *Id.* at 170. The new structure and punctuation reflected the fact that the need to protect the right followed from the need for the militias. The committee shifted the militia's role from ensuring "the security of a free country" to "the security of a free State," highlighting the role of the militia in defending the state. *Id.*

All remarks recorded in the House's debate related to military service; none pertained to private use of weapons, including self-defense. 1 Debates, *supra*, at 778-81; *see* Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 961, 995 (1975). Members of the House also debated the conscientious-objector clause, and their comments show that House members understood the Amendment as a whole to relate to military service. 1 Debates, *supra*, at 778-80. For instance, Elbridge Gerry opined: "If we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head." *Id.* at 779.

The Senate, meeting in closed session without recorded debate, altered the House draft to the present language and retained the direct connection between explicit purpose and right. Beyond striking the conscientious-objector clause, the Senate eliminated the House's description of the militia as "composed of the body of the people." 1 *Journal of the First Session of the Senate* ("Journal") 71 (Gales and Seaton 1789). That phrase might have been seen to undermine Congress's power under the Militia Clauses to decide how to organize the state militias. Rakove, *supra*, at 125. The Senate substituted "necessary for the security" in place of "the best security" (Journal, *supra*, at 77) but that substitution changed neither the clause's subject (the militia) nor its object (the security of a free State) and so left the military import intact.

The Senate rejected an amendment to add "for the common defence" after "Arms." Journal, *supra*, at 77. Such an amendment, while consistent with one purpose of the Militia Clauses, could have been thought inconsistent with another purpose: using the militias for law enforcement. Rakove, *supra*, at 126. The change also could have been understood to refer to common defense of the Nation and thus to detract from the guarantee that the militia also existed to protect the security of individual states. In any event, especially given the opening clause, the Amendment's "military sense is the obvious sense. It does not cease to be the obvious sense if something that might have been added was not added." Garry Wills, *A Necessary Evil: A History of American Distrust of Government* 64 (Simon & Schuster 1999).[6]

3. In addition to this affirmative history of what was said and done, common understandings of state

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[6] The Senate defeated a proposal that would have amended the Militia Clauses to make explicit that states could not only arm but also regulate and discipline their militias if Congress failed to do so. 2 Schwartz, *supra*, at 1151-1153. That was one of twenty unsuccessful amendments offered by Virginia's two Anti-Federalist senators. *Id.* at 1151-53, 1186-87. Respondent has argued that this proposal shows that the Second Amendment was not directed at ensuring the availability of arms for the militia; otherwise the two senators would have considered its inclusion unnecessary. Whatever Virginia's senators may have contemplated, their proposal went much farther than the Second Amendment. It would not only have revised the body of the Constitution, which the Federalists opposed doing, but also have provoked disputes about whether Congress had regulated and disciplined the militias so insufficiently as to warrant state intervention. The Senate may also have concluded that the Second Amendment made the minority's proposal redundant.

arms provisions at the time further support the conclusion that the right recognized by the Second Amendment relates only to arms for the common defense.

In 1789, several state constitutions and declarations of rights included provisions recognizing a right to arms only for that purpose. Massachusetts explicitly recognized the right of the people to "keep and bear arms for the common defence." *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 183 (Neil H. Cogan ed., 1997). North Carolina had materially similar wording. *Id.* at 184. These provisions were coupled with declarations that standing armies are "dangerous to liberty" and should not be "maintained" or "kept up." *Id.*

Other state constitutions did not address arms possession directly but stressed the need for militia—and, by extension, privately owned military arms—for the common defense in place of a standing army. With minor variations, the Delaware, Maryland, and Virginia constitutions recognized that "well-regulated militia" provide "the proper, natural, and safe defence" of a "free State" or "free government" and that "standing armies are dangerous to liberty." *Id.* at 183-85. New York's constitution stated that it was the "Duty of every Man to be prepared and willing to defend [the State]" and therefore the "Militia of the State at all times . . . shall be armed and disciplined and in Readiness for Service." *Id.* at 183. If there was a right associated with these declarations, it was only to have arms for common defense, making a standing army unnecessary. Robert Hardaway, *The Inconven-*

ient Militia Clause of the Second Amendment, 16 St. John's J. Legal Comment. 41, 82 (2002).[7]

Article XIII of Pennsylvania's 1776 declaration of rights is another example of the dominant focus of these provisions on communal defense:

> That the people have a right to bear arms for the defense of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination to, and governed by, the civil power.

Cogan, *supra*, at 184. There is strong support for the proposition that Article XIII protects only a right to bear arms for communal (rather than personal) self-defense. Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 39 Rutgers L.J. 1041 (forthcoming 2008) (discussing how Article XIII originated from dispute between frontiersmen seeking state support for community self-defense organizations and Quaker-dominated legislature that refused to provide it); *see* Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 495-96, 498 (2004). More significantly, the specific language in Article XIII—"defense of themselves"—is not in the Second Amendment.[8]

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[7] New Hampshire's 1783 constitution exempted persons "conscientiously scrupulous of bearing arms" for the common defense from being "compelled thereto" but had no other provision on arms. *Id.* at 183. Georgia's constitution directed that each county with men "liable to bear arms" should form battalions or companies. *Id.* New Jersey's and South Carolina's constitutions did not mention either arms or militias. Connecticut and Rhode Island had no constitutions.

While state provisions differed, "the meaning was the same. Only the citizenry, trained, armed, and organized in the militia, could be depended on to preserve republican liberties for 'themselves' and to ensure the constitutional stability of 'the state.'" Lawrence D. Cress, *An Armed Community*, 71 J. Am. Hist. 22, 29 (1984).

Subsequently, many states adopted constitutions that protect some right to bear arms. *See generally* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006). They are far from uniform, with a few tracking the Second Amendment, others explicitly protecting self-defense, others focusing on common defense, and some specifically including a right to hunt. These provisions illustrate how easy it would have been to provide for a right to own guns for private use and to decouple that right from the preservation of state militias. They also illustrate how guaranteeing some right to gun ownership has been considered vital in some, but not all, jurisdictions.

4. Not only were there extant state constitutional provisions that informed the drafters of the Second Amendment, but three proposals were introduced at state ratifying conventions that would have expressly protected a right to arms for personal use. *See* 2 Schwartz, *supra*, at 761 ("Congress shall never disarm

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[8] Vermont was not yet a state, but its 1777 and 1786 declarations of rights had similar language. Cogan, *supra*, at 184-85.

any Citizen unless such as are or have been in Actual Rebellion") (New Hampshire); *id.* at 658-59 ("That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .") (Pennsylvania minority); *id.* at 675, 707 ("that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms") (Massachusetts minority). Only New Hampshire's proposal gained ratifying convention approval.

Madison culled his proposals from a 1788 pamphlet entitled *The Ratifications of the New Federal Constitution, Together with the Amendments, Proposed by the Federal States.* 11 *The Papers of James Madison* 299 (C.F. Hobson *et al.* eds., 1977). Had any of these alternative formulations been used by Congress, a right to weapons possession for private purposes would have been established, but none was debated, much less adopted. That Congress ignored these alternatives and instead tied the right to the militia strongly suggests that Congress's exclusive intent was to protect a militia-related right.

5. This history firmly supports the District's reading of the Second Amendment: seeing a problem—the possibility of disarmed state militias—the Framers acted to address it. They did so by protecting the right of citizens to own guns to support those militias, but they never saw private gun ownership as a need to be addressed, and they did not accept those proposals

that would have expressly protected a right to self-defense.

The majority below suggested that its view was also compatible with this history, on the theory that securing a broad right to possess weapons for private purposes would enable states to summon armed militiamen to muster. PA44a. But the fear that Congress might disarm the citizenry *outside the context of militia service* was never expressed by any person known to be involved with the passage of the Second Amendment. Indeed, it is doubtful that Congress's limited powers, as understood in 1791, would have been thought to encompass any power over firearms outside the militia context. *See United States v. Lopez*, 514 U.S. 549 (1995). If the majority were correct, that would imply that the Framers held a surprising view of congressional authority and adopted an overbroad solution to the problem that they identified.

Moreover, the Framers likely would have feared that a broad constitutional right to possess weapons for private purposes might undermine their avowed end. Actions by individuals, unilaterally deciding what weapons to keep and how and when to use them for one's own purposes, do not ordinarily promote "the security of a free State." Events like Shays's Rebellion were vivid reminders that such actions could endanger state security. The Framers of the Second Amendment therefore placed their trust specifically in the "well regulated Militia" rather than armed individuals acting on their own.

That decision is apparent not only from the Amendment's text, but also the care both the House and the Senate took in crafting it. They were particularly meticulous regarding what became the first clause; indeed, the second clause as enacted has the same words as Madison's draft. Their efforts surely were purposeful, and should not be ignored two centuries later. History refutes the view of the majority below that all this attention was directed to a clause that does no more than announce *one* of the purposes of the Second Amendment.

* * *

In sum, in light of the language and history, the best construction of the Second Amendment is one that is consistent with *Miller's* interpretive principle and that recognizes a right having "some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. The Amendment does not protect—and was never intended to protect—a right to own guns for purely private use. Because respondent does not assert a right to keep or bear arms in connection with militia duties, he has no Second Amendment claim.

II. THE SECOND AMENDMENT DOES NOT APPLY TO LAWS LIMITED TO THE DISTRICT OF COLUMBIA.

The judgment must be reversed for the independent reason that the Second Amendment was intended as a federalism protection to prevent Congress, using its powers under the Militia Clauses, from disarming state militias. The Amendment thus "is a limitation only upon the power of Congress and the National government" and does not constrain states. *Presser v. Illinois*, 116 U.S. 252, 265 (1886). Laws limited to the District similarly raise no federalism-type concerns, whether passed by Congress or the Council, and so do not implicate the Second Amendment. The majority concluded otherwise by asserting that the entire Bill of Rights applies to the District, but that reason does not support its conclusion.

Although many of the concerns expressed in the Bill of Rights apply to the actions of governments generally, the primary goal of those who demanded it as a condition of ratification of the Constitution was to control the federal government, which had been given powers previously belonging to the states. That is especially true with respect to the inclusion of the Second Amendment, which was prompted by fear of the federal government's standing army and control over state militias. There was no expressed concern that states might disarm their citizens; the Amendment was enacted to *protect* states' prerogatives, not constrain them. Thus, even if this Court were to read the Second Amendment to protect private uses of firearms, the right should be limited in application to constraining federal legislation that could implicate the Amendment's "obvious purpose to assure the continuation and render possible the effectiveness of" state militias. *Miller*, 307 U.S. at 178.

Legislation limited to the District, where federal-state relations are not at issue, cannot implicate this obvious purpose. National limitations on what firearms may be possessed privately could conflict with a state's ability to call forth a militia armed as the state sees fit. As the majority below recognized, the Amendment ensures "that citizens would not be barred from keeping the arms they would need when called forth for militia duty." PA44a. But for the District there could be no conflict because Congress retains ultimate legislative power over whether and how to arm any militia, even when it delegates power to the District's local government. *See Sandidge v. United States*, 520 A.2d 1057, 1059 (D.C. 1987) (Nebeker, J., concurring).

Whatever the scope of the Second Amendment's protections in other contexts, its Framers could not have intended Congress to be more constrained in the seat of federal power than a state would be in its own territory. The Framers established a federal enclave in large part because of an incident in 1783 in which disgruntled, armed soldiers surrounded the State House in Philadelphia, forcing the Continental Congress to flee. Kenneth R. Bowling, *The Creation of Washington D.C.: The Idea and Location of the American Capital* 30-34, 76 (1991). Congress then depended on its host government for protection, and when "an angry regiment of the Continental Army demanding back pay" disrupted its proceedings, it asked Pennsylvania's Executive council to "call out the militia" to restore control. Lawrence Delbert Cress, *Whither Columbia? Congressional Residence and the Politics of the New Nation, 1776 to 1787*, 32 Wm. & Mary Q. 581, 588 (1975). The council refused, and Congress had to leave the city. *Id.*

In response, Madison declared that the federal government needed "complete authority over the seat of government" because, without it, "the public authority might be insulted and its proceedings interrupted." The Federalist No. 43, at 272 (Madison). The Framers therefore included the Seat of Government Clause, U.S. Const. art. I, § 8, cl.17, which provides Congress with plenary authority over this jurisdiction and explicitly allows the "Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful

Buildings," to ensure that the new government could defend itself.

Particularly given that concern, the Framers could not have intended to deprive the federal government of the most important power of self-protection it has under the Seat of Government Clause by disabling Congress from enacting firearms regulations. To the contrary, they would have expected that Congress had the power to enact the types of laws at issue here under that clause. It is not plausible to think that Congress intended to restrict itself in regulating firearms in the jurisdiction in which federal interests like the White House, the Capitol, and this Court had to be most secure.

That view is particularly illogical because it suggests that the Framers *uniquely* disabled firearm regulation in the District and other federal enclaves, such as the territories and military bases. This Court has squarely held that the Second Amendment was adopted as a limitation on only federal, not state, legislation. *Presser*, 116 U.S. at 265. Although the majority below suggested that the Second Amendment may subsequently have been incorporated against the states through the Fourteenth Amendment (PA37a-38a n.13), there is no dispute that the Second Amendment did not limit the states' regulatory authority over firearms when enacted.[9]

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[9] Although this case does not present the question of incorporation, there is no reason to think that a right to possess guns for personal use is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Moreover, incorporation against the

As noted above, some states have chosen to adopt constitutional provisions on gun rights and some have not. If the majority below were correct, neither Congress nor the Council would have comparable ability to choose whether similar constraints on legislative authority to enact gun-control laws are appropriate for the District. There is no reason for Congress and the Council to have less authority in the District than a state legislature would have.

Indeed, the claim below that every provision of the Constitution that restricts the national powers of Congress automatically applies when it acts pursuant to the Seat of Government Clause is simply wrong. *See Loughboro v. Blake*, 18 U.S. (5 Wheat.) 317, 318 (1820). For instance, before the Sixteenth Amendment was ratified, this Court enforced the limitation on Congress's power to impose a "Capitation, or other direct, Tax" in Article I, § 9, Clause 4, just as it enforces the Bill of Rights. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). Nonetheless, the Court held that the limitation did not apply to a real estate tax enacted by Congress limited to the District. *Gibbons v. District of Columbia*, 116 U.S. 404 (1886). And if precise parallelism were a constitutional mandate, it would suggest that the judges of the District's local court system would merit the protections of Article III, although this Court has held otherwise. *Palmore v. United States*, 411 U.S. 389, 397-98, 407-10 (1973). If the Second Amendment is read in light of the Constitution as a whole and in historical context,

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states would be curious since the Second Amendment was enacted to protect state prerogatives.

it too does not constrain Congress's authority over the District.

The fact that the laws in question here were enacted by the Council rather than Congress makes all the more clear that the laws do not implicate the concerns animating the Second Amendment. Congress established the Council as a local legislature that may enact legislation only for the District. D.C. Code § 1-203.02. The Council lacks the power to raise and maintain a standing army, let alone to affect militias or gun rights in the states. There is no reason to think that the Framers were worried about local entities like the District, acting through locally elected legislators, disarming their citizens, with no impact beyond their borders.

The Second Amendment thus has no bearing on what the District can do in the area of firearms regulation, just as it has no bearing on what the states can do. The routes to those conclusions differ, because the applicable constitutional doctrines are different. But the result should be the same: the District is subject to no more restrictions under the Second Amendment than are the states and localities acting under them. Thus, even if the Second Amendment protects possession of guns for personal purposes, that protection does not extend to a law limited to the District.

III. THE DISTRICT'S REASONABLE GUN-CONTROL LAWS DO NOT INFRINGE THE RIGHT TO KEEP AND BEAR ARMS.

In any event, the laws at issue should be upheld for the independent reason that they represent a permissible regulation of any asserted right. The rights protected by the Bill of Rights have "from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). After concluding that existing laws were insufficient, the Council reasonably found that it could substantially reduce the tragic harms caused by guns by regulating which weapons are available to District residents, how residents should store lawfully owned weapons, and who should be licensed to carry concealable weapons. The Council properly acted to reduce those harms without functionally disarming residents. Its reasonable legislative judgment should be upheld even if the Second Amendment is construed to protect the possession of firearms for self-defense in the District.

A. The Constitution Permits Reasonable Restrictions On The Ownership And Use Of Guns.

As the majority below purported to accept, governments may impose "reasonable restrictions" on the exercise of any Second Amendment right. PA51a. The United States agrees that "reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse" are constitutional. Brief for the United States in Opposition at 20 n.3, *Emerson v. United States*, 536 U.S. 907 (2002) (No. 01-8780). State courts interpreting their state constitutions uniformly uphold reasonable regulations as well.[10] Adam Winkler, *Scrutinizing the Second*

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[10] *See, e.g., State v. Cole*, 665 N.W.2d 328, 336-37 (Wisc. 2003); *Robertson v. Denver*, 874 P.2d 325, 328 & nn.15-16 (Colo. 1994); *Arnold v. Cleveland*, 616 N.E.2d 163, 172-73 (Ohio 1993); *State v. LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990); *State v. Hamlin*, 497 So. 2d 1369, 1371 (La. 1986); *State v. McAdams*,

Amendment, 105 Mich. L. Rev. 683, 686-87 (2007). As one court explained, the constitutional text is subject to a rule of reason because the common law right to self-defense is subject to that rule. *Benjamin v. Bailey*, 662 A.2d 1226, 1232-35 (Conn. 1995).

To strike down reasonable regulations of guns would flout a long legal tradition. Our legal system has historically permitted reasonable regulation of guns for public safety purposes. That was true in England and in the colonies, and remains true in the states. *See* Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 35-36 (2000); Cornell, *supra*, at 26-30. For example, Pennsylvania and Delaware passed acts prohibiting the firing of guns in cities and towns. Act of Feb. 9, 1750, ch. CCCLXXXVIII, 1750-1751 Pa. Laws 108; Act of Feb. 2, 1812, ch. CXCV, 1812 Del. Laws 522. Massachusetts prohibited Boston citizens from keeping loaded firearms in their homes. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. State and local legislatures (including in the District) later began to regulate weapons more heavily, banning concealed weapons or even the sale of concealable weapons. *E.g.*, Act of Feb. 1, 1839, no. 77, 1839 Ala. Laws 67; Act of Feb. 10, 1831, ch. XXVI, § 58, 1831 Rev'd Laws of Ind. 180, 192; Act of Jan. 27, 1838, ch. 137, 1837-1838 Tenn. Pub. Acts 200; *see supra* pages 2-3. Federal regulation of gun possession and use was added in the twentieth century. *E.g.*, National Firearms Act, Act of June 26, 1934, Pub. L. No. 73-474, 48 Stat. 1236.

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714 P.2d 1236, 1237-38 (Wyo. 1986); *Kalodimos v. Morton Grove*, 470 N.E.2d 266, 273 (Ill. 1984).

As the authorities, history, and practical realities all indicate, the Second Amendment affords elected officials substantial discretion to regulate guns. As guns have become cheaper and more lethal, state and local governments and Congress have matched the threat with increased regulation. The government must be allowed to respond appropriately to the threats posed by guns. That is particularly so regarding local laws like this one. Even if the Second Amendment were intended to apply to such laws, the Framers' overarching desire to support state prerogatives (consistent with basic concepts of federalism) requires that the Amendment at a minimum allow local governments to make different tradeoffs based on local conditions.[11]

The District does not suggest that gun regulations should be subject to mere rational basis review. Instead, if the Second Amendment is found to protect a right of gun ownership for purposes of self-defense, a reasonableness inquiry would consider the legislature's actual reasons for enacting a law limiting exercise of the right. Furthermore, whatever those reasons, a law that purported to eliminate that right—for instance, by banning all gun possession, or allowing only a firearm that was so ineffective that the law effected functional disarmament—could not be reasonable. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (land use regulation constitutes "taking" only when it eliminates essentially all use for property); *People v. Blue*, 544 P.2d 385, 391 (Colo. 1975) (state may not render state constitutional right to bear arms "nugatory"). But at least where a legislature has articulated proper reasons for enacting a gun-control law, with meaningful supporting evidence, and that law does not deprive the people of reasonable means to defend themselves, it should be upheld. *See* Winkler, *supra*, at 716-19 (describing how state courts apply this type of deferential standard).

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[11] Heightened scrutiny might be appropriate if Congress overrode the explicit command of the Second Amendment by barring a member of a well-regulated militia from possessing a weapon required to meet militia obligations. The asserted right to own and use a gun for private purposes is, however, not a fundamental right, *see supra* note 9, and individuals who wish to own and use guns for their own purposes are not a suspect class, *see Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). They have no difficulty in protecting their interests in political arenas.

B. The Court Of Appeals Applied The Wrong Standard, Created An Unworkable Test, And Misconstrued Relevant Precedent.

Although the majority below purported to recognize the "reasonableness" standard, the rule it adopted makes the reasonableness of the legislature's judgment irrelevant: "Once it is determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." PA53. But this Court has never adopted such a *per se* rule for any provision in the Bill of Rights. The rights it protects are not absolute, and the "necessities of the case"—particularly public safety concerns—may justify the regulation of a protected right. *Robertson*, 165 U.S. at 281; *see also Maryland v. Buie*, 494 U.S. 325 (1990) (Fourth Amendment does not require endangering safety of law enforcement officers); *New York v. Quarles*, 467 U.S. 649 (1984) (same for Fifth Amendment). "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Nothing in the Second Amendment's text or history suggests that it precludes legislatures from protecting their citizens by banning particularly dangerous types of weapons.

Rather than consider the "necessities of the case" or the legislature's careful judgment, respondent argues that any weapon "in common use" that has a "military application" is an arm that cannot be banned no matter what other weapons remain available for self-defense. Response to Petition for Certiorari 24-26. The court of appeals' equally inflexible and categorical rule would also require that the weapon be a "lineal descendant" of a "founding-era weapon." PA51.

This test is neither meaningful nor workable. Is the assault rifle a lineal descendant of the musket? How "common" must the weapon's use be, and in what locations and in what populations would the test be run? Because every firearm has *some* military application, how well-suited must it be? If the majority's test had any limits to it, handguns might not be "arms." *See United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 n.8 (7th Cir. 1982).

More important, the test leads to tragic results. It suggests, for instance, that Congress could ban the private ownership of a particularly dangerous weapon right after its invention, before it grows into common use, yet not if its dangerousness becomes clear only after its use becomes widespread. This impractical and coldhearted result does not follow even from a self-defense reading of the Second Amendment. As the majority below recognized, "the government's interest in public safety" allows it to bar certain members of "the people" (such as felons) from exercising any Second Amendment rights. PA52a. The same interest should allow the government to bar particularly dangerous arms, whether or not they are "lineal descendants" of far less powerful "Arms" from 1791.

The majority below was mistaken in its view that *Miller* supports the *per se* test it crafted. The logical result of the holding in *Miller*—that Congress may ban all short-barreled shotguns—in fact suggests that the District's handgun ban is constitutional. It is hard to see why short-barreled shotguns would not have *some* military application, and they were in sufficiently common use then for Congress to see a need to ban them. As for the lineal-descendant requirement, a short-barreled shotgun seems at least as related to its forebears as modern automatic handguns are to the pistols used by the militia in 1792.

Miller did not in fact define certain categories of "arms" that are entitled to Second Amendment protection; rather, it required that "possession or use" of the weapon in question "at this time ha[ve] some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178. This establishes that a weapon must have at least potential militia use for the Second Amendment even to be implicated. *Miller* says nothing, however, about what are protected "arms" under a self-defense theory of the Amendment never mentioned in the case. Moreover, *Miller* never suggests that if a weapon is of the type that might be kept by someone in the militia, its potential status as an "arm" would be sufficient to render the weapon immune to proscription.

Indeed, the holding below that the Constitution bars the District from choosing which particular arms to allow is precisely backwards, as the Militia Clauses and the Second Amendment contemplate that choosing among arms is the government's *duty*. Again, those mustering for militia service were required to bring those weapons chosen by the legislature. *See supra* pages 13-14. If the opening clause of the Second Amendment has any meaning, the rule adopted below—which pays no heed to whether a particular arm would meet a militiaman's obligations—cannot stand.

The majority's attempt to draw support by analogy to the First Amendment also fails. PA51a-52a. On a fundamental level, the analogy is inapt. Regulating dangerous weapons is at the heart of any government's traditional police power. Unlike speech restrictions, gun regulations raise no risk of viewpoint discrimination and no specter of silencing the views of the opposition. And, of course, the First Amendment does not have an opening clause comparable to that in the Second.

But even if the First Amendment analogy were applicable, it would confirm that the District's gun regulations are entitled to great deference and are constitutional. The decision below anomalously provides that no arm may be banned under the Second Amendment even though some forms of speech and some religious practices can be banned under the First. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968) (speech mixed with conduct); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Employment Div. v. Smith*, 494 U.S. 872, 876-82 (1990) (ingesting peyote). In particular, speech can be banned when it creates sufficient risks to public order or safety. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement to "imminent lawless action"); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words"). It is difficult to imagine that the practical men who wrote the Bill of Rights meant to allow banning potentially harmful speech, but not particularly dangerous firearms.

Moreover, as the panel majority recognized, protected speech may be subjected to "time, place, or manner" restrictions. PA51a (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Although handguns are banned in the District, rifles and shotguns are not. So long as homeowners have a means of defending themselves, the handgun ban can be understood to be the Second Amendment analog to a time, place, or manner restriction properly tailored to the District's unique status as an urban jurisdiction. Indeed, First Amendment jurisprudence makes clear that "alternative" means of exercising a right need not be precisely equivalent to the banned or burdened means. *See, e.g.*, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986). If the Second Amendment has a self-defense purpose, it is concerned with the practical realities of functional disarmament—not guaranteeing a choice among whatever weapons fit the labels in the court of appeals' test. *Cf. NAACP v. Button*, 371 U.S. 415, 429 (1963).

C. The District's Gun Regulations Satisfy The Reasonableness Standard.

In 1976, the District's elected representatives determined that existing gun-control laws needed to be made more effective. The much-debated and carefully-crafted legislative solution included both a ban on handguns and a trigger-lock requirement for firearms kept at home. It was the reasonable judgment of the District's political representatives that such a comprehensive package best promoted public safety while respecting private gun ownership. In addition, the District has a longstanding gun licensing requirement that works with these provisions to promote public safety. The Second Amendment should not be read to give the courts the authority to overturn those reasoned judgments.

1. The Handgun Ban Limits the Unique Harms Posed by Handguns in an Urban Environment.

a. The Council adopted a focused firearm restriction: it banned private possession of handguns, but not rifles and shotguns. Based on the evidence before it, the Council reasonably found that a handgun ban would mitigate the very serious problem of handgun violence in the District, including the use of handguns in crimes and their misuse by normally law-abiding citizens. By their nature, handguns are easy to steal and conceal, and especially effective for robberies and murders. The dangers those weapons cause are particularly acute in the District. As Councilmember Clarke noted, "The District of Columbia is a unique place. . . . [O]ur area is totally urban. There is no purpose in this city for . . . handguns other than to shoot somebody else with." Morning Council Sess. Tr. 73:9-12, May 3, 1976; *see also* Morning Council Sess. Tr. 47:20-21, May 18, 1976.

The evidence on which the Council relied was more than sufficient to justify its decision to act. *See supra* pages 4-6. The Council had a manifestly reasonable basis to conclude that handguns are uniquely dangerous, and that the dangers to others, both in the home and outside of it, justify the handgun ban. Moreover, its predictive judgment—that the deaths and serious injuries that handguns would cause would more than offset any benefits from allowing residents to keep handguns in their homes—is precisely the kind of reasoned assessment that legislatures rather than courts are tasked with making in our democracy.

The Council carefully balanced the costs and benefits of its regulations, *see supra* pages 4-5, and its determinations are entitled to substantial deference. *See Gonzales v. Carhart*, 127 S. Ct. 1610, 1636 (2007) (legislature should receive deference in absence of expert consensus). This Court "accord[s] substantial deference" to legislatures' predictive judgments. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broad. Sys. v. FCC* (*Turner I*), 512 U.S. 622, 665 (1994) (plurality opinion)). Its "sole obligation is 'to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.'" *Id.* (quoting *Turner I*, 512 U.S. at 666). The Council has done so here.

b. In any event, subsequent evidence supports the Council's judgment that banning handguns saves lives. Many cities, states, and nations regulate or ban handguns based on the unique dangers of those deadly weapons.[12] Those dangers exist even when the gun is kept at home and the owner is generally law-abiding and responsible.

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[12] *E.g.*, Chicago Mun. Code §§ 8-20-040, 8-20-050(c); Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* (2006), http://www.lcav.org/library/re-

First, handguns are vulnerable to theft, and thus often fall into the hands of criminals. Far more handguns than other firearms are stolen—hundreds of thousands per year. Caroline W. Harlow, U.S. Dep't of Justice, Bureau of Justice Statistics, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders* 1-3 (Special Rep. Nov. 2001), http://www.ojp.usdoj.gov/bjs/pub/pdf/fuo.pdf; Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearms, Crime, and Justice: Guns Used in Crime* 3 (July 1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf.

Inmates report (and statistics demonstrate) that the handgun is their "preferred firearm." Harlow, *supra*, at 1-3. Handguns are the weapon most likely to be used in street crimes. Although only a third of the Nation's firearms are handguns, they are responsible for far more killings, woundings, and crimes than all other types of firearms combined. Zawitz, *supra*, at 2. Eighty-seven percent of all guns used in crime are handguns. Craig Perkins, U.S. Dep't of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime* 3 (Special Rep. Sept. 2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf.

Handguns pose particular dangers to police officers, including when executing warrants, pursuing felons, quelling domestic violence, and otherwise en-

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ports_analyses/regulating_guns.asp; Wendy Cukier & Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47s* 144 (2006).

tering into private homes. Of the 55 police officers killed in felonies in 2005, 42 deaths were from handguns. *See* Federal Bureau of Investigation, *Uniform Crime Report—Law Enforcement Officers Killed and Assaulted*, at tbl.28 (2005), http://www.fbi.gov/ucr/killed/2005/table28.htm.

A study of the District's handgun ban concluded that it coincided with an abrupt decline in firearm-caused homicides in the District but no comparable decline elsewhere in the region. Colin Loftin *et al.*, *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991). More recently, researchers found that a 10% increase in handgun ownership increases the homicide rate by 2%. *See* Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1095-98 (2001). Not surprisingly, other countries have had success with handgun bans and near-bans. Cukier & Sidel, *supra*, at 178-205.

Second, all too often, in the heat of anger, handguns turn domestic violence into murder. Seventy-two percent of women killed in firearm homicides in 2004 were killed by handguns. Violence Policy Center, *When Men Murder Women: An Analysis of 2004 Homicide Data*, at 3 (Sept. 2006), http://www.vpc.org/studies/wmmw2006.pdf. People who live in houses with firearms, particularly handguns, are almost three times more likely to die in a homicide, and much more likely to die at the hands of a family member or intimate acquaintance than people who do not. *See* Arthur L. Kellermann *et al.*, *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993).

Third, handguns cause accidents, frequently involving children. The smaller the weapon, the more likely a child can use it, and children as young as three years old are strong enough to fire today's handguns. David Hemenway, *Private Guns, Public Health* 32 (2004). Every year, the majority of people killed in handgun accidents are young adults and children, including dozens under the age of 14. *See* National Center for Health Statistics, *Trend C Table 292: Deaths for 282 Selected Causes*, at 1888 (2006), http://www.cdc.gov/nchs/data/statab/gm292_3.pdf.

Fourth, handguns are easy to bring to schools, where their concealability and capacity to fire multiple rounds in quick succession make them especially dangerous. In urban areas, as many as 25% of junior high school boys carry or have carried a gun. Jack M. Bergstein *et al.*, *Guns in Young Hands: A Survey of Urban Teenagers' Attitudes and Behaviors Related to Handgun Violence*, 41 J. Trauma 794 (1996). In the recent Virginia Tech shooting, a single student with two handguns discharged over 170 rounds in nine minutes, killing 32 people and wounding 25 more. Reed Williams & Shawna Morrison, *Police: No Motive Found*, Roanoke Times, Apr. 26, 2007, at A1.

Fifth, handguns enable suicide. A study was conducted comparing the District to nearby Maryland and Virginia immediately after the District's handgun ban was enacted, when no changes were made in the Maryland and Virginia laws. There was a 23% drop in suicides by firearms in the District and no increase in other suicide methods. Loftin, *supra*. Moreover, the District's overall, youth, and firearms-related suicide rates have consistently been the lowest in the Nation. *See* National Center for Injury Prevention and Control, WISQARS Injury Mortality Reports, 1999-2004, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (interactive database). Handguns pose a higher suicide risk than other firearms; indeed, purchasing a handgun correlates to a doubled risk that the buyer will die in a homicide or a suicide. *See* Hemenway (*Private Guns*), *supra*, at 41; Peter Cummings *et al.*, *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 Am. J. Pub. Health, 974, 976–77 (1997).

The Council had good reason to conclude that other less restrictive measures were insufficient by themselves. PA104a. Safety mechanisms, while helpful, do not always work as designed, and compliance, even with mandatory safety laws, is imperfect. *See* Cynthia Leonardatos *et al.*, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 Conn. L. Rev. 157, 169-70, 178-80 (2001). Furthermore, safe-storage policies are of no help where the handgun owner is determined to kill a family member or himself.

Although there are competing views today, just as in 1976, the Council acted based on plainly reasonable grounds. It adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights' proponents contend are actually the weapons of choice for home defense. Dave Spaulding, *Shotguns for Home Defense: Here's How to Choose and Use the Most Effective Tool for Stopping an Attack*, Guns & Ammo, Sept. 2006, at 42; Clint Smith, *Home Defense*, Guns Mag., July 2005, at 50 (preferring rifles). The Second Amendment inquiry requires no more.[13]

2. The Trigger-Lock Requirement Is A Reasonable Safety Regulation.

Like the handgun ban, the trigger-lock requirement in D.C. Code § 7-2507.02 is a reasonable regulation designed to prevent accidental and unnecessary shootings, while preserving citizens' ability to possess safely stored firearms. And as with the ban, the Council debated the trigger-lock requirement extensively and carefully considered opposing viewpoints. *E.g.*, Afternoon Council Sess. Tr., May 18, 1976, at 31-33; Evening Council Sess. Tr., Jun. 15, 1976, at 33-34. Only then did it enact a trigger-lock requirement based on the predictive judgment that it would save lives. *See supra* page 6.

That conclusion is confirmed by subsequent studies. In 1991 the U.S. General Accounting Office found that 8% of accidental shooting deaths resulted from shots fired by children under the age of six, which could have been prevented by child-proof safety locks. U.S. Gen Accounting Office, *Accidental Shootings:*

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[13] The majority independently erred in its determination of the proper relief to be accorded respondent. Finding no disputed issue of material fact, it ordered that summary judgment be entered in favor of respondent. PA55a. The facts it found relevant depended, however, on its mistaken adoption of a *per se* rule. If it had properly considered the challenged laws' reasonableness, it should have affirmed the dismissal of the complaint given the facts as found by the Council, as confirmed by subsequent studies. At a minimum it should have remanded for further proceedings to allow the parties and the district court to address reasonableness in the first instance. In any event, the record is sufficient for this Court to order entry of judgment for the District.

Many Deaths and Injuries Caused by Firearms Could Be Prevented 17-19 (1991), http://161.203.16.4/d20t9/143619.pdf. Nor are adults immune from the kind of accidental shootings that send 15,000 people per year to hospital emergency rooms. Karen D. Gotsch *et al.*, *CDC Surveillance Summary No. SS-2, Surveillance for Fatal and Nonfatal Firearm-Related Injuries—United States 1993-1998* 2 (Apr. 13, 2001), http://www.cdc.gov/mmwr/pdf/ss/ss5002.pdf.

Respondent does not argue, and the majority below did not find, that it is unconstitutional for the District to require trigger locks on guns under normal circumstances. C.A. Br. 59; PA55a. Rather, respondent's argument—which the panel embraced as a corollary of its invalidation of the handgun ban—is that the trigger-lock requirement is unconstitutional because it does not specifically contain a self-defense exception. According to respondent, even if he lawfully possessed a handgun, the District would prohibit him from unlocking it to defend himself against a sudden intruder in his home. If respondent were correct, the District agrees that the law would be unreasonable.

Respondent is wrong. Such an exception is fairly implied in the trigger lock requirement, just as it is in many of the District's other laws. *See, e.g.*, *United States v. Bailey*, 444 U.S. 394, 410-11 (1980) (noting existence of duress and necessity defenses in common law); *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) (recognizing the necessity defense in criminal cases). As Councilmember Wilson noted, "it would have to be a very irresponsible and unintelligent judge" who would punish a person for unlocking and using a gun to defend herself against a rapist. Evening Council Sess. Tr. 26:22-28:8, Jun. 15, 1976.

This Court should not accept respondent's invitation to create an unnecessary constitutional question. Federal courts should construe statutes to avoid serious constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Furthermore, the District's courts have not yet interpreted section 7-2507.02, and local courts normally should have the first opportunity "to avoid constitutional infirmities." *New York v. Ferber*, 458 U.S. 747, 768 (1982).

Moreover, respondent's assertion that the law *might* have unconstitutional consequences under some narrow and hypothetical circumstances is insufficient to render it wholly invalid in this facial challenge. The law may be struck down only if there is "no set of circumstances" under which it would be constitutional, *United States v. Salerno*, 481 U.S. 739, 745 (1987), a burden that respondent cannot meet.

In any event, even if the lack of a specifically enumerated self-defense exception were enough to render the trigger-lock requirement unconstitutional, the proper remedy would be for this Court to disapprove only that limited application of the trigger-lock requirement and leave the remainder of the District's laws intact. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-30 (2006).

3. The Licensing Requirement Does No More Than Properly Limit Those Who May Carry Handguns.

As an additional corollary to its holding on the handgun ban, the majority invalidated D.C. Code

§ 22-4504(a), which requires a license to carry concealable weapons in the District, seemingly on the theory that it eliminates respondent's right to use handguns for self-defense in his home. However, licensing laws ensure that only law-abiding, competent individuals have access to dangerous weapons. The majority recognized that the Second Amendment permits governments to deny firearms to felons and the insane and to test for firearm proficiency and responsibility. PA52a; *see Lewis*, 445 U.S. at 65 n.8 (felons). Such laws legitimately "promote the government's interest in public safety" and are "consistent with a 'well regulated militia.'" PA52a.

Nonetheless, the majority concluded that section 22-4504(a) functions as a complete ban on using handguns for self-defense at home because one cannot obtain a license for a handgun. PA54a-55a. But if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified. Once he did, nothing in District law would prevent him from "carrying" his gun in his home when needed for self-defense.

* * *

The Second Amendment was not intended to tie the hands of government in providing for public safety. Reasonable regulations of firearms have been commonplace since the founding of the Republic. Consistent with this tradition, the Council enacted gun-control legislation tailored to the unique problems presented by the District's urban environment. The contrary holdings of the court of appeals were premised upon reasoning with no basis in law or logic. This Court should restore the District's laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

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AND MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

◆

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Respondent Dick Anthony Heller successfully challenged the Nation's three most draconian infringements of Second Amendment rights. D.C. Code section 7-2502.02(a)(4) forbids registration of handguns, thereby effecting a ban on the possession of handguns within the home. D.C. Code section 7-2507.02 forbids the possession of any functional firearms within the home, without exception. D.C. Code section 22-4504(a) forbids the carrying of a handgun without a license. This section was amended in 1994 to criminalize the unlicensed carrying of a handgun within one's home. "It is common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable." *Bsharah* v. *United States*, 646 A.2d 993, 996 n.12 (D.C. 1994). Respondent challenges this provision only as it relates to his home.

No state, and only one other major city (Chicago), bans handguns outright. The other two provisions appear unique to Washington, D.C.

In reviewing the handgun ban, the D.C. Circuit correctly applied this Court's test for determining which "arms" are constitutionally protected. *United States* v. *Miller*, 307 U.S. 174 (1939). The court found that handguns pass the *Miller* test, as they are arms of the type in common use by individuals, the possession of which can contribute to the common defense. PA53a.

The D.C. Circuit further held, correctly, that as home possession of handguns is constitutionally protected, Petitioners may not prohibit their movement within the home. The court struck down the license provision for carrying handguns as applied to home possession. PA54a-55a.

Finally, the D.C. Circuit correctly found that the literal text of section 7-2507.02 "amounts to a complete prohibition on the lawful use of handguns for self-defense," PA55a, and is thus unconstitutional.

SUMMARY OF ARGUMENT

The Second Amendment plainly protects "the right of the people"—an individual right—"to keep and bear arms."

However else Petitioners might regulate the possession and use of arms, their complete ban on the home possession of all functional firearms, and their prohibition against home possession and movement of handguns, are unconstitutional.

The Amendment's structure and etymology are not overly mysterious. The first clause, referencing the importance of "[a] well regulated Militia," provides a non-exclusive yet perfectly sensible justification for securing the people's right to keep and bear arms. In any event, the Second Amendment's preamble cannot limit, transform, or negate its operative rights-securing text.

The Second Amendment was engendered by the Framers' bitter experience with the King's disarmament of the population. That disarmament was especially pernicious to the colonists, who fervently believed they possessed an individual right to arms. In resisting British tyranny, the militia were not directed by the government officials they sought to overthrow, but certainly depended on the citizenry's familiarity with, and private possession of, firearms.

The Second Amendment's text thus reflects two related, non-exclusive concerns: it confirms the people's right to arms and explains that the right is necessary for free people to guarantee their security by acting as militia.

The Second Amendment's drafting and ratification history demonstrates it was designed to secure individual rights, consistent with the demands of the Anti-Federalists, whom the Bill of Rights was intended to mollify. Petitioners' militia theory was specifically addressed—and rejected—by the Framers, and that rejection is confirmed by centuries of precedent. Precedent likewise confirms the individual nature of Second Amendment rights.

Under this Court's precedent, the arms whose individual possession is protected by the Second Amendment are those arms that (1) are of the kind in common use, such that civilians would be expected to have them for ordinary purposes, and (2) would have military utility in time of need. A weapon that satisfies only one of these requirements would not be protected by the Second Amendment. Handguns indisputably satisfy both requirements.

Petitioners concede that a functional firearms ban would be inconsistent with an individual right to arms. The dispute surrounding D.C. Code section 7-2507.02 thus merely concerns statutory interpretation. The D.C. Circuit's interpretation of this section's language is correct.

Although this case does not call upon the Court to determine the standard of review applicable to regulations of Second Amendment rights, Respondent observes that the right to arms protects two of the most fundamental rights—the defense of one's life inside one's home, and the defense of society against tyrannical usurpation of authority. Petitioners' casual use of social science sharply underscores the importance of securing Second Amendment rights with a meaningful standard of review.

Finally, Petitioners' contention that the Second Amendment is not binding law within the Nation's capital is spurious.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP ORDINARY FIREARMS, UNRELATED TO GOVERNMENT MILITARY SERVICE.

A. Preambles Cannot Negate Operative Text.

By its own terms, the rationale of the Second Amendment's preamble is not exclusive. The operative rights-securing clause is grammatically and logically independent of the preamble. Skilled diplomacy, a powerful army, or adherence to the constitution may sufficiently provide for "the security of a free state," and still the people would enjoy their right to arms. Most critically, the preamble cannot contradict or render meaningless the operative text.

As Petitioners note, preambles are examined only "[i]f words happen to still be dubious." Pet. Br. 17 (quotation and citation omitted). "[B]ut when the words of the enacting clause are clear and positive, recourse must not be had to the preamble." James Kent, 1 COMMENTARIES ON AMERICAN LAW 516 (9th ed. 1858). "The preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, it cannot be used to create doubt or uncertainty." Norman Singer, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 47.04, at 295 (7th ed. 2007).

The Framers were familiar with these rules of construction. One influential English precedent held:

> I can by no means allow of the notion that the preamble shall restrain the operation of the enacting clause; and that, because the preamble is too narrow or defective, therefore the enacting clause, which has general words, shall be restrained from its full latitude, and from doing that good which the words would otherwise, and of themselves, import; which (with some heat) his Lordship said was a ridiculous notion.

Copeman v. *Gallant*, 1 P. Wms. 314, 320 (Ch. 1716); see also Edward Wilberforce, STATUTE LAW: THE PRINCIPLES WHICH GOVERN THE CONSTRUCTION AND OPERATION OF STATUTES 288-89 (1881).

> [G]eneral words in the enacting part, shall never be restrained by any words introducing that part; for it is no rule in the exposition of statutes to confine the general words of the enacting part to any particular words either introducing it, or to any such words even in the preamble itself.

King v. *Athos*, 8 Mod. Rep. 136, 144 (K.B. 1723); see also *Mace* v. *Cadell*, 1 Cowp. 232, 233 (K.B. 1774) ("if the statute meant to comprehend nothing more than is contained in the preamble, it means nothing at all").

Preambles are "properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble." 1 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 326-27 (2d ed. 1851). Accordingly, the Constitution's other preambles are given no weight. "Although that [opening] Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power. . . ." *Jacobson* v. *Massachusetts*, 197 U.S. 11, 22 (1905).

The Copyright and Patent Clause preamble would arguably possess greater operative force than that of the Second Amendment, as it begins with the infinitive that introduces most powers of Congress. The power "[t]o promote the Progress of Science and the useful Arts," U.S. CONST. art. I, § 8, cl. 8, viewed with the same breadth as the power "[t]o regulate Commerce," U.S. CONST. art. I, § 8, cl. 3, could stand alone absent the text that follows. In contrast, the Second Amendment's preamble merely declares a concept. Yet "Congress need not 'require that each copyrighted work be shown to promote the useful arts.'" *Schnapper* v. *Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981) (citations omitted). And this Court does not question whether copyright and patent laws serve the preambular purpose of promoting progress, though some laws might fail such examination. *Eldred* v. *Ashcroft*, 537 U.S. 186, 212 (2003).

That the Second Amendment contained a declaration of purpose was not unusual for its day. But such declarative language was never given the transformative effect urged by Petitioners. E.g., Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U.L. Rev. 793, 794-95 (1998). The same Congress that passed the Second Amendment also reauthorized the Northwest Ordinance of 1787, containing this language: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52. But nobody would seriously contend that were religion, morality, or knowledge one day found unnecessary for good government, schools should no longer be encouraged in the states of the former Northwest Territory.

Petitioners argue that the preamble should be given controlling weight because "'it cannot be presumed that any clause in the constitution is intended to be without effect.'" Pet. Br. 17 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)). But their citation to *Marbury* is incomplete—the passage concludes: "unless the words require it." *Marbury*, 5 U.S. (1 Cranch) at 174. Because Petitioners urge an interpretation of the preamble inconsistent with the plain meaning of the operative text, and considering the established rules of construction governing preambular language, the "presumption" urged by Petitioners is rebutted. Notwithstanding *Marbury*, the Court did not give force to the opening preamble in *Jacobson* or to the Copyright preamble in *Eldred*.

No doubts or ambiguities arise from the words "the right of the people to keep and bear arms shall not be infringed." The words cannot be rendered meaningless by resort to their preamble. Any preamble-based interpretive rationale demanding an advanced degree in linguistics for its explication is especially suspect in this context. "A bill of rights may be considered, not only as intended to give law, and assign limits to government . . . , but as giving information to the people [so that] every man of the meanest capacity and understanding may learn his own rights, and know when they are violated. . . ." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES, app. 308 (1803).

B. The Second Amendment's Plain Text Secures an Individual Right.

"The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia.*" *Patton* v. *United States*, 281 U.S. 276, 298 (1930), overruled on other grounds, *Williams* v. *Florida*, 399 U.S. 78 (1970). There should be no distinction among "'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments. . . ." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (citation omitted).

Conceding that the Second Amendment secures individual rights, Petitioners nonetheless argue that the term "bear arms" is exclusively military, such that the Second Amendment right can be exercised only under the direction of a governmental military organization. Putting aside this rather strange concept of rights—a "right" to particular weapons in an environment where the individual is obliged to obey orders, or a "right" to defend the government but not oneself or one's family—the text does not support this notion.

"Keep and bear" embody distinct concepts in the Second Amendment, just as "speedy and public" reflect separate rights in the Sixth Amendment. Had the Framers eliminated either "speedy" or "public" from the Sixth Amendment, they would have significantly narrowed the right's scope. Cf. U.S. CONST. amend. VIII (proscribing "cruel and unusual punishments").

This case concerns the right to "keep" arms in the ordinary sense of the verb: to possess at home.[1] "Keep" has no exclusive military connotation. "Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944). When the Constitution was written, English law had "settled and determined" that "a man may keep a gun for the defence of his house and family." *Mallock* v. *Eastly*, 87 Eng. Rep.

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[1] See Question Presented. The "bearing" of arms implicates different interests and concerns not at issue here.

1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). Legislatures in England and America employed "keep" in the purely individual sense—especially when disarming minorities. See, e.g., 1 W. & M., Sess. 1, c. 15, § 4 (1689) ("no papist . . . shall or may have or keep in his house . . . any arms. . . ."); 4 Hening's Statutes at Large (Va.) 131 ("no negro, mulatto, or Indian . . . shall hereafter presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever. . . .").

Neither did the term "bear arms" have a uniquely military application. See, e.g., *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting). Johnson and Webster defined "bear" primarily as "to carry." 1 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (not paginated); Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (not paginated) (also "To wear . . . bear arms in a coat"). Accordingly, "bear arms" often had purely civilian connotations. For example, Parliament forbade Scottish Highlanders to "use or bear . . . side-pistols, or guns, or any other warlike weapons, in the fields, or in the way coming or going to, from or at any church, market, fair, burials, huntings, meetings, or any occasion whatsoever. . . ." 9 Geo. I Chap. 26 (1724), 15 Statutes at Large 246-47 (1765);[2] cf. *Scott* v. *Sandford*, 60 U.S.

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[2] See Clayton Cramer & Joseph Olson, *What Does "Bear Arms" Imply?*, GEO. J.L. & PUB. POL'Y (forthcoming 2008), http://papers.ssrn.com/abstract=1081201 (supplying numerous examples).

(19 How.) 393, 417 (1857) (Constitution secured citizens' right "to keep and carry arms wherever they went," along with rights of speech and assembly).[3]

Eighteenth-century constitutional drafters used "bearing arms" in the individual sense. See PA. CONST. OF 1776, art. XIII ("That the people have a right to bear arms for the defence of themselves and the state. . . ."); VT. CONST. OF 1777, Ch. 1, art. XV (same). Petitioners' claim that Pennsylvania's drafters used "themselves" collectively not only defies the word's normal meaning, but would also render it redundant of "the state."[4]

Pennsylvania reiterated "the right of citizens to bear arms, in defence of themselves and the State" in its 1790 constitution. James Wilson, delegate to Pennsylvania's 1790 constitutional convention and later Associate Justice of this Court, explained:

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[3] That early congressional references to "bearing arms" related to military matters was a function of (1) the issues facing Congress in those years, (2) the perception that Congress did not have broad regulatory powers over private arms, and, of course, (3) the Second Amendment's limitation on those powers. Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 260-62 (2004).

[4] "Themselves" as otherwise used by the Pennsylvania drafters is self-evidently not collective: "[T]he people have a right to hold themselves, their houses, papers, and possessions free from search or seizure. . . ." PA. CONST. OF 1776, art. X.

> [W]hen it is necessary for the defence of one's person or house . . . it is the great natural law of self-preservation, which . . . cannot be repealed, or superseded, or suspended by any human institution [but] is expressly recognized in the constitution of Pennsylvania.

3 WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson ed., 1804) (citing PA. CONST. OF 1790, art. IX, sec. XXI); see also *Ortiz* v. *Commonwealth*, 681 A.2d 152, 156 (Pa. 1996). "The constitutions of most of our States assert that all power is inherent in the people; that . . . it is their right and duty to be at all times armed. . . ." *Letter from Thomas Jefferson to Justice John Cartwright* (June 5, 1824), 16 WRITINGS OF THOMAS JEFFERSON 45 (A.A. Lipscomb ed., 1907).

Perhaps the most instructive 18th-century usage of "bear arms" is that of James Madison, author of the Second Amendment. In 1785, Madison introduced in Virginia's legislature a hunting bill drafted by Jefferson. The bill stated, in part:

> [I]f, within twelve months after the date of the recognizance he shall *bear a gun* out of his inclosed ground, *unless whilst performing military duty*, it shall be deemed a breach of the recognizance, and be good cause to bind him a new, and every such *bearing of a gun* shall be a breach of the new recognizance. . . .

A Bill for Preservation of Deer (1785), in 2 PAPERS OF THOMAS JEFFERSON 443-44 (J. Boyd ed., 1950) (emphases added).

Madison's usage of "bear" was no personal idiosyncrasy. St. George Tucker, the leading legal scholar of the early Republic, observed:

> The bare circumstance of having arms . . . of itself, creates a presumption of warlike force in England. . . . But ought that circumstance, of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself?

5 Tucker, BLACKSTONE'S COMMENTARIES, app. B at 19 (*Concerning Treason*).

"An individual could bear arms without being a soldier or militiaman." Leonard Levy, ORIGINS OF THE BILL OF RIGHTS 135 (1999). But even if "bear arms" had a purely military connotation, that idiomatic meaning would itself be transformed by inclusion of the word "keep." For example, "Mary knows how to stir the pot" conveys a meaning (i.e., cause trouble) very different from, "Mary knows how to hold and stir the pot" (i.e., cook).

* * *

To the extent the Second Amendment's preamble informs the nature of the operative rights-securing provision, the necessity of a "well regulated Militia" does not negate, but rather advances the individual character of the right to arms.

The Militia is constitutionally defined as a preexisting entity, separate and apart from an army or navy that might be raised. U.S. CONST. amend. V (". . . in the land or naval forces, or in the Militia"). "Congress was authorized both to raise and support a national army and also to organize 'the Militia.'" *Perpich* v. *Dep't of Def.*, 496 U.S. 334, 340 (1990). "[T]he militia" are not "troops" or "standing armies," but "civilians primarily"—"all males physically capable of acting in concert for the common defense. . . ." *Miller*, 307 U.S. at 179.

"Who are the Militia? They consist now of the whole people. . . ." 3 Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 425 (2d ed. 1836) (George Mason). That "the 'militia' is identical to 'the people,'" Akhil Amar, THE BILL OF RIGHTS 51 (1998), is evident from Madison's description of "a militia amounting to near half a million of citizens with arms in their hands," who could resist an oppressive standing army. THE FEDERALIST NO. 46, 244 (James Madison) (Carey & McClellan eds., 1990). This militia reflected "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to "governments [that] are afraid to trust the people with arms." *Id.*; BOSTON EVENING POST, Nov. 21, 1768, at 2, col. 3 ("The total number of the Militia, in the large province of New-England, is upwards of 150,000 men, who all have and can use arms. . . ."); NEW YORK PACKET AND

AMERICAN ADVERTISER, Apr. 4, 1776, at 2, cols. 1-2 ("Whoever asserts that 10 or 12,000 soldiers would be sufficient to control the militia of this Continent, consisting of 500,000 brave men, pays but a despicable compliment to the spirit and ability of Americans").

That "the militia" was broadly composed of the general population, and expected to check government force, belies the notion that "militia" refers only to specific forces organized by government. The American militia's broad composition set it apart from its far narrower English counterpart. "[T]he Militia, in this country, is not a Select part of the People, as it is in England, set apart for that purpose, under Officers . . . employed and paid at the publick charge; but the Whole body of the people from sixteen years of age to fifty." *Speech of Gov. Morris*, June 29, 1744, in 6 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF NEW JERSEY 187 (William Whitehead ed., 1882). "Select militia members in England were required to have qualifications even higher than those required to be a member of the House of Commons." David Young, THE FOUNDERS' VIEW OF THE RIGHT TO BEAR ARMS 11 n.6 (2007) (citation omitted).

The broad civilian understanding of who constitutes "the Militia" continues today. Congress defines "the militia of the United States" as comprising all able-bodied males from 17 to 45, who are or intend to become citizens; and members of the National Guard up to age 64. 10 U.S.C. §§ 311, 313.[5] Excluded from this definition of Militia, among others, are "members of the armed forces, except members who are not on active duty." 10 U.S.C. § 312(a)(3); accord D.C. Code § 49-401 (District of Columbia required to enroll most able-bodied males age 18 to 45 in militia).

In order that the ordinary civilians constituting the Militia might function effectively, it was necessary that the people possess arms and be familiar with their use. After all, individuals called for militia duty were "expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Miller*, 307 U.S. at 179. Thus, the "militia system . . . implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence." *Id.* at 179-80 (citation omitted); see also NEW YORK JOURNAL, May 11, 1775, at 1, cols. 2-3 (recommending "to the inhabitants of this country, capable of bearing arms, to provide themselves with arms and ammunition, to defend their country in case of any invasion").

That a militia be "well regulated" does not mean that it must necessarily be the subject of state control. With respect to troops, "regulated" is defined as "properly disciplined." 7 OXFORD ENGLISH DICTIONARY

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[5] Congress may define that part of the Militia to which it wishes to apply its Article I powers, but Petitioners defy logic in suggesting that the protection of a right against the federal government may thus be legislated away by Congress. Pet. Br. 14 n.2.

380 (1933). In turn, "discipline" in relation to arms is defined as "training in the practice of arms." 3 OXFORD ENGLISH DICTIONARY 416 (1933). Notably, pre-revolutionary Americans forming voluntary associations for the purpose of resisting British rule, including Washington and Mason, employed the term "well regulated militia" to describe their associations. 1 Kate Mason Rowland, LIFE OF GEORGE MASON 428 (1892). These organizations were decidedly not sanctioned by any governmental authority.

George Mason succinctly explained the logic underlying the relationship of the Second Amendment's preamble to its operative text when he warned Virginia's ratifying convention that absent a Bill of Rights, "[t]he militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them." 2 Rowland, at 408.

The Second Amendment secures the *pre-existing* right of the people to keep and bear arms.[6] And it does so, in part, because a militia—comprised of the body of ordinary people proficient in the use of their private arms—was deemed necessary. Were the people denied their right to keep and bear arms, they could not function as a well regulated militia.

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[6] *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1875) (right to arms "not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence").

C. The Framers Secured an Individual Right to Keep and Bear Arms in Reaction to the British Colonial Experience.

"[C]onstitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past." *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (L. Hand, J.). The rights secured by the first eight amendments were not conjured at random, but in reaction to specific outrages of the King's rule. The Second Amendment is no exception. While Petitioners and their amici may not believe that English law secured an individual right to arms for self-defense, colonial Americans certainly did, and it was the repeated, wanton violation of that right that led them to demand and ratify the Second Amendment.

As British troops arrived in Boston to enforce the Townshend Acts in 1768, a call went out for the people to arm themselves. Responding to British criticism of the civilian armament, Samuel Adams declared that "it is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights . . . are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs." 1 WRITINGS OF SAMUEL ADAMS 299 (Harry Cushing ed., 1904). Citing Blackstone's "right of having and using arms for self-preservation and defence," Adams added, "[h]ow little do those persons attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to *provide themselves with arms for their defence* at any time. . . ." *Id.* at 317-18 (emphasis in original).

The "Journal of the Times" concurred:

> It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.

NEW YORK JOURNAL, Supplement, Apr. 13, 1769, at 1, col. 3.

So accepted was the notion that Americans had the right to arms that Crown prosecutors of the soldiers charged in the Boston Massacre invoked the victims' right to armed resistance against abusive Redcoats. 3 LEGAL PAPERS OF JOHN ADAMS 149, 274 (L. Wroth & H. Zobel eds., 1965). John Adams, in his successful defense of the soldiers, concurred: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence. . . ." *Id.* at 248.

Nonetheless, reports of British troops disarming Americans surfaced as early as February 1769. NEW YORK JOURNAL, Feb. 2, 1769, at 2, col. 2. And much to the dismay of the colonists, the governing council newly appointed for Massachusetts came to propose "the disarming of the town of Boston, and as much of the province as might be." BOSTON GAZETTE, Sept. 5, 1774, at 3, col. 2. The following day, Lt. General Thomas Gage, commander of the British military in America and Massachusetts Royal Governor, moved the powder stored at Charlestown to Castle William and forbade the release of privately owned powder from the Boston magazine. The ensuing unrest came to be known as "the Powder Alarm." Young, FOUNDERS' VIEW, at 37.[7]

The citizens of Suffolk County, Massachusetts promptly issued a proclamation denouncing the powder seizure (among other outrages). The Continental Congress quickly approved the "Suffolk Resolves." *Id.* at 38. In addition to the powder seizure, "[t]he Crown forcibly purchased arms and ammunition held in the inventory of merchants, and an order went out that the inhabitants must turn in their arms." Stephen Halbrook, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 45 (2008) (citation omitted).

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[7] Owing to the instability of black powder used in colonial times, fire safety measures of the day mandated that large stores of gunpowder, as those belonging to merchants, be stored in "powder houses" away from other structures, as were powder and other arms purchased by a community for the benefit of its citizens. The 1783 Massachusetts statute allegedly "prohibit[ing] Boston citizens from keeping loaded firearms in their homes," Pet. Br. 42, was a *fire safety* measure intended to regulate the storage of gunpowder: "An Act in Addition to the several Acts already made for the prudent storage of Gun-Powder within the Town of Boston." Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. The act opens with, "Whereas the depositing of loaded Arms . . . is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out," with no reference to firearms qua firearms being inherently dangerous. *Id.*

The order to disarm was apparently ignored, but British seizure of private arms continued. "They keep a constant search for every thing which will be serviceable in battle; and whenever they espy any instruments which may serve or disserve them,—whether they are the property of individuals or the public is immaterial,—they are seized. . . ." *Letter of Joseph Warren to Samuel Adams*, Sept. 29, 1774, in Richard Frothingham, LIFE AND TIMES OF JOSEPH WARREN 381 (1865).

The colonists expressed their displeasure over firearms seizures. Worcester County complained to Gage that although "the People [are] justified in providing for their own Defense," passing through Boston Neck entailed having "many places searched, where Arms and Ammunition were suspected to be; and if found seized; yet as the People have never acted offensively, nor discovered any disposition so to do, as above related, the County apprehend this can never justify the seizure of private Property." BOSTON GAZETTE, Oct. 17, 1774, at 2, cols. 2-3. "It is said that the troops, under your command, have seized a number of cartridges which were carrying out of the town of Boston, into the country; and as you were pleased to deny that you had meddled with private property . . . I would gladly be informed on what different pretence you now meddled with those cartridges. . . ." NEWPORT MERCURY (Rhode Island), Apr. 10, 1775, at 2, col. 1.

The British also prohibited importation of guns and powder, prompting further outcry. "Could they [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies?" NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, Jan. 13, 1775, at 1, col. 1 (reprinted in 1 AMERICAN ARCHIVES, 4TH SERIES 1065 (Peter Force ed., 1837)). South Carolina's General Committee protested that "by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them. . . ." 1 John Drayton, MEMOIRS OF THE AMERICAN REVOLUTION 166 (1821).

Notwithstanding the import prohibition and occasional seizure of private weapons, Gage understood that complete disarmament of the population required military domination. Halbrook, THE FOUNDERS' SECOND AMENDMENT at 49 (collecting sources). The colonists agreed: "[I]f they should come to disarming the inhabitants, the matter is settled with the town at once; for blood and carnage must inevitably ensue. . . ." *Letter of John Andrews*, Sept. 12, 1774, in PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 359 (1866).

Not surprisingly, the Revolution's first battle opened on April 19, 1775, with an ill-conceived British expedition to seize weapons from private property in Concord. Fear of arms seizures prompted Americans to transfer publicly stored weapons to their homes, and when Redcoats came to seize public and private arms alike, war erupted.

The immediate aftermath of Lexington and Concord found Boston cut off from the remainder of the province. Gage offered Bostonians free passage from the city provided they would deliver their arms for safekeeping. A vote was taken and the people agreed to Gage's terms, surrendering "1778 fire-arms, *634 pistols*, 973 bayonets, and 38 blunderbusses." Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON 95 (1851) (emphasis added).[8] Gage quickly reneged on his promise of safe passage. Young, FOUNDERS' VIEW, at 52.

Americans reacted strongly to the disarmament of Boston. Thomas Jefferson and John Dickinson drafted a "Declaration of the Causes and Necessity of Taking Up Arms," issued by the Second Continental Congress on July 6, 1775. Gage's disarmament scheme figured prominently among the "Causes" for armed revolt:

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[8] Another account repeats these numbers, save for 700 fewer bayonets. 1 David Ramsay, HISTORY OF THE AMERICAN REVOLUTION 176 (1789). Boston's 1765 population totaled 15,520. EARLY CENSUS MAKING IN MASSACHUSETTS, 1643-1765, 102 (1902).

> [I]t was stipulated that the said inhabitants having deposited *their arms* . . . should have liberty to depart, taking with them their other effects. They accordingly delivered up *their arms*, but . . . the governor ordered the arms . . . seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave *their most valuable effects* behind.

2 JOURNALS OF THE CONTINENTAL CONGRESS 136-37 (1905) (emphases added).

Disarmament as a grievance became a common theme among the Patriots. For example, addressing Indian tribes in search of alliance, Samuel Adams complained that the British "have told us we shall have no more guns, no powder to use. . . . How can you live without powder and guns? But we hope to supply you soon with both, of our own making." 3 WRITINGS OF SAMUEL ADAMS 212-13.

That the colonists cared little about the prospect of having their guns seized is not the only ahistorical concept underlying Petitioners' repudiation of the Second Amendment. Redcoats and Patriots alike would have puzzled at Petitioners' notion that the Revolution produced an exclusive governmental right to operate an organized militia. The "well regulated militia" of the American Revolution operated not merely beyond the control of, but in direct challenge to, the King's governors.

In Massachusetts, as in other colonies, militia officers were elected from among the militiamen. This "meant that [officers] appointed by the Royal governor would be thrown out. The Provincial Congress further usurped the Crown's militia power by appointing a Committee of Safety that could call out the militia when necessary." Halbrook, FOUNDERS' SECOND AMENDMENT at 48 (citation omitted). Gage recognized this process as a threat to British rule:

> The Officers of the Militia have in most Places been forced to resign their Commissions, And the Men choose their Officers, who are frequently made and unmade; and I shall not be surprized, as the Provincial Congress seems to proceed higher and higher in their Determinations, if Persons should be Authorized by them to grant Commissions and Assume every Power of a legal Government. . . .

1 PARLIAMENTARY REGISTER, 14TH PARLIAMENT, 1ST SESSION 58 (1802).

North Carolina's colonial governor, Josiah Martin, decried the new militias that "submit to the illegal and usurped authorities of [patriotic] Committees." William Hoyt, THE MECKLENBURG DECLARATION OF INDEPENDENCE 44 (1907); see also Vernon Stumpf, JOSIAH MARTIN 112 (1986) ("they are now actually endeavoring to form what they call independent Companies under my nose"). Virginia's Governor, Lord Dunmore, complained that "[e]very County is now Arming a Company of men whom they call an independent Company for the avowed purpose of protecting their Committee, and to be employed against Government if occasion require." *Letter to Earl of Dartmouth*, Dec. 24, 1774, in 2 WRITINGS OF GEORGE WASHINGTON 445 n.1 (Worthington Ford ed., 1889). Loyalists were horrified by the rise of extra-governmental militias, but Patriots such as John Adams would have none of the criticism:

> "The new-fangled militia," as the specious [Loyalist] calls it, is such a militia as he never saw. They are commanded through the province, not by men who procured their commissions from a governor as a reward for making themselves pimps to his tools, and by discovering a hatred of the people, but by gentlemen, whose estates, abilities, and benevolence have rendered them the delight of the soldiers. . . .

4 WORKS OF JOHN ADAMS 40-41 (1865).

Indeed, extra-governmental militias existed even in times of good relations with the Crown. Pennsylvania, owing to Quaker influence, was alone among the colonies in not having a governmentally organized militia for most of its history. But this did not mean that a militia was unneeded in Pennsylvania, or that the colony lacked for means of defense. Responding to the depredations of privateers on the Delaware River, Benjamin Franklin published *Plain Truth* in 1747, warning of dire consequences were the people, though well-armed, to remain unprepared. 3 WORKS OF BENJAMIN FRANKLIN 1-21 (Jared Sparks ed., 1882). Franklin quickly followed *Plain Truth* with *Form of Association*, laying out a vision of voluntary mutual self-defense "Associations" palatable to the religiously scrupulous. The Associations would be freely formed by individuals electing their own officers, with neither offensive intent nor governmental compulsion or oversight. 3 PAPERS OF BENJAMIN FRANKLIN 205 (Leonard Labaree ed., 1961).

Franklin's vision triumphed, the 1747 Association enrolling 10,000 men. William Shepherd, 6 HISTORY OF PROPRIETARY GOVERNMENT IN PENNSYLVANIA 530 (1896). But not everyone was comfortable with the arrangement:

> It strongly resembles treason. The people should have desired the president and council to appoint officers for their training, and put themselves under their direction. . . . This is erecting a government within a government, and rebelling against the king's authority.

Id. (quoting *Letter of Thomas Penn to Mr. Peters* (March 30, 1748)). The King in Council disallowed a 1755 law granting formal recognition of the voluntary associations, but Pennsylvanians continued their voluntary armed association in times of need. Young, FOUNDERS' VIEW, 20-23.

John Adams explicitly clarified that militia forces served their purpose regardless of whether they were organized pursuant to law. In the First Continental Congress, Adams proposed a resolution

> that it be recommended to all the Colonies, to establish by Provincial Laws, where it can be done, a regular well furnished, and disciplined Militia, and where it cannot be done by Law, by voluntary Associations, and private Agreements.

1 LETTERS OF DELEGATES TO CONGRESS 132 (Paul Smith ed., 1976).

As war approached, clashes between voluntary militias and colonial governors became not merely philosophical, but physical. When Governor Dunmore seized the powder at Williamsburg, Patrick Henry's Hanover Independent Militia Company forced restitution. R.D. Meade, PATRICK HENRY 50-51 (1969). One paper reported that as a "party of the militia being at exercise on Boston common, a party of the army surrounded them and took away their fire arms; immediately thereupon a larger party of the militia assembled, pursued the Army, and retook their fire arms." MASSACHUSETTS GAZETTE, Dec. 29, 1774, at 2, col. 2.

Militia forces operating without the government's blessing would prove critical to the American war effort. For example, the first American military offensive of the Revolution, Ethan Allen's capture of Fort Ticonderoga, was accomplished by "two hundred undisciplined men, with small arms, without a single bayonet. . . ." Ira Allen, THE NATURAL AND POLITICAL HISTORY OF THE STATE OF VERMONT 44 (reprint 1969).

Respondent does not suggest that members of private paramilitary organizations have a right to commit violent acts under the auspices of acting as a citizen militia. See, e.g., Va. Code § 18.2-433.2; Cal. Penal Code § 11460. The Framers, who organized the militia under the new constitution, doubtless agreed that citizens should not compete with legitimate government authority. "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes. . . . Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

But as expressed in the Declaration, the Framers saw no tension between accepting the lawful authority of an imperfect and even frequently unjust government, while retaining the ability to resist tyranny. The notion that independent, armed militia would engage in the treason and insurrection forbidden by the Constitution is spurious. The Framers, who used militia organized in direct defiance of the government they deposed, envisioned the militia as a tool for restoring the Constitution in the event of usurpation. See THE FEDERALIST NO. 46 (James Madison), *supra*; THE FEDERALIST NO. 29 (Alexander Hamilton).

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and it

> will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

2 Story, COMMENTARIES, *supra*, at 607.

Cooley agreed, explaining that the Second Amendment "is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people." Thomas Cooley, *The Abnegation of Self-Government*, 12 PRINCETON REV. 209, 213-14 (1883). The individual use of Second-Amendment-protected arms to check despotism, "far from being revolutionary, would be in strict accord with popular right and duty." *Id.*

> The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Silveira v. *Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). The Framers intended the Second Amendment to guard against "[o]ne of the ordinary modes, by which tyrants accomplish their purposes without resistance [which is] by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia." Joseph Story, A FAMILIAR EXPOSITION ON THE CONSTITUTION OF THE UNITED STATES 264 (1847).

Certainly Petitioners would not dispute Americans' justification for revolting against Great Britain, an event that would not have been possible without the private ownership of firearms. And should our Nation someday suffer tyranny again, preservation of the right to keep and bear arms would enhance the people's ability to act as militia in the manner practiced by the Framers.

That the Second Amendment was designed to secure a personal right of the citizens is clear from Madison's notes for the speech introducing the Bill of Rights. "They [the proposed amendments] relate first to private rights," 12 PAPERS OF JAMES MADISON 193-94 (C. Hobson et al. eds., 1979). Madison thus initially proposed placing the Second Amendment alongside other provisions securing individual rights in Article I, sec. 9—following the habeas corpus privilege and the proscriptions against bills of attainder and *ex post facto* laws, together with his proposed protections for speech, press, and assembly. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (N. Cogan ed., 1997).

If "bear arms" had the exclusively military connotation urged by Petitioners, no one would have proposed qualifying the phrase with "for the common defence." But the Senate rejected just that proposal. JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 77 (1820). Some collective rights adherents speculate that "common defence" was considered redundant, but more plausibly the Senate did not wish to narrow "bear arms" to a purely military usage. After all, the first Congress knew how to condition individual rights on militia service. E.g., U.S. CONST. amend. V (no presentment or indictment right "in cases arising in . . . the Militia, when in actual service. . . .")[9]

Indeed, House debates on the Second Amendment reveal the Framers' reluctance to adopt text that might denigrate the individual character of the right to arms. Collectivists assert that a proposal to include a conscientious objector clause in the Second Amendment confirms the military character of "bear arms." But the proposal was defeated after Rep. Gerry warned "that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms." 1 ANNALS OF CONGRESS 778 (1834).

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[9] Petitioners claim that the "common defence" language was scrapped as an excessive and controversial revision to the Constitution's body, Pet. Br. at 29 n.6, contradicting their claim that the Second Amendment was intended to remedy deficiencies in the Constitution's militia clauses. E.g., Pet. Br. 22, 33.

Representative Scott's objection to the conscientious objector language not only reflected the individual character of the Second Amendment, but also the distinct nature of "keep" and "bear": He said the language would "lead to the violation of another article in the constitution, which secures to the people the right of keeping arms. . . ." *Id.* at 796. Petitioners' claim that "[a]ll remarks recorded in the House's debate related to military service; none pertained to private use of weapons, including self-defense," Pet. Br. 28 (citations omitted), is conclusory—true only if one accepts that "bear arms" as used by Gerry, and the people's "right of keeping arms" as used by Scott, referred to military service. But that construction is insupportable.

Equally unpersuasive is the notion that the defeated conscientious objector clause's military nature imparted a military flavor to what remained and passed as the Second Amendment. Other amendments, as passed, contain unrelated concepts. The First Amendment secures various rights of expression and conscience, yet nobody would contend Madison intended to protect only religious speech or assembly. Likewise, the Fifth Amendment's Grand Jury Clause appears only tenuously related to the Takings Clause. No particular intent can be gleaned from a legislative combination of seemingly unrelated subjects, especially when anomalous provisions are omitted before final passage.[10]

Petitioners claim that the Second Amendment is derived from the seventeenth of certain amendments proposed by Virginia, and that Virginia "[s]eparately . . . proposed amending the Militia Clauses directly: '11th—That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.'" Pet. Br. 26 (citation omitted). Yet both proposals originated in the same document, the Second Amendment's precursor among provisions "constituting the bill of rights," and the militia amendment among what the convention labeled "[t]he other amendments." David Young, THE ORIGIN OF THE SECOND AMENDMENT 462 (2d ed. 2001).

If guaranteeing the people's "right to keep and bear arms," with reference to a "well regulated militia" and "a free state," were intended to secure the states a right to arm their militias, the Virginia Convention would not have separately proposed an explicit reservation of the states' militia powers. That the Second Amendment's direct precursor came to Congress in a "bill of rights," alongside a state militia power among "other amendments," strongly suggests the two are not identical.

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[10] Notably, Madison's initial Second Amendment draft starts with the right to keep and bear arms, separated from the remaining provisions with a semicolon—the same punctuation Madison used to distinguish unrelated concepts in the First and Fifth Amendments.

Indeed, if rejected language is any clue as to the meaning of that which was accepted, perhaps the most telling example was the Framers' rejection of the following proposed amendment: "That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. . . ." FIRST SENATE JOURNAL 126.

This proposal stated, in unmistakably direct and concise fashion, exactly that meaning which Petitioners would divine in the Second Amendment through tortured linguistics, fanciful explanations, and "hidden history." *And it was rejected by the Framers.* "[H]istory does not warrant concluding that it necessarily follows from the pairing of the concepts that a person has a right to bear arms solely in his function as a member of the militia." Robert Sprecher, *The Lost Amendment*, 51 AM. BAR ASS'N J. 554, 557 (1965).[11]

The Bill of Rights was never thought necessary by the Federalists, other than as a tool to placate Anti-Federalist resistance to the new constitution. While rejection of militia-powers amendments demonstrates that the Bill of Rights did not address each and every Anti-Federalist concern, the Second Amendment did at least address a different concern: the individual right to arms.

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[11] The ABA, founded in 1878, notes it has taken the opposite view "[f]or more than forty years." ABA Br. 2. Sprecher's article won the ABA's 1964 Samuel Pool Weaver Constitutional Law Essay Competition.

Demands for a bill of rights prevailed in five of seven constitutional ratifying conventions. The only provisions common to all were freedom of religion and the right to arms. New Hampshire's convention demanded recognition that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 Elliot, DEBATES at 326. Pennsylvania Anti-Federalists demanded

> that the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.

Levy, ORIGINS, *supra* at 143-44.[12] In Massachusetts, Samuel Adams demanded that "the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF

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[12] As did the Virginia majority, the Anti-Federalist Pennsylvania minority proposed a separate state-militia-powers amendment. *Id.*

MASSACHUSETTS 86 (1856). These were the sentiments Madison addressed in the Second Amendment.

Petitioners' notion that the Second Amendment secures state prerogatives to control their militia free of federal interference—as a limitation or repudiation of congressional militia powers—also contradicts the substantial body of precedent interpreting Congress's authority over the militia. As early as 1820, this Court held that Congress had preempted the field of militia regulation:

> Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised.

Houston v. *Moore*, 18 U.S. (5 Wheat.) 1, 24 (1820) (Washington, J.). Dissenting from *Houston*'s conclusion that state courts had concurrent jurisdiction over militia courts-martial, Justice Story (joined by Chief Justice Marshall) nevertheless observed that "a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress. . . ." *Houston*, 18 U.S. (5 Wheat.) at 52 (Story, J., dissenting). The Second Amendment "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id.* at 52-53.

This Court would later make clear that with the adoption of the Constitution, "[t]here was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies." *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918). And just as Congress may pre-empt the regulation of the states' militias under Article I, it likewise enjoys the exclusive power to call the states' militias into federal service, which has been delegated to the President since 1795. *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 43-44 (1849). Indeed, while Congress permits the states to maintain a voluntary defense force immune from federal conscription, 32 U.S.C. § 109(c), that part of the militia organized into the National Guard is under plenary federal control, such that a state's governor may not object to the President's training of Guard units overseas. *Perpich*, 496 U.S. 334. Petitioners' Second Amendment theory defies each of these precedents.

Petitioners are not the first to make this mistake. In 1863, Pennsylvania's Supreme Court enjoined the conscription of Union soldiers, theorizing that the Civil War draft violated the state's militia powers. *Kneedler* v. *Lane*, 45 Pa. 238, 259 (1863). One Justice invoked Petitioners' view of the Second Amendment to support the decision. *Id.* at 271-72 (Thompson, J., concurring). The court quickly reversed itself. *Id.* at 295. If Petitioners' derision of the individual right to arms as proposing treason or insurrection, Pet. Br. 15 n.3, questions the legitimacy of America's Revolution, their view of the Second Amendment's impact on the allocation of federal-state power would threaten the Union itself.

Petitioners' collective-purpose interpretation is also at odds with this Court's only direct Second Amendment opinion in *Miller*. In examining whether Miller had a right to possess his sawed-off shotgun, this Court never asked whether Miller was part of any state-authorized military organization. "Had the lack of [militia] membership or engagement been a ground of the decision in *Miller*, the Court's opinion would obviously have made mention of it. But it did not." *United States* v. *Emerson*, 270 F.3d 203, 224 (5th Cir. 2001) (footnote omitted). Indeed, the government advanced the collectivist theory as its first argument in *Miller*, PA40a, but the Court ignored it. The Court asked only whether the gun at issue was of a type Miller would be constitutionally privileged in possessing.

II. WASHINGTON, D.C.'S HANDGUN BANS ARE UNCONSTITUTIONAL.

To determine whether a particular weapon falls within the Second Amendment's protection, the Court need not apply any particular standard of review. The question is categorical, identical in kind to the questions courts routinely answer in determining what constitutes "religion" or "speech" under the First Amendment, or what constitutes a "search" or "seizure" under the Fourth.

Answering such questions is often a requisite first step in evaluating the constitutionality of governmental action. Only if protected speech is found will a court examine the permissibility of a particular burden on it; only if an officer has searched or seized a citizen will the reasonableness of the action be examined.

With respect to Petitioners' handgun ban, answering the threshold question resolves the case. If the possession of handguns is protected by the Second Amendment, handguns cannot be completely banned, however else the government may regulate their possession and use.[13] The fact that a type of arm is

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[13] Petitioners' claim that no "per se" categorical restrictions exist within the Bill of Rights, Pet. Br. at 44, is false. Cf. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 244 (2002) ("a law imposing criminal penalties on protected speech is a stark example of speech suppression"); cf. *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991)

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protected by the Second Amendment defeats Petitioners' attempt to position this case as a "standard of review" question, such that the government may ban any arms it deems too dangerous even if such arms are traditionally used for lawful civilian purposes. After all, Petitioners can conjure a rationale for banning *any* "arm."[14] Certainly the government may ban arms that are not protected by the Second Amendment and regulate those that are, but the threshold question of whether an arm falls into the former or latter category cannot be avoided.

Nor may the government justify a ban on a particular firearm simply by claiming to allow the possession of others. While it is a dubious proposition that Petitioners allow individuals *any* firearms for private home use, the government's compliance with the Constitution by allowing rifles would not permit the government to violate the Constitution by banning handguns—any more than the government could prohibit books because it permits newspapers and considers them an "adequate substitute." The court

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(Kennedy, J., concurring in judgment) (noting that "traditional legal categories" are "preferable to . . . ad hoc balancing").

[14] Indeed, until 1993, the city even banned mace. Now legal, "self-defense sprays" must be registered with the police. D.C. Code § 7-2502.14.

below properly termed this argument "frivolous." PA53a.[15]

The test for whether a particular weapon is or is not within the Second Amendment's protection was established in *Miller*. For all the claims that the D.C. Circuit failed to follow *Miller*, it is Petitioners and their amici—including the Solicitor General—who reject that precedent.

Miller's conceptual framework is plain. First, this Court inquires whether a weapon "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia," meaning that the weapon is "any part of the ordinary military equipment or that its use could contribute to the common defense." *Miller*, 307 U.S. at 178. Second, the Court explained that when fulfilling the Second Amendment's militia rationale, people "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179. The assumption is that at least some arms of the kind people would use for ordinary civilian purposes—arms in "common use at the time"—would also be the arms used in militia service. This is fully consistent with the historical record, *supra* at 29.[16] It is also

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[15] Petitioners implicitly concede the point in admitting that "banning all gun possession"—presumably without impacting the possession of other "arms"—would violate the Second Amendment. Pet. Br. 43.

[16] *Miller*'s earlier use of "at this time," *id.* at 178, makes clear that the relevant time period is the present, not 1791. The

(Continued on following page)

consistent with the understanding of "arms" at the time. "In law, arms are any thing which a man takes in his hand in anger, to strike or assault another." WEBSTER'S DICTIONARY, *supra* at 11 ("Arms").

In sum, an "arm" is protected under the *Miller* test if it is of the type that (1) civilians would use, such that they could be expected to possess it for ordinary lawful purposes (in the absence of, or even despite, legal prohibition), and (2) would be useful in militia service. The latter requirement may be in tension with the pre-existing right to keep and bear arms, which is not always related to militia service.[17] In that respect, *Miller* may be in tension with itself. There is no justification to limit the Second Amendment's protection to arms that have military utility.

Framers clearly intended to preserve people's ability to act as militia, and would not have expected future generations to have obsolete weapons in "common use" any more than the Framers would have expected to secure only 18th-century religions or media. The lineal descendants of personal arms of the type in predictable civilian usage are thus protected, but modern weapons of the type that serve no ordinary civilian function are not.

[17] "Attempting to draw a line between the ownership and use of 'Arms' for *private* purposes and the ownership and use of 'Arms' for *militia* purposes would have been an extremely silly exercise on the part of the First Congress if indeed the very survival of the militia depended on men who would bring their commonplace, *private* arms with them to muster." PA43a (emphasis in original).

But as a practical matter, the second prong adds nothing to the analysis in virtually all cases, including this one. Categorically, firearms "in common use" for civilian purposes—rifles, shotguns, and handguns—are plainly "part of the ordinary military equipment," and their "use could contribute to the common defense." *Miller*, 307 U.S. at 178. The D.C. Circuit's opinion is thus compatible with *Miller*, because handguns meet both *Miller* criteria. Arms that may have great military utility but which are inappropriate for civilian purposes are still sensibly excluded from the Second Amendment's protection, as civilians would not commonly use them.

The *Miller* test for whether a particular arm is constitutionally protected is hardly "unworkable." Pet. Br. 44. To the contrary, *Miller* presents a straightforward constitutional question, lending itself to practical application far more readily than questions of whether a search is "reasonable" under the Fourth Amendment, or at what point "government entanglement" with religion becomes so "excessive" as to violate the First Amendment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971). To the extent *Miller* can be read as establishing a "lineal descent" rule, this Court already applies precisely that framework in its Seventh Amendment jurisprudence. For example, parties in discrimination lawsuits are not denied access to civil juries simply because discrimination claims were unknown in 1791. *Curtis* v. *Loether*, 415 U.S. 189, 193-94 (1974).

In cases of unusual or exotic arms, or where the court lacks familiarity with a particular weapon, e.g., *Miller*, 307 U.S. at 178, courts may wish to receive evidence regarding whether a weapon has ordinary civilian application and can be traced to a form historically used by militia forces. But in most cases, as here, the answer will be clear.

No court has questioned that a handgun, generally, is an arm "of the kind in common use" by the public and is either "ordinary military equipment" or otherwise useful in a manner that "could contribute to the common defense." *Miller*, 307 U.S. at 178. As below, the Fifth Circuit experienced no difficulty applying the *Miller* test to handguns. *Emerson*, 270 F.3d at 227 n.22. Even courts hostile to the Second Amendment's individual nature likewise accept that handguns are the type of arms referenced in the Amendment. In adopting the collective-rights theory "without further analysis or citation of authority," *Emerson*, 270 F.3d at 224, the First Circuit conceded that a revolver would fall within the *Miller* test's ambit, as a handgun "may be capable of military use [and] familiarity with it might be regarded as of value in training a person to use a comparable weapon of military type and caliber." *Cases* v. *United States*, 131 F.2d 916, 922-23 (1st Cir. 1942); see also *Quilici* v. *Village of Morton Grove*, 695 F.2d 261, 266 (7th Cir. 1982) ("Handguns are undisputedly the type of arms commonly used for recreation or the protection of person and property") (internal citations omitted).

Indeed, this Court has not required any evidentiary hearing to determine that "pistols . . . may be supposed to be needed occasionally for self-defence." *Patsone* v. *Pennsylvania*, 232 U.S. 138, 143 (1914). That handguns are appropriate tools for lawful self-defense and are a class of weapon "of the kind in common use," *Miller*, 307 U.S. at 179, has been within the judicial notice of this Court and lower federal courts for nearly a century. Nearly forty percent of firearms produced today are handguns. See BATFE Report, http://www.atf.treas.gov/firearms/stats/afmer/afmer2006.pdf.

Congress's specific description of pistols as militia weapons in the Second Militia Act, so soon following passage of the Second Amendment, offers conclusive proof that handguns are within the Second Amendment's protection. PA50a-51a. In defining handguns as militia weapons, Congress broke no new ground. The Continental Congress likewise reported pistols as acceptable militia weapons, 25 JOURNALS OF THE CONTINENTAL CONGRESS 741-42 (1922), as had the various states. See, e.g., ACTS AND LAWS OF THE STATE OF CONNECTICUT 150 (1784); STATUTES OF THE STATE OF NORTH CAROLINA 592 (1791).

Eighteenth-century American governments recognized handguns as militia arms not only due to their military utility, but also owing to the deep roots of civilian handgun ownership from the dawn of the Nation's settlement. Thirteen percent of firearms listed in the Plymouth Colony's probate records from the 1670s were pistols, "and 54.5 percent of lead projectiles recovered from Plymouth Colony digs were pistol ammunition." Clayton Cramer and Joseph Olson, *Pistols, Crime, and Public Safety in Early America*, WILLAMETTE L. REV. (forthcoming 2008), http://ssrn.com/abstract=1081403 (citation omitted). Two weeks before the Boston Tea Party, John Andrews observed "'twould puzzle any person to purchase a pair of p__ls [pistols] in town, as they are all bought up, with a full determination to repell force by force." *Letter of December 1, 1773* in LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON, 1772-1776, 12 (Winthrop Sargent ed., 1866).

Some of those pistols might have been purchased by the Tea Party Indians, "each arm'd with a hatchet or axe, and pair pistoles." *Id. Letter of December 18, 1773.* The 634 pistols confiscated by General Gage constituted a full 18.25% of the firearms whose seizure the Continental Congress declared a *causus belli*.

Petitioners and their amici greatly overstate our Nation's history of handgun regulation. Washington, D.C.'s complete handgun ban was the first such prohibition on American soil since the Revolution. The fact that "never before in the more than two hundred years of our Republic has a gun law been struck down by the federal courts as a violation of the Second Amendment," Brady Br. 29, is a testament to the extreme nature of Petitioners' enactments. Notably, Petitioners' state amici do not defend or endorse a total handgun ban, which none of them maintains. New York Br. 1, 2.

The oft-cited case of *Aymette* v. *State*, 21 Tenn. 154 (1840), upheld prohibition of carrying certain knives and daggers, *not* guns, as suggested by some. E.g., ABA Br. 9; Chicago Br. 14 n.15, 32; LDF Br. 15-16.[18] When Tennessee's Supreme Court considered the constitutionality of banning (as opposed to regulating) the carrying of handguns, it struck down the law. *State* v. *Andrews*, 50 Tenn. 165 (1871). On occasion, the carrying of guns has been *required* in this country. See, e.g., 19 COLONIAL RECORDS OF THE STATE OF GEORGIA, PART 1, 138 (1911) (churchgoer "shall carry with him a gun, or a pair of pistols, in good order and fit for service, with at least six charges of gun-powder and ball, and shall take the said gun or pistols with him to the pew or seat").

Various briefs invoke Georgia's 1837 ban on the sale of certain pistols, Appleseed Br. 13; Law Professors Br. 18; Chicago Br. 14, but none mentions that the act was struck down—on Second Amendment grounds—in an as-applied challenge by a man who openly wore a prohibited pistol. *Nunn* v. *State*, 1 Ga. 243 (1846). Oakland does not ban all handguns, LDF Br. 20, a measure that would be impermissible under California law. *Fiscal* v. *City and County of San Francisco*, ___ P.3d ___, 2008 Cal. App. LEXIS 21 (Cal. Ct. App. Jan. 9, 2008). The cited measure addressed a specific type of handgun thought unsuitable for legitimate purposes. Major Cities Br. 9.

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[18] *Aymette* expressly upheld the "unqualified right to keep" arms. *Aymette*, 21 Tenn. at 160.

No trial is required to establish that handguns continue to be in common use for legitimate purposes and that their possession can contribute to the common defense. Handguns are therefore protected arms under *Miller*, and the right to "keep" them "shall not be infringed." U.S. Const. amend. II.

That the "keeping" at issue here relates to the home is significant. Even obscene materials not otherwise protected by the First Amendment may be viewed in the privacy of one's home. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). The exercise of Second Amendment rights within the home is entitled to no less protection. "The government bears a heavy burden when attempting to justify an expansion, as in gun control, of the 'limited circumstances' in which intrusion into the privacy of a home is permitted." *Quilici*, 695 F.2d at 280 (Coffey, J., dissenting).

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The Solicitor General greatly overstates the D.C. Circuit decision's implications for laws governing machineguns. Courts understand that the decision below striking down the handgun bans "address[es] only the possession of handguns, not machine guns." *Somerville* v. *United States*, 2008 U.S. Dist. LEXIS 412 at *4 (W.D. Mich. Jan. 3, 2008). And unlike the laws at issue here banning handguns,[19] federal law *does not* ban the private possession of machineguns, of which approximately 120,000 are in lawful civilian possession. Bureau of Justice Statistics, *Selected Findings: Guns Used in Crime* 4 (July 1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf (240,000 registered machineguns); Gary Kleck, TARGETING GUNS: FIREARMS AND THEIR CONTROL 108 (1997) (half of registered machineguns are in civilian use) (citing BATF, *Statistics Listing of Registered Weapons*, Apr. 19, 1989).[20]

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[19] This case does not address Petitioners' machinegun ban, D.C. Code § 22-4514(a).

"ATF's interest is not in determining why a law-abiding individual wishes to possess a certain firearm or device, but rather in ensuring that such objects are not criminally misused." Testimony of Stephen Higgins, BATF Director, in *Hearings on H.R. 641 and Related Bills, House Judiciary Committee Subcommittee on Crime*, 98th Congress 111 (1986). To that end, federal law subjects machinegun possession to the same stringent regulatory regime considered in *Miller*. 26 U.S.C. § 5801, *et seq.*; 27 C.F.R. §§ 478.98, 479.84, *et seq.* These regulations work: "it is highly unusual—and in fact, it is very, very rare," that legally owned machineguns are criminally misused. Higgins, *supra*, at 117.

Had Miller possessed a machinegun, this Court would presumably have had little trouble finding that the weapon had militia utility. The Court might nonetheless have held that machineguns fall outside the scope of the Second Amendment's protection as they were not "in common use at the time" such that civilians could be expected to have possessed them for ordinary lawful purposes. *Miller*, 307 U.S. at 179.

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[20] Title 18 U.S.C. § 922(o) prohibits the civilian transfer or possession of machineguns not lawfully possessed by May 19, 1986, exempting previously authorized machineguns.

And even if this Court had accepted that some machineguns are protected by the Second Amendment, their current tight regulation under federal law could well pass any level of scrutiny devised by this Court for the regulation of protected arms. Of course, Respondent's simple revolver is no machinegun, and the types of restrictions imposed by the National Firearms Act—including an FBI background check, $200 tax, authorization from one's local chief law enforcement officer, and a statement of "reasonable necessity"—would be inappropriate to apply to a common handgun.

But this case is not about what regulations ought to govern machineguns. The question is whether the arms at issue—including handguns—are protected at all. They are.

III. WASHINGTON, D.C.'S FUNCTIONAL FIREARMS BAN IS UNCONSTITUTIONAL.

Petitioners concede that if the Second Amendment protects an individual right, "a law that purported to eliminate that right—for instance, by banning all gun possession, or allowing only a firearm that was so ineffective that the law effected functional disarmament," would be unconstitutional. Pet.

Br. 43-44.[21] The only dispute is whether D.C. Code section 7-2507.02 "effects functional disarmament."

Determining whether section 7-2507.02 effects functional disarmament requires no fact-finding. And as Petitioners concede, a functional firearms ban would be unconstitutional "whatever [a Legislature's] reasons" might be for enacting it. Pet. Br. 43. Making matters easier, Petitioners agree that section 7-2507.02 "would be unreasonable" if it offered no provision for home self-defense. Pet. Br. 56.

The statutory language is unequivocal: without exception, individuals may never possess a functional firearm at home. If Petitioners had wished to create an exception for home self-defense, they knew how to do so. Section 7-2507.02 permits functional firearms "at [a] place of business, or while being used for lawful recreational purposes." Petitioners cannot "turn a few passages in the legislative history that are partially contrary to the statutory language into a justification for this court to rewrite the statute," *Chem. Mfrs. Ass'n* v. *EPA*, 673 F.2d 507, 514 (D.C. Cir. 1982), and thereby add a saving exemption for home self-defense. "[T]his court will not read into a statute language that is clearly not there. . . . The express inclusion of one (or more) thing(s) implies the exclusion of other things from similar treatment." *Castellon* v. *United States*, 864 A.2d 141, 148-49 (D.C. 2004) (internal quotations and citations omitted).

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[21] Cf. *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970) ("the right to counsel is the right to the effective assistance of counsel") (citation omitted); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 878 (1992) (O'Connor, Kennedy, and Souter, JJ.) ("undue burden exists" if law's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability").

Indeed, the city successfully asserted a reason for "distinguish[ing] between a home and a business establishment in the Act." *McIntosh* v. *Washington*, 395 A.2d 744, 755 (D.C. 1978). Petitioners cannot now be heard to argue for judicial alteration of the home-business distinction, especially as they can offer no guidelines as to when, exactly, a citizen might render her firearm operational to respond to a perceived threat. Resp. to Pet. for Cert. at 19-21.

Respondent would not quarrel with a true "safe storage" law, properly crafted to address Petitioners' stated concerns. But as *McIntosh* reveals, the city said what it meant and meant what it said in prohibiting armed self-defense inside private homes. The law, as written and defended by the city, is unconstitutional.

IV. THE STANDARD OF REVIEW IN SECOND AMENDMENT CASES IS STRICT SCRUTINY.

Although Petitioners "do[ ] not suggest that gun regulations should be subject to mere rational basis review," Pet. Br. 43, the true nature of their proposed "reasonableness" standard is exposed by their claims that the Nation's most draconian gun laws are constitutional. The Solicitor General's supposed "heightened" scrutiny standard is scarcely better, demanding that judges weigh conflicting and disputable scientific claims to determine the constitutionality of disarming law-abiding individuals, apparently on an as-applied basis.[22]

As explained *supra* and accepted by the court below, this case does not require the application of any standard of review, because it involves a ban on a class of weapons protected under *Miller*, and a statutory interpretation dispute concerning whether a particular provision enacts a functional firearms ban.

Nonetheless, should the Court venture to comment on the standard of review governing the regulation of Second Amendment rights, it should do so consistent with well-established precedent. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); cf. *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 33 (1973) (fundamental rights are those

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[22] The Solicitor General's "reasonable alternative" test would demand that individuals wishing to exercise a fundamental constitutional right demonstrate their need to do so, subject to the skeptical review of officials hostile to the right. For example, a would-be handgun owner might have to show that she was physically incapable of using a rifle or shotgun. The *Miller* test anticipates this problem: Because handguns are in common use they are constitutionally protected, meaning an individual has the right to choose a handgun as the type of weapon she would keep at home for lawful purposes.

"explicitly or implicitly guaranteed by the Constitution"). Fundamental rights are those "so rooted in the traditions and conscience of our people as to be ranked as fundamental [and] implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (citations and quotation marks omitted). Justice Story's "palladium of the liberties" ought to qualify, whether the Second Amendment entails the right to defend one's life, the right to resist tyrannical usurpation of constitutional authority, or even, as Petitioners would have it, a right guaranteeing states freedom and security. See Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1 (2007).

Today the Court is told that private gun ownership is too dangerous to be counted among first-tier enumerated rights. Americans who suffered British rule might disagree. BOSTON GAZETTE, Dec. 5, 1774, at 4, col. 1 ("But what most irritated the People next to seizing their Arms and Ammunition, was the apprehending [of] six gentlemen . . . who had assembled a Town meeting. . . ."). As our Nation continues to face the scourges of crime and terrorism, no provision of the Bill of Rights would be immune from demands that perceived governmental necessity overwhelm the very standard by which enumerated rights are secured. Exorbitant claims of authority to deny basic constitutional rights are not unknown. See, e.g., *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004).

Demoting the Second Amendment to some lower tier of enumerated rights is unwarranted. The Second Amendment has the distinction of securing the most fundamental rights of all—enabling the preservation of one's life and guaranteeing our liberty. These are not second-class concerns. Yet preservation of human life is also the government's chief regulatory interest in arms. Constitutional review of gun laws thus finds both individual and governmental interests at their zenith.

If a gun law is to be upheld, it should be upheld precisely because the government has a compelling interest in its regulatory impact. Because the governmental interest is so strong in this arena, applying the ordinary level of strict scrutiny for enumerated rights to gun regulations will not result in wholesale abandonment of the country's basic firearm safety laws. Strict scrutiny is context-sensitive and is "far from the inevitably deadly test imagined by the Gunther myth." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793, 795 (2006). The prohibition on possession of guns by felons, 18 U.S.C. § 922(g), and the requirement that gun buyers undergo a background check for history of criminal activity or mental illness, 18 U.S.C. § 922(t), would easily survive strict scrutiny.

Searching for a lower level of review, the Solicitor General would look to "the practical impact of the challenged restriction," U.S. Br. 8, 24, as courts do at the outset of examining the constitutionality of election regulations. But voting is a poor analog to gun possession. Each exercise of the right to vote burdens state resources and implicates a direct interest in operating an election, which states have an express grant of authority to regulate. U.S. CONST. art. I, § 4, cl. 1.

And not all election laws are subject to the government's endorsed level of scrutiny. If the Court finds the burden to be "severe," then strict scrutiny is applied. *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). The Solicitor General assumes that no gun regulations—including those at issue here—can impose "severe" burdens on Second Amendment rights. But no such presumption exists in the election field. Considering the severity of the challenged gun laws, the correct standard, per the Solicitor General's precedent, would be strict scrutiny.

The government's fears of a meaningful Second Amendment standard are unfounded. Seven years ago, the Fifth Circuit announced a version of strict scrutiny to evaluate gun laws under the Second Amendment, permitting regulations that are "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." *Emerson*, 270 F.3d at 261; *United States* v. *Patterson*, 431 F.3d 832, 836 (5th Cir. 2005) (applying *Emerson*, restrictions are "limited" and "narrowly tailored" but "[p]rohibiting unlawful drug users from possessing firearms is not inconsistent with the right to bear arms guaranteed by the Second Amendment"). Large cities in the Fifth Circuit remain generally more peaceful than Washington, D.C.

The careless handling of social science by Petitioners and their amici underscores the impropriety of adopting anything but the highest level of scrutiny for regulations implicating Second Amendment rights. The matter is only peripheral to the case, but some remarks are in order.

The ABA asserts that "the most notable risk factor for mortality among abused women is the presence of a gun," and argues that "[h]ow to weigh these risks against the desire to own a gun for self defense is a policy judgment, not a constitutional one." ABA Br. 21 n.8 (citing Jane Koziol-McLain, et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results From a Multisite Case Control Study*, in ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 143 (J.C. Campbell ed., 2d ed. 2007)) (other citation omitted). Putting aside the likelihood that the Constitution embodies at least some policy choices the ABA finds uncongenial, the cited study does not support the conclusion. The study reports an adjusted odds ratio of 13.0 for "abuser gun access," not *victim* gun access. The study does not address, much less refute, "the desire to own a gun for self defense."[23]

Petitioners also persist in relying upon a deeply flawed study claiming their handgun ban reduced deaths. Colin Loftin, et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 23 (1991).[24] Putting aside that correlation does not equal causation, even the correlative relationship is dubious. The study measures death with raw numbers rather than rates, thus ignoring the city's dramatic depopulation through the studied period. Between the two ten-year periods examined in the study, Washington's average annual population declined 15%. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES. When one examines homicide *rates*, the supposed benefits disappear. The suicide prevention benefits are likewise overstated. Moreover, the study ends in 1988, a year in which the murder rate doubled pre-ban levels, and one year before a severe crime increase. In 1991, the peak year, the homicide rate tripled pre-ban levels. FBI UCR Data compiled by Rothstein Catalog on

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[23] A different study indicates that women living alone with a gun face a statistically insignificant odds ratio for increased femicide of 0.22. Jacquelyn Campbell, et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM. J. PUB. HEALTH 1089, 1090-92 (2003).

[24] The study constituted the bulk of Petitioners' evidence on summary judgment.

Disaster Recovery and The Disaster Center, available at http://www.disastercenter.com/crime/dccrime.htm.

Gun crimes, suicides, and accidents were not unknown in early America. E.g., Cramer & Olson, *Pistols*, *supra*. The same newspaper containing admonishments from Continental Congress representatives that "It is the Right of every English Subject to be prepared with Weapons for his Defense," N.C. GAZETTE (NEWBURN), July 7, 1775, at 2, col. 3, also reported that "a Demoniac" shot three and wounded one with a sword before being shot by others. *Id.* at 3, col. 1.

Petitioners' sophistic "reasonableness" arguments were likewise familiar to the Framers—and rejected. Colonial Americans were conversant with the works of Cesare Beccaria, whose 1764 treatise ON CRIMES AND PUNISHMENTS founded the science of criminology. John Adams cited Beccaria to open his argument at the Boston Massacre trial. 3 LEGAL PAPERS OF JOHN ADAMS 242. In a passage Jefferson copied into his "Commonplace Book" of wise excerpts from philosophers and poets, Beccaria decried the "False Utility" of laws that

> disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code . . . will respect the less important and arbitrary ones, which can be violated with ease and impunity, and

> which, if strictly obeyed, would put an end to personal liberty. . . . Such laws make things worse for the assaulted and better for the assailants. . . . [These] laws [are] not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree. . . .

Thomas Jefferson, COMMONPLACE BOOK 314 (1926).

"If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion." *Ullman* v. *United States*, 350 U.S. 422, 427-28 (1956) (citation omitted).

Petitioners plainly disagree with the Framers' Second Amendment policy choices. Petitioners' remedy must be found within the Constitution's Fifth Article, not with linguistic sophistries or an anemic standard of review that would deprive the right of any real force.

V. THE GOVERNMENT OF THE NATION'S CAPITAL MUST OBEY THE CONSTITUTION.

The Constitution, and its Bill of Rights—including the Second Amendment—are the supreme law of the land. U.S. CONST. art. VI, cl. 1. "That the Constitution is in effect . . . in the District has been so often determined in the affirmative that it is no longer an open question." *O'Donoghue* v. *United States*, 289 U.S. 516, 541 (1933).

Petitioners' legislative authority is not above the Constitution, but derived from it; a delegation of Congress's authority to legislate for the District. U.S. CONST. art. I, § 8, cl. 17. That power "is plenary; but it does not . . . authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable." *O'Donoghue*, 289 U.S. at 539. "If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void." *Id.* at 541 (citation omitted).

Accordingly, Congress can exercise general police powers within the District, "so long as it does not contravene any provision of the Constitution of the United States." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973) (citation omitted). For example, Congress may operate public schools in the District of Columbia, a power otherwise reserved to the states. But such schools cannot be segregated. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

Indeed, because the Constitution with its Bill of Rights applies directly to the federal government, of which the city is a creature, Petitioners are bound to respect even those rights that are not incorporated as against the states through the Fourteenth Amendment. See *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) (Seventh Amendment right to civil jury trial);

United States v. *Moreland*, 258 U.S. 433 (1922) (Fifth Amendment right to grand jury indictment).[25] Even were the pre-incorporation holding of *Presser* v. *Illinois*, 116 U.S. 252 (1886) still good law, which is doubtful,[26] the fact remains that the District of Columbia is not a state. *Hepburn* v. *Ellzey*, 6 U.S (2 Cranch) 445 (1805). The question of incorporation is therefore not before the Court.

Nothing in Petitioners' precedent suggests that the District is free to ignore constitutional restrictions. The judges of the District's local court system do not merit Article III protection because they are Article I judges. D.C. Code § 11-101; *Palmore*, 411 U.S. at 398. When the District's judges were Article III judges, they enjoyed Article III protection. *O'Donoghue*, *supra* (Congress could not reduce pay of District of Columbia judges). And pre-Sixteenth Amendment tax limitations did not apply within the District of Columbia because Article I's District Clause grants Congress the broad power of "exclusive Legislation" for the city, including the power to tax "in like manner as the legislature of a State may tax the people of a State for State purposes." *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407 (1886).

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[25] Petitioners distinguish the Second Amendment as relating only to federal authority over the states, rather than securing individual rights; but that argument assumes their conclusion. Pet. Br. 38.

[26] As Judge Reinhardt recognizes, "*Presser* rest[s] on a principle that is now thoroughly discredited," *Silveira* v. *Lockyer*, 312 F.3d 1052, 1067 n.17 (9th Cir. 2002) (citing *Emerson*, 270 F.3d at 221 n.13).

Washington was not planned as a "Forbidden City" in which federal officials would be shielded from the hazards of interaction with the otherwise-free people of the United States. Quite the contrary:

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution. . . . [I]t is not reasonable to assume that the cession stripped them of these rights. . . .

O'Donoghue, 289 U.S. at 540.

Finally, there is no logic to Petitioners' extraordinary claim that gun control "is the most important power of self-protection" for the seat of government. Pet. Br. 38. The District Clause, after all, allows Congress to "[erect] Forts, Magazines, Arsenals, dock-Yards and other needful Buildings." U.S. CONST. art. I, § 8, cl. 17. Congress surely has the power to regulate firearms in Washington; but if Congress felt that disarming Americans at home were necessary for its security, it might have attempted to do so in the first 177 years of the city's service as the seat of government. As recent history demonstrates, those who would attack our capital are hardly deterred by

Petitioners' ban on handguns and functional firearms in the home.

CONCLUSION

The decision below is correct with respect to the merits of Respondent's substantive claims, and should be affirmed in that regard.

Respectfully submitted,

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REPLY
BRIEF

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No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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ARGUMENT

This Court should reverse the decision below for any of three independent reasons. First, only the District's view that the Amendment protects a militia-related right makes sense of its language, history, and purposes. Second, the Amendment was enacted to preserve state autonomy from federal interference and imposes no limitation on the District's laws. Third, the Amendment does not, in any event, confer a right to possess the weapons of one's choosing. The District's decision to ban a particularly dangerous weapon while permitting access to other weapons, including rifles and shotguns, should be upheld.

I. THE SECOND AMENDMENT PROTECTS ONLY MILITIA-RELATED FIREARM RIGHTS.

When the Framers submitted the Constitution to state ratifying conventions, the ensuing political debate was one of the most divisive in American history. By proposing to transfer authority from state governments to a distant national government, the Constitution seemed (to some) to threaten the democratic principles upon which the states had governed themselves in the decade since independence.

In particular, some were alarmed by the Constitution's grant of powers to the national government to create a standing army and exercise substantial control over state militias. Many viewed a professional standing army as a threat to liberty, preferring to keep military force in the hands of "the people," assembled as citizen-soldiers, "fighting for their common liberties, and united and conducted by governments possessing their affections and confidence." Federalist No. 46 (James Madison). The militia—considered in this very real sense to be "the people"—would temporarily put aside their livelihoods to take up arms when called to defend their communities.

One clause of the Constitution was thus a lightning rod for criticism: Article I, § 8, cl.16, which gave Congress the power "to provide for organizing, arming, and disciplining, the Militia." The notion that the distant national government could "provide for [the] . . . arming" (and thus effectively the "disarming") of the militias became "a topic of serious alarm and powerful objection." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1201, at 84 (1833).

As its text makes clear, the Second Amendment directly responded to this grant of power. The Amendment prevents Congress from interfering with the right of the people of each state to arm a well-regulated militia composed not of professional soldiers, but of the people themselves.

Respondent and the United States offer competing readings of the Amendment which are not only unsupported by its text and history, but utterly at odds with both. Respondent's proposed right of insurrection turns history on its head: states wanted to maintain control over the arming of their militias to defeat, not to promote, rebellion. And the United States' reading engrafts onto the Amendment a free-standing personal liberty right unrelated to any state's ability to maintain a militia.

The Amendment's text and history make clear that the right the Amendment enshrines requires some connection to a state militia. The nature and quality of the connection an individual must show to raise a successful challenge need not be resolved in this case. Respondent has not alleged—and cannot establish—*any* connection between his desire to own a handgun and a well-regulated militia.

A. The Amendment's Text, History, And Purposes All Support A Militia-Related Right.

The "declaration *and* guarantee" of the Amendment "must be interpreted and applied" "in view" of its "obvious purpose" of protecting state militias. *United States v. Miller*, 307 U.S. 174, 178 (1939) (emphasis added). The District's reading gives meaning to every word of the Amendment and comports with its history and "obvious purpose." *Id.*

1. The first half of the Amendment—"a well regulated Militia, being necessary to the security of a free State"—so plainly supports the District's position that respondent, like the United States and the court below, is reduced to arguing that it must be given *no* operative effect whatsoever. Respondent's Brief (RBr) 5; United States' Brief (USBr) 14; PA34a-35a. But reading half the Amendment out of the text cannot be reconciled either with this Court's repeated condemnation of interpretations that render constitutional language irrelevant, *see* Petitioners' Brief (PBr) 17; Brief of Brady Center (BCBr) 6, or with the considerable attention the Framers focused on this language during the Amendment's drafting, PBr27-29.

Respondent nevertheless contends that the Court should ignore the Amendment's declaration, which he calls the "preamble," because the second half of the Amendment is "clear and positive," requiring no further elaboration. *See* RBr5-8. But that misstates the rule of construction on which respondent relies. *See, e.g.*, 1 Story, *supra*, § 459, at 443 ("[t]he importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions"). Giving effect to all of the Amendment's language is especially vital here because the declaration is not a separate preamble, but an absolute clause within the Amendment itself. Brief of Linguists (LingBr) 14; BCBr8-9; 1 James Kent, *Commentaries on American Law* 431-32 (1826).[1]

2. In any event, respondent cannot show that the second half of the Amendment "clear[ly] and positive[ly]" supports his position. Respondent cannot explain why a non-militia right so "clear[ly]" protected by the second part of the Amendment has nevertheless been overlooked by multiple adverse precedents, including *Miller*. The United States confirms the lack of clarity by offering an interpretation that differs from both its own longstanding position, *see* Brief of Former Department of Justice Officials 9, and *Miller* itself, *see* USBr20 n.4 (noting that *Miller* "differs in some respects" from the United States' position).

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[1] Respondent suggests that the Copyright Clause also contains a meaningless "preamble," but in *Graham v. John Deere Co.*, 383 U.S. 1 (1966), this Court held that this language is a "constitutional command" that "may not be ignored," *id.* at 6. *See also Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (Copyright Clause is "'both a grant of power and a limitation'" (quoting *Graham*, 383 U.S. at 6)); BCBr7-10 (discussing state constitutions).

a. Respondent and the United States argue that the Amendment's use of "the right" shows that it is enforceable by individuals. RBr9-10; USBr11. The District agrees. *Cf. Printz v. United States*, 521 U.S. 898, 918 (1997) (structural rights may be enforced by individuals). But that says nothing about *what* right individuals may enforce.

Nor does it advance respondent's position to argue that the phrase "*the* right" must be read to refer to some pre-existing right. *See* RBr18; *see also* USBr12. The right of the people to keep and bear arms in connection with militia service was a preexisting right, recognized by states prior to the Founding in an effort to provide for their defense. Massachusetts and North Carolina, for instance, recognized the right of the people to "keep and bear arms for the common defense" and "to Bear Arms, for the Defense of the State." CertPet12; *see also* PBr30-31 (Delaware, Maryland, Virginia); PBr13 & n.1; Brief of American Jewish Committee (AJCBr) 9; Brief of Historians (HBr) 10-11. By contrast, *no* state recognized a right to "bear Arms" for private purposes. PBr30-31; HBr10. Contrary to respondent's suggestion that Pennsylvania protected a private right to arms, RBr12, its constitution separately protected hunting (without any mention of the right to "bear arms," HBr10 n.3), and the provision protecting the right to "bear arms for the defense of themselves and the State" encompassed only the right to engage in military defense on behalf of the community, PBr31. That is proven by its conscientious objector clause, which used the phrase "bearing arms" to refer exclusively to military service. *See The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 184 (Neil H. Cogan ed., 1997).

The Second Amendment was enacted precisely because Anti-Federalists feared that the Constitution's Militia Clauses, which authorize Congress to "organiz[e], *arm*[], and disciplin[e], the Militia," U.S. Const. art. I, § 8, cl.16 (emphasis added), threatened this pre-existing militia-related right. As George Mason explained at the Virginia Ratifying Convention, "[t]he militia may here be destroyed . . . by rendering them useless—by disarming them." PA24; *see also* AJCBr15-17, 80a. The Amendment directly and proportionately responded to these concerns by protecting the right of the people to be armed in connection with state militias.[2]

Respondent suggests that it is "strange" to limit "the right" to militia-related conduct entailing a duty to "obey orders." RBr10. But "rights" and "duties" were often linked at the Founding. *See, e.g.,* 1 Kent, *supra*, at 397-98; 2 *id.* 33-63; 1 William Blackstone, *Commentaries on the Laws of England* *119-23, *157, *237-38, *243-44 (1765); Pa. Const. art. VIII (1776). Respondent's authorities recognize that the "right" at issue involved the concomitant duty to defend the new republic. RBr13 ("The constitutions of most of our States assert" that it is the people's "right *and duty* to be at all times armed" (quoting Thomas Jefferson) (emphasis added)); *see also* HBr18.

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[2] Nineteenth-century scholars and jurists also accepted the principle that the Amendment protects a militia-related right. *See, e.g.*, CertReply3 n.3; 3 Story, *supra*, § 1890, at 746; Benjamin L. Oliver, *The Rights of an American Citizen* 176 (1832); Joel P. Bishop, *Commentaries on the Law of Statutory Crimes* § 792, at 497-98 (1883); *Louisiana v. Smith*, 11 La. Ann. 633, 633 (1856); *Arkansas v. Buzzard*, 4 Ark. 18, 19-20 (1842); BCBr13 (discussing *Aymette v. State*, 21 Tenn. 154 (1840)).

b. Respondent contends that, because it uses the phrase "the people," the Amendment's guarantee must sweep more broadly than its declaration, which refers only to "a well regulated Militia." In fact, the two phrases are tightly connected, because there was little space between "the people" and the "Militia" at the Framing. RBr15-16; USBr16. The militia consisted of citizen-soldiers drawn from the community, as opposed to full-time professional soldiers lacking allegiance to it. RBr15 (quoting Mason). "[T]he people" of the guarantee draws the same distinction: the Framers sought to distinguish the "Militia" from professional standing armies. BCBr27-29. As Federal Farmer explained, the "Militia" were "the people, immediately under the management of the state governments." AJCBr18-19; *see also* PBr20-21.

c. Most importantly, the phrase that defines the right—"to keep and bear Arms"—supports the District's position. The Framers used that phrase—as opposed to the formulations upon which respondent relies, *see* RBr11 ("bear . . . guns")—because this idiomatic expression referred to the use of arms in a military context. Every use of the phrase "bear Arms" in congressional debates from 1774 to 1821 supports the District's military reading. PBr16; LingBr18-27; *see also* Nathaniel Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. Pa. J. Const. L. 413, 416 (forthcoming 2008) (*available at* http://www.law.upenn.edu/journals/conlaw/articles/vol10num3/kozuskanich.pdf). Madison's original inclusion of a conscientious objector clause exempting "any person religiously scrupulous of bearing arms" confirms the point. LingBr23; BCBr23-25. Respondent's only response is that the words "Arms" and "bear Arms" did not have a "uniquely" or "exclusive[ly]" military meaning at the Founding. RBr10-11. But even if that were so, respondent does not and could not argue that his reading of "keep and bear Arms" is the more natural one—let alone that the phrase "clear[ly] and positive[ly]" compels his non-military reading.

Seeking to elide that obvious problem, respondent argues that the words "keep" and "bear" "embody distinct concepts in the Second Amendment." RBr10. But ripping the words "keep" and "bear" out of their context deprives them of their natural meaning when read as part of the Amendment as a whole.

Respondent's claim that the word "keep" means "possess at home," RBr10, for example, says nothing about *why* arms could be kept at home. The purpose of the word "keep" was to ensure citizen-soldiers access to "Arms" so that, when called into service, they could "bear" them. *See, e.g.*, LingBr27; BCBr20-22&26. That was the meaning of "keep" in the most relevant authorities: contemporary state constitutions and militia laws. PBr16-17, 30. Respondent and his *amici* can point only to other statutes and contexts lacking the critical military language surrounding the word "keep" in the Second Amendment. RBr10-11; Brief of Cato Institute 12-14.

Respondent's argument that "bear" means "carry" has similar shortcomings. RBr11. Stripped of its context, it suggests to respondent that the Framers meant to ensure the people could possess ("keep") and carry ("bear") arms without expressly protecting *any* particular uses, even in militia service—a reading fundamentally at odds with the text and history of the Amendment. The District's reading, by contrast, makes sense of the Amendment as a whole.

3. The Amendment's drafting history confirms that the right the Framers protected was militia-related. PBr27-29. Respondent asserts that Madison meant to incorporate proposals by the New Hampshire ratifying convention and by *dissenters* in Pennsylvania and Massachusetts. RBr37-38. The suggestion that Madison intended to endorse those decidedly atypical formulations, while studiously avoiding their language, is untenable. AJCBr20; PBr32-33.

The Amendment's drafters considered various proposals that would have altered the delicate compromise struck in Article One, which gave Congress authority to ensure the militias were capable of performing their responsibilities, while preserving to the individual states some control over them. For example, the Framers found it unnecessary to include the language "for the common defence," which might have been read to suggest that the militias could only be used for the Union's "common defence," thereby limiting the power of the individual states to use their militias to suppress localized insurrections like Shays' Rebellion. PBr29.

Federalists also rejected a Virginia proposal that would have given the states authority to "organiz[e], arm[], and disciplin[e]" the militia because they were unwilling to change the body of the Constitution and feared the proposal would give too much power to the states, preventing the federal government from ensuring that the militia were sufficiently well-regulated and disciplined. *See* PBr29 n.6; HBr3-4; RBr36. But they adapted the alternative Virginia proposal, which recognized that "a well armed and well regulated militia [is] the best security of a free country." PBr27, 29 n.6. Only the District's position explains the language that was chosen, as well as the language that was not.

B. The Theories Offered By Respondent And The United States Are Contrary To The Amendment's Text, History, And Purposes.

Neither respondent nor the United States provides an account of the Amendment consistent with its text, history, and purposes. Under their views, the Amendment protects a broad right of gun ownership for private purposes, but it provides no protection to the militia *qua* militia.

1. Respondent contends that the Amendment protects the right of individuals and private "militias" to "resist tyranny" by engaging in armed insurrection against their government. RBr30; *see* RBr25, 28. In support of this view, respondent claims that the phrase "well regulated Militia" refers to private militias operating in defiance of government authority. RBr25.

a. The first problem with this claim is that the Constitution does not encourage treason, but criminalizes it. U.S. Const. art. III, § 3. Article One similarly explains that militias are needed to "suppress Insurrections," not cause them. *Id.* art. I, § 8, cl.15. And the Second Amendment itself states that a "well regulated Militia"—not, as respondent would have it, a militia "beyond the control of, [and] in direct challenge to" the government, *see* RBr25—is "necessary to the security of a free State," not necessary to overthrow it. PBr15 n.3. Respondent's view that armed private citizens may decide for themselves when to rise up and "resist tyranny" is impossible to reconcile with these provisions.

Respondent's theory also has no support in the Amendment's history. Respondent fails to cite any evidence from the debates surrounding the Constitution or the Amendment that the Framers intended to facilitate armed insurrection against the government. Instead, respondent relies on events taking place before and during the Revolutionary War. RBr22-35. Even if those events were relevant, respondent's argument would fail: the colonists did not endorse private insurrection by individuals, but instead made every effort to give their actions legitimacy under law. *See* Letter from George Mason to Martin Cockburn (Aug. 22, 1775), *reprinted in* Kate Mason Rowland, *Life and Correspondence of George Mason* 206, 208 (1892).

More important, the Second Amendment was not enacted before or during the Revolutionary War, but only after a critical intervening decade had passed. During that period, militias were brought under extensive state control. *See* PBr12-14. They were also brought under substantial federal control in response to Daniel Shays' attempt to overthrow Massachusetts' purportedly "tyrannical" government and its debt collection efforts. PBr22-23; AJCBr12-13. And the Second Amendment then ensured that Congress could not disarm state militias. AJCBr11-13; HBr14-17, 32-33. Those who championed the "well regulated militia" at that time plainly did not have in mind pre-Revolutionary private militias acting in *defiance* of any and all governmental control.

Respondent also wrongly conflates the Framers' views of why resistance to British oppression was justified with their views of what rights Americans possessed against their new government under the Constitution. As early as 1776, states began taking steps to prevent insurrection by disarming individuals who refused to swear loyalty oaths. *See* AJCBr22-23 (Massachusetts, Pennsylvania); *see also* 4 Journals of the Continental Congress, 1774–1789, at 201-05 (1906) (Continental Congress recommendation that provincial legislatures disarm all persons "who are notoriously disaffected to the cause of America"). And in 1792, Congress passed two Militia Acts empowering the President to call out state militia to *quash* private rebellions (and to provide for discipline and organization so they would be effective in doing so), *see* PBr14; BCBr15, as George Washington did in 1794 in response to the Whiskey Rebellion, *see* AJCBr13. Accordingly, although the Framers believed that armed insurrection was justified against the British, they did not enshrine an individual right of insurrection against the "more perfect Union" they fought a war to create. PBr15 n.3; BCBr19-20.

b. Respondent's theory is also inconsistent with the Amendment's "obvious purpose." *Miller*, 307 U.S. at 178. The Framers thought the best protection against tyranny was the states, supported by their militias. *See* Federalist No. 46 (James Madison) ("the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of"); *see also* HBr32. That is why they protected militia-related, and only militia-related, rights under the Amendment. Some modern critics may believe that *private* gun ownership is necessary to prevent tyranny. But that was not the view of the Framers, who feared that the wrath of an unregulated and armed people would lead to anarchy. Under the Framers' vision, it was the people acting *through* the "well regulated Militia" who would instead safeguard against oppression.

2. The United States argues that the Amendment protects the "common-law right to possess firearms." USBr13. Its theory is based largely on the assertion that the Amendment protects a preexisting right. But, as already explained, the District's position is consistent with that view, as well as with the Amendment's text, history, and purposes. By contrast, the United States does not demonstrate that (1) the phrase "keep and bear Arms" is best read as protecting any common-law right; (2) the drafting and ratification history support that reading; or (3) the Framers were concerned that Congress could or would *infringe* that right. *See* Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 Md. L. Rev. 150, 161 (2007). The United States is therefore attempting to graft onto the Amendment a freestanding personal liberty interest unrelated to the Amendment's purpose of protecting the states' ability to maintain their militias.

The United States relies heavily on Blackstone in support of its position. USBr18-19. But even if Blackstone's writings could overcome the actual text, history, and purposes of the Amendment, they support the District's position for three reasons. First, Blackstone viewed arms ownership as a civic right of subjects to participate in the common defense, not an individual right to own guns for private purposes, such as self-defense. *See* 1 Blackstone, *supra*, at *136-39 (describing the five "auxiliary" rights protecting British subjects against governmental oppression); *see also* HBr5-8.

Second, although this civic right limited the powers of the Crown, it did *not* limit Parliament's power. HBr8 ("we may venture to affirm, that the power of parliament is absolute and without control" (quoting 1 Blackstone, *supra*, at *157)). The United States effectively acknowledges this point, noting that "the right secured" was "the right of English subjects 'of having arms for their defense, *suitable to their condition and degree, and as such as are allowed by law*.'" USBr23 (quoting 1 Blackstone, *supra*, at *143-44 (emphasis added)); *see also* L.G. Schwoerer, *To Hold and Bear Arms*, 76 Chi.-Kent L. Rev. 27, 55-56 (2000) ("the phrase 'as allowed by law' invited recognition of parliament's law-making authority in the past, the present, and the future").

Third, this civic right did not permit individuals to decide for themselves when to resist tyranny. As Blackstone explained, "allow[ing] to every individual the right of determining [when resistance to government is appropriate] is . . . [a] doctrine productive of anarchy, and, in consequence, equally fatal to civil liberty, as tyranny itself." 1 Blackstone, *supra*, at *251.

For these reasons, regulation of firearms by Parliament remained pervasive in England long after the Bill of Rights. AJCBr12 n.3, 28-29; HBr5-7. Shortly after the English Bill of Rights was enacted, Parliament soundly rejected a proposal to "enable every Protestant to keep a musket in his House for *his defence*," with opponents stressing that the proposal "savours of the politics to arm the mob, which . . . is not very safe for any government." Schwoerer, *supra*, at 50-51 (emphasis added).

Blackstone's *separate* discussion of the common-law right of self-defense, USBr19, also does not support the United States' position. The civic right discussed above was distinct from the common-law rights of (1) personal security, which encompassed a right to kill to prevent loss of "life and limbs," 1 Blackstone, *supra*, at *126; and (2) self-defense, which made excusable or justifiable any homicide committed to protect oneself from assault or capital crime, 4 *id.* at *184; *see also* 3 *id.* at *3-4. *See* HBr8; AJCBr12 n.3. Those distinct rights did not encompass any right to own firearms—let alone to "keep and bear Arms." 4 Blackstone, *supra*, at *183-88. The Court should reject any attempt to conflate what are two separate questions: "what an individual may rightly do when he is subject to imminent attack" and "what measures the legislature may properly take *ex ante* to protect the lives and safety of citizens." Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 Chi.-Kent L. Rev. 237, 245 (2000).

* * *

Respondent—who is not a member of any militia—nowhere suggests that there is any connection between his desired private use of handguns and any militia, let alone a well-regulated one. Nor could he. The necessary precondition for establishing the requisite connection to that militia would be a determination by the state that handgun ownership is conducive to the establishment or maintenance of its militia. Here, the District not only has declined to require or even permit handgun possession for militia-related purposes; it has barred handgun possession for any private purpose.

II. LEGISLATION CONFINED TO THE DISTRICT, LIKE OTHER STATE AND LOCAL GUN REGULATION, DOES NOT INFRINGE THE SECOND AMENDMENT.

Any reading of the Amendment that recognizes a liberty interest unrelated to a state's ability to maintain a militia could lead to results completely at odds with the Amendment's protection of state autonomy. For example, some of respondent's *amici* contend that a right to gun possession is enforceable not only against national legislation but also against state and local laws. *See* Brief of Texas 23 n.6. That would turn the Amendment, which was designed to limit federal interference with state prerogatives, into a sword *federal* judges could use to strike down measures that *state* and local governments adopt to control the use of weapons within their borders. This is a case in point. *See* Brief of National Rifle Association 11 (contending that the District's laws are misguided because "[a]n *effective* militia cannot spring forth fully-formed from a people unfamiliar with firearms" (emphasis added)).

1. Even if the right the Amendment protects encompasses private uses of weapons, it does so as a vehicle to protect state authority as a counterbalance to federal power. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (the Framers' "discovery" was to "split the atom of sovereignty"); *New York v. United States*,

505 U.S. 144, 181 (1992) ("[s]tate sovereignty . . . secur[es] to citizens the liberties that derive from the diffusion of state power"). Because the Amendment was enacted to secure a means of protecting state governments, it makes no sense to hold that the Amendment limits the powers of state and local governments. *See* Brief of Major American Cities 12-24; Brief of City of Chicago (ChiBr) 4-31; AJCBr5-31; Brief of New York 2-13. The same holds for the District. PBr35-38.

The Amendment's history also shows that it is only concerned with the powers exercised by a distant federal government. *See* USBr17. The Constitution's creation of a standing army under the control of that government made the potential for oppression real, *see* PBr23; AJCBr80a; USBr17, resulting in calls for protection against it, *see* AJCBr64a. State and local governments, closer to the people and forbidden from maintaining standing armies, posed no similar threat. *See* U.S. Const. art. I, § 10, cl.3; PBr20-21. The Framers had no reason to constrain state and local government in making judgments about the arming of their citizenry, and no reason to constrain such judgments in the Seat of Government. PBr37-38; *see also* Laurence H. Tribe, *Sanity and the Second Amendment*, Wall St. J., Mar. 4, 2008, at A16.

For these reasons, "properly understood," the Amendment "is no limitation on arms control by the states." Antonin Scalia, *Response*, in *A Matter of Interpretation: Federal Courts and the Law* 137 n.13 (Amy Gutmann ed., 1997); *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

2. Unlike some of his *amici*, respondent contends that the question of incorporation is not before the Court. RBr64. He argues instead that the Bill of Rights is operative in the District. RBr62-65. Of course it is. But the question "is not whether the Constitution is operative [in the District], for that is self-evident, but whether the provision relied on is applicable." *O'Donoghue v. United States*, 289 U.S. 516, 542 (1933) (internal citation omitted). Constitutional provisions limiting federal *interference* with state authority do *not* apply to legislation confined to the District. *See, e.g., D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 6-7 (D.C. Cir. 1988) ("'the District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment'" (quoting *Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979)). The District is a creation of the federal Constitution and, unlike the states, has no residual sovereignty to protect against federal encroachment. Rather, *Congress* exercises the powers of a state in asserting legislative control over the District. *See District of Columbia v. Carter*, 409 U.S. 418, 429 (1973) ("[T]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs" (quoting *Berman v. Parker*, 348 U.S. 26, 31 (1954)).

There can therefore be no structural concern that Congress will interfere with the District's independent sovereign authority here—and respondent asserts none. And although the United States is correct that the District "has a militia statute," USBr21 n.5, the militia it creates is "essentially a component of the federal government" under the exclusive control of the President. *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 241 (D.D.C. 2004); *see also* D.C. Code

§§ 49-404, 405, 409. The statute does not (and cannot) provide the District with independent authority as a counterbalance to federal power.

Assuming the Amendment does not limit the states, respondent's position would uniquely disable the District from enacting gun-control regulations free of the constraints of the Amendment. Given the Framers' intent that the Amendment protect state autonomy from federal interference and, conversely, their desire to create a federal seat of government free of *state* interference, that outcome would be anomalous if not perverse. Legislation regulating guns that would raise no constitutional issue if adopted by the Commonwealth of Virginia or the City of Baltimore would be invalid if adopted for the District either directly by Congress or by the District's own government. That defies common sense.

III. THE DISTRICT'S LAWS ARE IN ANY EVENT PERMISSIBLE REGULATIONS OF RESPONDENT'S ASSERTED RIGHTS.

Even if the Amendment protects respondent's asserted right, the District's laws do not violate that right. The District bans particularly concealable and dangerous handguns while permitting access to other weapons, such as rifles and shotguns, for self-defense—a reasonable legislative decision balancing public safety against self-defense in an exclusively urban environment. Respondent asks the Court to embrace a categorical rule placing off-limits government proscriptions of dangerous weapons claimed necessary to allow individuals to rise up and "resist tyranny." RBr30. That view is unprecedented, unworkable, and unwise.

A. Respondent's Proposed Rules Are Insupportable.

1. Respondent contends that *any* government prohibition of an "Arm" within the meaning of the Second Amendment is necessarily invalid, without more. That *per se* rule of invalidity would create a constitutional right to own any "Arm," no matter how dangerous. RBr55 n.22. The United States agrees with the District that respondent's claim has no grounding in the text or history of the Amendment. PBr44-45; USBr22-23.

Respondent's rule is based largely on the court of appeals' misreading of *Miller*. PA53a. Although *Miller* held that the *absence* of a connection between the use of a weapon and maintenance of a well-regulated militia undermines a Second Amendment claim, 307 U.S. at 178, it did not hold or suggest the converse: that the private use of a protected arm is always immune from proscription. Respondent attempts to bridge that gap by arguing that categorical inquiries are "often a requisite *first step* in evaluating the constitutionality of governmental action." RBr41 (emphasis added). That is true. But what distinguishes respondent's proposed rule is that the categorical inquiry into whether a weapon is a protected "Arm" is both the first *and* last step in assessing the constitutionality of a gun ban. Respondent fails to identify a single other provision in the Bill of Rights that works that way.

Respondent's *per se* rule is made especially dangerous by the fact that it would seem to apply to an exceedingly broad swath of weapons. Respondent first contends that an arm is constitutionally protected if "it is of the type that (1) civilians would use, such that they could be expected to possess it for ordinary lawful purposes (in the absence of, or even despite, legal prohibition), and (2) would be useful in militia service." RBr44. But because respondent later explains that the Second Amendment's protections should not be "limit[ed] . . . to arms that have military utility," *id.*, and that weapons used for "the protection of person and property" fall within his definition, *id.* 46, it appears that virtually any weapon falling into common use is immune from proscription, no matter how decisively its costs outweigh its benefits. *See* PBr45-46.

Respondent's organizing theory of the Second Amendment compels that conclusion. Although respondent attempts to sidestep the logical consequences of his position, it is surely the case that the weapons most likely to be useful to individuals and self-styled militia taking up arms against the government "should our Nation someday suffer tyranny again," RBr32, are those most capable of inflicting harm on a heavily fortified adversary—precisely the same powerful and dangerous weapons most destructive of public safety. Under respondent's conception of the Second Amendment, in other words, the grave threat to public safety that gives governments a paramount interest in *banning* especially dangerous weapons is precisely what operates to put those weapons off-limits to government proscription.

Respondent's test is also unworkable and illogical. It is unclear, for instance, how much of the population must own a particular weapon to make it "common" or what geographic unit determines commonness.[3] PBr45. More troubling is that respondent's proposed rule works in only one direction over time—it protects an ever-widening category of dangerous weapons once they grow into "common use," even if they do so "*despite* . . . legal prohibition." RBr44-46 (emphasis added). Respondent appears to contend that machineguns may already be entitled to categorical protection. RBr50-52 (noting 120,000 machineguns in lawful civilian possession). If weapons are constitutionally protected solely by virtue of their "commonness," despite government attempts to ban them, then our Nation lacks the fundamental police power to address the potentially catastrophic consequences of private ownership of increasingly dangerous, ever-proliferating weapons. *See* AJCBr29-31; CertPet23-24.

2. Respondent also urges application of strict scrutiny for all "gun laws," potentially including laws incidentally affecting gun rights, such as taxes, background checks, and licenses. RBr54-62. Respondent fails to explain why such incidental restrictions warrant the application of strict scrutiny. Given that the District's laws neither implicate the Amendment's core militia-related right nor effectuate functional disarmament, strict scrutiny would be inappropriate *here* even if it were appropriate for laws that intrude into that core. *See* PBr43-44 & n.11.

At any rate, strict scrutiny is inappropriate for the Second Amendment. *See Lewis v. United States*,

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[3] If the test depends on whether a weapon is commonly used in the Nation as a whole, that is reason to conclude that the Amendment only applies to national legislation. Otherwise, the Amendment would enable outlier jurisdictions to dictate what weapons other, dissimilar jurisdictions must allow.

445 U.S. 55, 65-66 & n.8 (1980). It would elevate the Second Amendment above almost all other provisions in the Bill of Rights, even though only the Second Amendment demands "regulat[ion]" to effectuate the right and even though *no* state employs strict scrutiny to protect its own state constitutional right to own firearms for private purposes. *See* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 Const. Comment. 227, 229 (2006) ("Two amendments trigger strict scrutiny; eight do not."); PBr47-48; Brief of Law Professors (LawProfBr) 4-30. And it would do so without justification under existing law, which limits strict scrutiny to racial and other invidious classifications, as well as content-based restrictions of speech, in order to root out illegitimate motivations behind laws the Constitution views as presumptively suspect. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005); *Burson v. Freeman*, 504 U.S. 191, 211-14 (1992) (Kennedy, J., concurring); *see also* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 146 (1980). Laws regulating dangerous weapons are not suspect in the same way, LawProfBr6-9, and respondent does not assert that the governmental interest here is a pretext for some other illicit motive.

Finally, the right to own particular weapons for private purposes is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental [and] implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations and quotation marks omitted). Since the Founding, state governments have extensively regulated private uses of guns. Liberty and justice have survived for two centuries despite the courts' consistent refusal to recognize as "fundamental" the right respondent asserts here. *See, e.g.*, *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (the "right to possess a gun is clearly not a fundamental right"). This Court should decline the invitation to protect that right and simultaneously elevate it to fundamental status. *See* ChiBr16-20 (not fundamental under selective incorporation doctrine).

B. The District's Laws Satisfy The United States' Proposed Standard.

The United States agrees that the standard adopted below is incorrect. USBr9. Instead of the reasonableness test it has supported in prior briefs, PBr41, the United States now proposes a two-tiered standard of review that would apply heightened scrutiny to any law that regulates arms "in a way that has no grounding in Framing-era practice." USBr23-24.

The Court should adopt the reasonableness test established in state law instead. PBr41-42. The United States' test would require reassessment of scores of laws that have long been deemed constitutional, particularly if the right in the Second Amendment is later incorporated against the states. *See* Brief of Members of Congress in Support of Reversal 5-9; Brief of American Bar Association 11-16; LawProfBr22-24. And even if national legislation warranted heightened scrutiny, the reasonableness standard is appropriate to review the District's exercise of local police power to protect safety and health.

In any event, the District's laws are permissible under the United States' test. The predicate for heightened scrutiny is not present because the laws *do* have a "grounding in Framing-era practice." Long before the Founding, England banned the use of particular weapons. *See* ChiBr10; HBr6-7. Near the Founding, Boston enacted storage requirements that effectively banned the possession of loaded firearms within city limits. PBr42; AJCBr24 n.8. States took steps to disarm individuals refusing to enroll in militias or swear an oath of loyalty to the new republic. AJCBr22-23. And like the states, PBr42; AJCBr23-24, the District itself has carefully regulated weapons since its inception, barring firing weapons "within four hundred yards of any house," with an exception for militiamen ordered to fire. PBr3-4.

The District's laws also satisfy heightened scrutiny, which requires assessing the reasons for the laws and their impact on an individual's ability to have weapons for self-defense. USBr27. No one disputes that the general governmental interests in regulating dangerous weapons are "paramount." USBr25; RBr57. Those interests are especially compelling in the District, where there is a unique need to protect not only citizen safety but also national security. PBr35-40; *see also* Federalist No. 43 (James Madison) (noting that the federal government would have "complete authority" over the seat of government). The United States recognizes that the Amendment "may have *limited or no application* to special federal enclaves such as military bases," USBr21 n.5 (emphasis added), but fails to note that Article One allows Congress to "exercise like authority" over "Forts" and the "Seat of the Government," U.S. Const. art. I, § 8, cl.17.

The District's laws also directly further the kinds of "important regulatory interests" the United States agrees are "typically sufficient to justify restrictions" on gun ownership. USBr24. The Council concluded that concealable and lethal handguns are responsible for a disproportionately high number of violent crimes, accidents, and suicides, particularly in an exclusively urban jurisdiction. *See* PBr49-55; Brief of Violence Policy Center (VPCBr) 13-32. It acted to target those weapons without unduly burdening any asserted right. For similar reasons, the United States contends that existing federal bans on "particular types of firearms," such as machineguns, "*readily* pass [heightened] scrutiny." USBr25 (emphasis added).[4] But as the United States acknowledges elsewhere, any purported distinction between the federal ban and the District's handgun ban is elusive at best. *Id.* at 21-22; VPCBr1a-4a. Like other federal laws the United States continues to enforce,[5] the District's handgun ban limits access to one particularly dangerous gun.

The United States suggests that the Court remand this case so that the lower courts can apply its new standards on a fuller record. USBr28-29. That evidentiary remand would apparently address the

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[4] Respondent argues that "federal law does not ban the private possession of machine guns," evidently referring to the "grandfathering" of machine guns in private possession at the time of the federal ban, *see* 18 U.S.C. § 922(o). But under that logic, the District's law likewise does not ban handguns because it also has a grandfathering exception. D.C. Code § 7-2502.02.

[5] The United States continues to enforce federal gun laws, including the very laws at issue in this case. *See* USBr1; *Andrews v. United States*, 922 A.2d 449, 456-57 (D.C. 2007). Unlike the District's handgun ban, existing federal restrictions on the manufacture, sale, and importation of firearms, USBr3, are *not* grounded in Framing-era practices.

"factual issue" whether handguns are easier for *some* individuals to use in self-defense than long-guns. USBr28-29, 31 & n.9. But the United States' speculation that handguns might better suit certain individuals with disabilities, for example, cannot remotely support a *facial* challenge to the District's laws. PBr57. And respondent himself can both "possess a functional long gun in his home," USBr31, and is perfectly capable of using it in self-defense, JA51a. His assertion that he has the "right to possess a functional, personal firearm, such as a handgun *or* ordinary long gun (shotgun or rifle) within the home," USBr5 (citing JA54a (emphasis added)), is not implicated by the District's laws. No further fact-finding is either necessary or warranted.[6]

C. The District's Laws Are Reasonable And Should Be Upheld.

1. Even if the Second Amendment otherwise protected a right of gun ownership for private purposes, reasonableness is the standard that most appropriately balances the rights of individuals with the historic exercise of widespread police power over private uses of guns. PBr41-44; HBr4-30; AJCBr21-26. It is a workable and tested standard that has accommo-

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[6] At the very least, the Court should not adopt a heightened scrutiny standard and find that the District's laws violate the Amendment without first permitting the District to develop a sufficient record before the district court. Even if respondent had offered a cognizable facial or applied challenge under the United States' test, the appropriate remedy would be to reverse the judgment and remand with instructions directing the district court to engage in appropriate fact-finding. *See* USBr28 (urging remand and noting that the district court "did not engage in intermediate scrutiny or indeed in any consideration (or fact-finding) on the constitutionality of the D.C. laws").

dated both undeniable public safety concerns and meaningful protection for private firearms possession. Respondent does not deny that state courts interpreting constitutions that (unlike the federal Constitution) create a right to own weapons for private purposes have long and uniformly employed reasonableness as the proper test to determine whether a legislature has overstepped its traditional authority to regulate dangerous weapons. PBr41-42; LawProfBr 4-30.

Nor does respondent deny that the predictive judgment of the District's Council on a quintessentially legislative matter—the decision to ban an easily concealable weapon that is uniquely dangerous in an urban context, while allowing rifles and shotguns for private use, *see* VPCBr11-32—is reasonable under the established state-court standard of review. PBr48-55.

Rather, respondent's only argument is that the District's laws are unreasonable because they ban *all* functional firearms. RBr52-54. That is not so. The District and the United States agree that the trigger-lock law should be read to contain an implicit exception for self-defense. USBr31 n.8; Brief of DC Appleseed 29-31.[7] Because respondent's *only* challenge to the trigger-lock provision is that it fails to contain an exception for self-defense, the judgment should be reversed.

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[7] *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. 1978), is not to the contrary. RBr53-54. That case merely holds that there is no equal protection violation in having different rules for homes and businesses. Nor does the fact that guns may be kept unlocked at businesses limit the "established D.C.-law principles" that a self-defense exception is implicit irrespective of where the gun is located. USBr31 n.8.

Indeed, even if respondent's view of the trigger-lock provision were correct, the decision below should still be reversed for two reasons respondent fails to address. First, respondent's challenge is that the District *might* prosecute *someone* for disabling a trigger lock while being attacked in the home. That does not come close to satisfying this Court's requirements for a facial challenge. PBr57. Second, at the end of the day, even if respondent were correct in all other respects, the appropriate remedy would be limited to the trigger-lock law and would leave the rest of the District's laws intact. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-30 (2006). The Court should reject respondent's improper attempt to use the trigger-lock law as a vehicle to invalidate the District's handgun law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 07-290

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

DICK ANTHONY HELLER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

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In the Supreme Court of the United States

No. 07-290

DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

DICK ANTHONY HELLER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Congress has enacted numerous laws regulating firearms. Those statutes include restrictions on private possession of types of firearms that are particularly susceptible to criminal misuse. The United States has a substantial interest in the constitutionality and effective implementation of those laws. The United States also is responsible for prosecuting adult defendants charged with violating D.C. Code § 22-4504(a) (prohibiting carrying of pistol without license), and has frequently prosecuted adults charged with violating D.C. Code § 7-2502.01(a) (prohibiting possession of unregistered firearms). See generally D.C. Code § 23-101(c)-(d).

STATEMENT

1. Congress has enacted numerous laws governing the sale, transportation, and possession of various categories of firearms.

a. Congress has generally prohibited the private possession of particularly dangerous types of firearms, including certain types of handguns. Possession of machineguns is generally prohibited by 18 U.S.C. 922(*o*), and the definition of "machinegun," see 18 U.S.C. 921(a)(23); 26 U.S.C. 5845(b), encompasses some weapons that fall within the D.C.-law definition of "pistol." See p. 4, *infra*. A similar restriction as to "semiautomatic assault weapon[s]" was in effect until 2004. See 18 U.S.C. 922(v)(1) (repealed 2004 pursuant to preexisting sunset provision). Federal law also restricts the possession of firearms—including handguns—that, under specified circumstances, are undetectable by metal detectors or x-ray machines. See 18 U.S.C. 922(p) (2000 & Supp. V 2005).

b. Federal law also restricts the possession of firearms by various categories of individuals whom Congress has deemed unfit to possess such weapons. The most frequently applied provision generally prohibits the possession of firearms by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). Section 922(g) also generally prohibits the possession of firearms by fugitives from justice; unlawful users of controlled substances; persons who have been adjudicated as mental defectives or committed to mental institutions; aliens illegally present within the United States; persons dishonorably discharged from the armed forces; persons who have renounced their United States citizenship; persons subject to restraining orders that include a finding that the individual is a credible threat to the physical safety of an intimate partner or child; and persons convicted of misdemeanor crimes of domestic violence (unless such convictions have been expunged, etc.). 18 U.S.C. 922(g)(2)-(9).

In addition, Congress has prohibited the private possession of firearms at particular locations. See, *e.g.*, 18 U.S.C. 930 (2000 & Supp. V 2005) (federal government facilities); 40 U.S.C. 5104(e)(1)(A) (Supp. IV 2004) (Capitol Grounds and Capitol Buildings); 49 U.S.C. 46505(b)(1) ("concealed dangerous weapon" "when on, or attempting to get on, an aircraft").

c. Federal law also regulates the manufacture, sale, and importation of firearms. The Gun Control Act of 1968 (GCA), Pub. L. No. 90-618, 82 Stat. 1213, prohibits any person from engaging in the business of importing, manufacturing, or dealing in firearms without a license. See 18 U.S.C. 923 (2000 & Supp. V 2005); see also 18 U.S.C. 922(a) (2000 & Supp. V 2005). The GCA also substantially restricts the importation of firearms and prohibits the receipt of firearms imported in violation of law. See 18 U.S.C. 922(*l*).

d. In 2001, the Attorney General adopted the position that the Second Amendment protects an individual right to possess firearms for a lawful private purpose unrelated to service in a militia, and that such right—like other constitutional rights—is subject to reasonable restrictions. See U.S. Br. in Opp. at 19-20 n.3, *Emerson* v. *United States*, 536 U.S. 907 (2002) (No. 01-8780); *id.* at appendix (attaching Attorney General memorandum); U.S. Br. in Opp. at 5 n.2, *Haney* v. *United States*, 536 U.S. 907 (2002) (No. 01-8272). Consistent with that view and the Department's enforcement responsibilities, the Attorney General made clear that the United States "can and will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws." Attorney General memorandum.

2. This case involves four related gun-control measures applicable only in the District of Columbia. First, D.C. Code § 7-2502.01(a) generally makes it unlawful for any person to possess an unregistered firearm within the District. Second, D.C. Code § 7-2502.02(a)(4), which was enacted by the D.C. City Council in 1976, generally bars the registration of any "[p]istol," which is defined as "any firearm originally designed to be fired by use of a single hand." D.C. Code § 7-2501.01(12). Together, those provisions effectively ban the private possession of handguns, with relatively minor exceptions not implicated here. Third, D.C. Code § 22-4504 prohibits carrying a pistol without a license. Fourth, D.C. Code § 7-2507.02 requires that all lawfully owned firearms—both pistols and long guns—must be kept "unloaded and disassembled or bound by a trigger lock or similar device unless [the] firearm is kept at [the registrant's] place of business."

3. Respondent is a District of Columbia special police officer who is permitted to carry a handgun while on duty as a guard at the Federal Judicial Center. Pet. App. 4a. Wishing to possess a handgun in his home for the purpose of self-defense, respondent applied for a registration certificate. *Id.* at 4a, 120a. Relying on D.C. Code § 7-2502.02(a)(4), the D.C. government denied that application. Pet. App. 4a, 120a. Respondent (along with five other plaintiffs whose claims are not at issue here) then filed suit in federal district court under 42 U.S.C. 1983, challenging the constitutionality of the D.C. laws discussed above. Pet. App. 4a, 71a.

Respondent alleged that he "presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by [petitioners'] active enforcement of unconstitutional policies." J.A. 51a. Respondent further alleged that the D.C. firearm provisions discussed above effectively prohibit "the private ownership and possession of handguns and functional firearms within the home" and therefore violate his rights under the Second Amendment. J.A. 57a. "At a minimum," he contended, "the Second Amendment guarantees individuals a fundamental right to possess a functional, personal firearm, such as a handgun or ordinary long gun (shotgun or rifle) within the home." J.A. 54a.

The district court granted petitioners' motion to dismiss the complaint. Pet. App. 71a-83a. The court held that the Second Amendment does not secure any "individual right to bear arms separate and apart from service in the Militia." *Id.* at 83a; see *id.* at 73a-83a. The court concluded that, "because none of the plaintiffs have asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment." *Id.* at 83a.

4. The court of appeals reversed. Pet. App. 1a-70a.

a. Looking to the text, context, and history of the Second Amendment, the court of appeals held that the Second Amendment protects an individual right to keep and bear firearms unrelated to militia operations. Pet. App. 12a-44a. The court held that the Second Amendment applies to legislation enacted by the D.C. City Council, reasoning that "the Bill of Rights are in effect in the District." *Id.* at 45a; see *id.* at 44a-48a. The court further held that, as applied to handgun possession in the home, the District's handgun ban violates the Second Amendment. *Id.* at 48a-55a.

The court of appeals adopted a two-part test, under which a particular weapon is a Second Amendment "Arm[]" if it (i) bears a "reasonable relationship to the preservation or efficiency of a well regulated militia," and (ii) is "of the kind in common use at the time" the Second Amendment was adopted. Pet. App. 50a-51a (quoting *United States* v. *Miller*, 307 U.S. 174, 178, 179 (1939)). The court concluded that the handgun respondent sought to possess was covered under both of those prongs. *Id.* at 51a. The court rejected petitioners' contention that, because D.C. law allows respondent to possess other types of firearms, the ban on handguns does not violate the Second Amendment. *Id.* at 53a. The court explained: "Once it is determined—as we have done—that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." *Ibid.* The court further held that D.C. Code § 7-2507.02—the trigger-lock provision—is unconstitutional because it also "bars [respondent] from lawfully using a handgun for self protection in the home." Pet. App. 55a.[1]

b. Judge Henderson dissented. Pet. App. 56a-70a. She would have held that, because the District of Columbia is not a "State" within the meaning of the Second Amendment, the Amendment does not apply to the District. See *id.* at 70a.

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[1] The court of appeals observed that, because respondent did "not claim a legal right to carry a handgun outside his home," the court was not required to "consider the more difficult issue whether the District can ban the carrying of handguns in public, or in automobiles." Pet. App. 54a. The court also appeared to accept the legitimacy of D.C.'s requirement that privately-owned firearms be registered. The court observed that such registration requirements "might be thought consistent with a 'well regulated Militia'" because "[t]he registration of firearms gives the government information as to how many people would be armed for militia service if called up." *Id.* at 52a.

SUMMARY OF ARGUMENT

A. The court of appeals correctly held that the Second Amendment protects an individual right to possess firearms unrelated to militia operations. By its plain text, the Second Amendment secures a "right," a term that the Constitution consistently uses to refer to *individual* freedoms rather than state prerogatives. The text also makes clear that the right is not limited to members of a select body (like today's National Guard) but extends to "the people" generally. The Second Amendment's placement within the Bill of Rights, and its use of a phrase ("the people") that has acquired a settled meaning in surrounding constitutional provisions, reinforces the most natural reading of the Amendment's text.

The Second Amendment's prefatory language, which refers to the "necess[ity]" of a "well regulated Militia," does not negate the Amendment's operative guarantee. It was common in constitutional and statutory provisions at the time of the Framing for prefatory language to identify a goal or principle of wise governance narrower than the operative language used to achieve it. The logical connection between militia operations and a general right of private gun ownership was particularly clear when the Second Amendment was adopted, since the Framing-era "Militia" was not a select body like today's National Guard, but instead comprised the free white male citizenry of fighting age, whose members were expected to bring their own weapons when called to service.

B. Although the court of appeals correctly held that the Second Amendment protects an individual right, it did not apply the correct standard for evaluating respondent's Second Amendment claim. Like other provisions of the Constitution that secure individual rights, the Second Amendment's protection of individual rights does not render all laws limiting gun ownership automatically invalid. To the contrary, the Second Amendment, properly construed, allows for reasonable regulation of firearms, must be interpreted in light of context and history, and is subject to important exceptions, such as the rule that convicted felons may be denied firearms because those persons have never been understood to be within the Amendment's protections. Nothing in the Second Amendment properly understood—and certainly no principle necessary to decide this case—calls for invalidation of the numerous federal laws regulating firearms.

When, as here, a law directly limits the private possession of "Arms" in a way that has no grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened scrutiny that considers (a) the practical impact of the challenged restrictions on the plaintiff's ability to possess firearms for lawful purposes (which depends in turn on the nature and functional adequacy of available alternatives), and (b) the strength of the government's interest in enforcement of the relevant restriction. Cf. *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). Under that intermediate level of review, the "rigorousness" of the inquiry depends on the degree of the burden on protected conduct, and important regulatory interests are typically sufficient to justify reasonable restrictions. *Ibid.*

The court of appeals, by contrast, appears to have adopted a more categorical approach. The court's decision could be read to hold that the Second Amendment *categorically* precludes any ban on a category of "Arms" that can be traced back to the Founding era. If adopted by this Court, such an analysis could cast doubt on the constitutionality of existing federal legislation prohibiting the possession of certain firearms, including machineguns. However, the text and history of the Second Amendment point to a more flexible standard of review. Just as the Second Congress expressed judgments about what "Arms" were appropriate for certain members of the militia, Congress today retains discretion in regulating "Arms," including those with military uses, in ways that further legitimate government interests. Under an appropriate standard of review, existing federal regulations, such as the prohibition on machineguns, readily pass constitutional muster.

C. Given that the D.C. Code provisions at issue ban a commonly-used and commonly-possessed firearm in a way that has no grounding in Framing-era practice, those provisions warrant close scrutiny under the analysis described above and may well fail such scrutiny. However, when a lower court has analyzed a constitutional question under a standard different from the one adopted by this Court, the Court's customary practice is to remand to permit further consideration (and any appropriate fact finding or legal determinations) by the lower courts in the first instance. Several factors counsel in favor of following the Court's customary practice here, particularly the lack of case law from this Court fleshing out the potentially relevant doctrines and subdoctrines that might inform the Second Amendment analysis. Accordingly, after taking the foundational steps discussed above, the better course would be to remand the case for further proceedings consistent with the Court's opinion.

ARGUMENT

As the court of appeals correctly held, the Second Amendment protects an individual right to possess firearms, including for private purposes unrelated to militia operations. But like other constitutional rights, that individual right is subject to reasonable restrictions, must be applied in light of context and history, and does not provide any protections to individuals who have never been understood to be within the Amendment's protections. The D.C. laws at issue here ban a commonly-used and commonly-possessed firearm. The ban is not unconstitutional just because it takes a categorical approach, but it is subject to heightened judicial scrutiny. This Court should affirm the court of appeals' threshold determination that the Second Amendment protects an individual right, but it should adopt a more flexible standard of review.

A. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO POSSESS FIREARMS, INCLUDING FOR PURPOSES UNRELATED TO MILITIA OPERATIONS

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Relying primarily on the Amendment's prefatory language, petitioners contend that the Second Amendment "protects the possession and use of guns only in service of an organized militia." Pet. Br. 8; see *id.* at 11-35. That is incorrect.

1. The Text Of The Second Amendment, And Its Placement Within The Bill of Rights, Strongly Indicate That The Amendment Protects An Individual Right

a. As the court of appeals explained, "[i]n determining whether the Second Amendment's guarantee is an individual one, or some sort of collective right, the most important word is the [term] the drafters chose to describe the holders of the right—'the people.'" Pet. App. 18a. The term "the people" would not naturally be used to refer to a select body like today's National Guard. Rather, as used in the Bill of Rights, it is a "term of art" that "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

The Second Amendment's use of the word "right" is likewise highly significant. "Setting aside the Second Amendment, not once does the Constitution confer a 'right' on any governmental entity, state or federal. Nor does it confer any 'right' restricted to persons in governmental service, such as members of an organized military unit." *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel 11 (Aug. 24, 2004) (*OLC Opinion*) <http://www.usdoj.gov/olc/secondamendment2.pdf>. Rather, the Constitution consistently uses the term to secure the rights of *individuals* as against governmental overreaching. See *ibid.* "It would be a marked anomaly if 'right' in the Second Amendment departed from such uniform usage throughout the Constitution." *Ibid.*

b. The placement of the Second Amendment within the Bill of Rights, and particularly within Amendments One to Four (Three to Six, as proposed), reinforces the most natural reading of the Amendment's text. The surrounding Amendments are unambiguously intended, and have consistently been construed, to place particular spheres of individual private activity beyond the reach of the national government. See Pet. App. 22a; *OLC Opinion* 35-36. If the purpose of the Second Amendment were to define the respective prerogatives of the federal and state governments with regard to collective military action, its placement would be odd indeed. That is particularly so because the federal-state division of authority over militia operations had *already* been addressed by Article I, Section 8, Clause 16 of the Constitution, which had taken effect only 15 months before the Bill of Rights was submitted to the States for ratification. See *OLC Opinion* 39.

In addition, the Framers' use of the phrase "the people" in the Second Amendment is consistent with their use of that "term of art" in other provisions of the Bill of Rights—the First and Fourth Amendments—that unquestionably protect individual rights. See *Verdugo-Urquidez*, 494 U.S. at 265. The basic structure of the Second Amendment is also similar to other provisions, like the Fourth Amendment, that protect individual rights. While each individual right guaranteed by the Constitution must be interpreted in its own light, it is telling that the wording of the Second Amendment comports with other Bill of Rights provisions long understood to secure individual rights.

c. It is also significant that the Second Amendment refers, not to "*a* right of the people," but to "*the* right of the people to keep and bear Arms." The Framers' use of the definite article indicates that the Amendment was intended to secure a pre-existing right rather than to create a new one. See Pet. App. 20a. Because the government of England did not have a federal structure, and because the Constitution was intended to refashion the division of authority between the state and national governments, a constitutional provision defining the respective state and federal roles in the sphere of militia operations could not plausibly have been viewed as protecting some pre-existing right. Rather, the pre-existing right secured by the Second Amendment could only have been the common-law right to possess firearms, which was not limited to possession for collective purposes. See pp. 17-19, *infra*; Pet. App. 21a.

In *Robertson* v. *Baldwin*, 165 U.S. 275 (1897), this Court explained:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; [and] the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons.

Id. at 281-282. The Court in *Robertson* thus read the Second Amendment in pari materia with other Bill of Rights provisions that indisputably protect individual freedoms, and it construed the Amendment as securing a pre-existing right "inherited from our English ancestors"—a right that was individual in nature and wholly unrelated to the distinct federal structure created by the Constitution.[2]

2. The Second Amendment's Reference To The Necessity Of A "Well Regulated Militia" Does Not Limit The Substantive Right That The Amendment Secures

In arguing that the individual right protected by the Second Amendment may be exercised only in connection with militia operations, petitioners emphasize that the Amendment's prefatory language "speaks only of militias, with not a hint about private uses of firearms." Br. 8. Petitioners' reliance on that language is misplaced.

a. The Second Amendment's prefatory language ("A well regulated Militia, being necessary to the security of a free State") reflects that the Framers regarded the furtherance of militia operations as a particularly salient benefit of private firearm ownership, but it does not limit the scope of the Amendment's substantive guarantee. While protection of the militia was a principal *object* of the Second Amendment, the Framers sought to achieve that goal not by defining a *new* right limited to active militia service or even to militia members, but by giving constitutional status to the *pre-existing* common-law "right of the people to keep and bear Arms." As Thomas M. Cooley explained, "[t]he meaning of the [Second Amendment] undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 297-298 (1898).

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[2] The *Robertson* Court's reference to concealed-weapon bans as evincing the qualified nature of the Second Amendment right further indicates that Court did not view the basic right as limited to firearm possession in furtherance of militia service. If the Court had so understood the Second Amendment, it would presumably have identified the requirement of militia-relatedness as the major limiting principle. The *Robertson* Court's analysis likewise bolsters the court of appeals' conclusion that the Second Amendment, no less than other provisions of the Bill of Rights, is applicable to the District of Columbia. See note 5, *infra*.

At the time the Second Amendment was adopted and ratified, moreover, "[i]t was quite common for prefatory language [in constitutional or statutory provisions] to state a principle of good government that was narrower than the operative language used to achieve it." Pet. App. 34a; see Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 814-821 (1998) (listing examples roughly contemporaneous with the Second Amendment); *OLC Opinion* 20. The interpretive significance of such prefatory language was well established. To the extent that a particular provision's substantive scope was otherwise unclear, the prefatory language could be used to resolve the ambiguity; but an introductory declaration or statement of purpose could not supersede the plain meaning of the operative guarantee. See *ibid.*; *United States* v. *Emerson*, 270 F.3d 203, 234 n.32 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002). Cf. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (explaining that "statutory prohibitions often go beyond the principal evil" that motivated the law); *Gonzales* v. *Oregon*, 546 U.S. 243, 288 (2006) (finding "no reason to think" that a statute's "*principal* concern" is its "*exclusive* concern").

b. If the term "well regulated Militia" is understood to refer to a select corps akin to today's National Guard, protection of "the right of the people to keep and bear Arms" might appear to be an extravagant means of furthering militia operations. See Antonin Scalia, *A Matter of Interpretation* 137 n.13 (1997) (explaining that, if the Second Amendment term "Militia" is construed to refer to a select body, the Amendment "produces a guarantee that goes far beyond its stated purpose"). The Framers, however, had a much broader conception of the militia. See, *e.g.*, Act of May 8, 1792 (Second Militia Act), ch. 33, § 1, 1 Stat. 271; Pet. App. 29a; *OLC Opinion* 27. As this Court has explained, "[t]he signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense." *United States* v. *Miller*, 307 U.S. 174, 179 (1939). The Court further explained that "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Ibid.*

Given the composition of the militia and the manner of its armament at the time the Second Amendment was ratified, no sharp distinction could have been drawn between private and militia-related gun possession. While the Founding-era militia was not entirely coextensive with "the people" at large, extending the Second Amendment's substantive protections to the general populace is consistent with the scope of the surrounding provisions of the Bill of Rights and directly furthers militia operations as well. There is consequently no reason to suppose that the Amendment's drafters intended either "Militia" or "the people" to be given anything other than its prevailing construction at the time the Amendment was adopted.[3]

c. In three related respects, the Framers regarded the individual right protected by the Second Amendment as central to the preservation of liberty.

First, the Framers' view that a "well regulated Militia" was "necessary to the security of a free State" was not based simply on a belief that the militia would be effective in preventing insurrection or invasion. In addition, many expressed profound concern that the obvious *alternative* mechanism for averting such dangers—a large standing army—would facilitate oppression by the federal government. Preservation of the militia was seen as a means of reducing the need and the rationale for such a force. See, *e.g.*, *Emerson*, 270 F.3d at 240, 272; *OLC Opinion* 66-67 (discussing, inter alia, amendment proposed by Virginia convention expressly linking right to keep and bear arms with concerns over standing armies). As Alexander Hamilton explained, "[i]f the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force." *The Federalist No. 29*, at 183 (Clinton Rossiter ed. 1961).

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[3] Under current federal law, the "militia of the United States" includes "all able-bodied males at least 17 years of age and * * * under 45 years of age" who are United States citizens or have declared their intention to become citizens, as well as female citizens who are members of the National Guard. 10 U.S.C. 311(a); see D.C. Code § 49-401 (defining D.C. militia). The requirements that each militia member procure appropriate weaponry, imposed by statute for the first century of the Republic, were repealed in 1901. See *Perpich* v. *DoD*, 496 U.S. 334, 341 (1990). The militia is now divided into the "organized militia," which consists of the National Guard and the Naval Militia, and the "unorganized militia," which includes all other members. 10 U.S.C. 311(b)(1) and (2). While membership in the militia no longer entails a legal obligation to possess firearms, militia members are potentially subject to being called to service in specified (albeit highly unusual) circumstances. See 10 U.S.C. 331, 332.

Second, Framing-era discussions of the need for the Second Amendment frequently described an armed citizenry as a deterrent to abusive behavior by the federal government itself. See, *e.g.*, *Emerson*, 270 F.3d at 237-240; Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 649 (1989). Justice Story stated that "[t]he right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them." Joseph Story, *Commentaries on the Constitution of the United States* § 1001, at 708 (1987). In that regard, the Framers frequently contrasted American society with the perceived tendency of European governments to disarm their populations in order to facilitate oppressive rule. See, *e.g.*, *The Federalist No. 46*, at 299 (James Madison); *Emerson*, 270 F.3d at 240 n.53; *OLC Opinion* 63 n.258.

Third, the Anglo-American common-law tradition recognized the importance of private firearm possession as a bulwark against private depredations. Thus, Blackstone identified the three "principal or primary" rights of English subjects as "the right of personal security, the right of personal liberty, and the right of private property." 1 William Blackstone, *Commentaries* *129.

Blackstone further recognized, however, that the recognition of those principal rights would be illusory "if the constitution had provided no other method to secure their actual enjoyment." *Id.* at *140-*141. Among the "auxiliary" rights that Blackstone recognized as necessary to preserve those primary rights was the right of English subjects "of having arms for their defence, suitable to their condition and degree, and such as are allowed by law." *Id.* at *143-*144. Blackstone described the right to possess arms as "a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at *144. Thus, by constitutionalizing the preexisting common-law right to possess firearms, the Second Amendment served in part to protect the individual's lawful right to possess a firearm for self-defense.[4]

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[4] In *Miller*, the Court observed that the Second Amendment should be "interpreted and applied" in light of what the Court described as the "obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces." 307 U.S. at 178. Applying that principle, the Court rejected a challenge to federal restrictions on the licensing and control of sawed-off shotguns given "the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." *Ibid.* Although the Court did not expressly address the issue, the decision in *Miller* is consistent with the conclusion that the Second Amendment confers an individual right of some character. Indeed, the Court considered Miller's Second Amendment claim without suggesting, much less holding, that he had no basis to press such a claim. In addition, the Court did not place any significance on whether the underlying indictment in *Miller* alleged that the defendants were involved in any military or militia service (which it did not). See *Emerson*, 270 F.3d at 224-227. Although the Court's decision (following the government's own brief in *Miller*) supports a mode of analysis that

B. LIKE RIGHTS CONFERRED BY SURROUNDING PROVISIONS OF THE BILL OF RIGHTS, THE INDIVIDUAL RIGHT GUARANTEED BY THE SECOND AMENDMENT IS SUBJECT TO REASONABLE RESTRICTIONS AND IMPORTANT EXCEPTIONS

For the reasons stated above, the court of appeals was correct in concluding that the Second Amendment protects an individual right. As the court of appeals further recognized (Pet. App. 51a), however, it does not follow that "the government is absolutely barred from regulating the use and ownership of pistols" or other firearms. See *Robertson*, 165 U.S. at 281 (The various liberties secured by the Bill of Rights "ha[ve], from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case."). Rather, the Second Amendment, properly construed, allows for reasonable regulation of firearms, must be applied in light of context and history, and does not provide any protections to certain individuals, such as convicted felons, who have never been understood to be within the Amendment's coverage. In those respects, the Second Amendment right is like rights conferred by the surrounding provisions of the Bill of Rights and enjoyed by individuals. Given the unquestionable threat to public safety that unrestricted private firearm posses-

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interprets the Second Amendment in light of the relationship between the regulated firearms and "the preservation or efficiency of a well regulated militia" (*ibid.*), the Court did not express any holding on whether or to what extent the Amendment applies only to "militia related" activities. Accordingly, although the Court's discussion of the Second Amendment in *Miller* differs in some respects from the analysis described in this brief, *Miller* presents no precedential barrier to adopting that approach.

sion would entail, various categories of firearm-related regulation are permitted by the Second Amendment under that constitutional understanding, as illustrated by the existing federal laws regulating firearms.[5]

1. Congress Has Authority To Prohibit Particular Types Of Firearms, Such As Machineguns

a. While the court of appeals correctly recognized that the Second Amendment both secures individual rights and allows "reasonable restrictions" (Pet. App. 51a), it appears to have adopted a categorical test. The court of appeals concluded that, "[o]nce it is determined * * * that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." Pet. App. 53a. Such a categorical approach would cast doubt on the constitutionality of the current federal machinegun ban, as well as on Congress's general authority to protect the public safety by identifying and proscribing particularly dangerous weapons. See p. 2, *supra.* Indeed, the court's unqualified determination that "handguns are 'Arms,'" Pet. App. 53a; see *id.* at 51a, does not exclude certain automatic weapons covered by 18 U.S.C. 922(*o*) that fall within the D.C.-law definition of "pistol." And because automatic rifles like the M-16 are now standard-issue military weapons for rank-and-file soldiers, the court's reference to the "lineal descendant[s]" of the weapons used in Founding-era militia operations, see Pet. App. 51a, on its face would cover machineguns and other firearms that represent vast technological improvements over the "Arms" available in 1791. See *ibid.*

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[5] The court of appeals correctly concluded that the Second Amendment—like the surrounding provisions of the Bill of Rights—applies to the District of Columbia. See Pet. App. 44a-48a; *O'Donoghue* v. *United States*, 289 U.S. 516, 539-541 (1933); *Robertson*, 165 U.S. at 281-282. Although the Second Amendment may have limited or no application to special federal enclaves such as military bases, where the government has always enjoyed greater leeway in regulating the private conduct of individuals who voluntarily enter, that rationale would not extend to the whole of the District of Columbia. Indeed, petitioners' argument (Br. 35-40) that the District is unique compared to the States when it comes to the Second Amendment is seriously undercut by the fact that the District has its own militia statute. D.C. Code § 49-401; see Act of Mar. 3, 1803, ch. 20, 2 Stat. 215 (providing for organization of D.C. militia).

b. The text and history of the Second Amendment strongly indicate that the Amendment does not *categorically* foreclose legislative prohibitions on particular categories of "Arms." The question remains whether the restriction is reasonable. The right protected by the Second Amendment is a right to "keep and bear *Arms*," not a right to possess any specific type of firearm. A ban on a type or class of firearms, such as machineguns, is not unconstitutional just *because* it is categorical. A number of factors—including whether a particular kind of firearm is commonly possessed, poses specific dangers, or has unique uses, as well as the availability of functional alternatives—are relevant to the constitutional analysis.

History also supports that conclusion. Because Founding-era militia members were expected to procure their own firearms and to bring those guns when called to service, see p. 16, *supra*, the militia could not have been "well regulated" if individuals had unrestricted freedom to choose *which* "Arms" they would possess. Rather, it was essential to the effective operation of the militia as then constituted that government officials be authorized to specify the weapons that individual members would be required to procure and maintain. The Amendment's text and history thus suggest that the substantive right secured did not guarantee an unfettered *choice* of "Arms."

That inference is strongly reinforced by the Second Militia Act of 1792. Because of its vintage, that Act provides significant contemporaneous evidence of the Framers' views as to the scope of the right that the Second Amendment secures. In addition to requiring (with limited exceptions) that all "free able-bodied white male citizen[s]" between 18 and 45 years old be enrolled in the militia, the Second Militia Act prescribed in considerable detail the type and quantity of firearms and ammunition that different classes of militia members were to procure and bring when called to service. See Second Militia Act, § 1, 1 Stat. 271-272; Pet. App. 29a, 49a-50a. Congress's enactment of that statute confirms that the Framers did not understand the right secured by the Second Amendment to include unrestricted freedom of choice among "Arms." Indeed, Congress could certainly have made clear—consistent with the Second Amendment—that certain "Arms" would be disruptive of a "well regulated Militia" if wielded by certain classes of militia members and so should not be brought when the militia was called to service.

Other historical evidence is to the same effect. Blackstone described the right secured by the English constitution as the right of English subjects "of having arms for their defence, suitable to their condition and degree, and *such as are allowed by law.*" 1 Blackstone, *supra*, *143-*144 (emphasis added). Blackstone further characterized the right as "a public allowance, *under due restrictions*, of the natural right of resistance and self-preservation." *Id.* at *144 (emphasis added).

Accordingly, when a law directly limits or prohibits the private possession of "Arms" in a way that has no grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened judicial scrutiny, but not to the type of per se rule suggested by the court of appeals. See Pet. App. 53a.[6] In conducting the appropriate inquiry, the reviewing court should consider (a) the practical impact of the challenged restrictions on the plaintiff's ability to possess firearms for lawful purposes (including the nature and practical adequacy of the available lawful alternatives), and (b) the strength of the government's interest in enforcement of the relevant restriction. Cf. *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). Under that approach, the "rigorousness of [the] inquiry" (*ibid.*) depends on the extent to which a law burdens Second Amendment rights, and important regulatory interests are typically sufficient to justify reasonable restrictions on such rights. See *ibid.*; *Timmons* v. *Twin City Area New Party*, 520 U.S. 351, 358-359 (1997).

The federal prohibitions on the possession of particular types of firearms, such as machineguns, readily pass such scrutiny. Those prohibitions are carefully targeted to firearms that have little or no legitimate private purpose, they permit possession for lawful purposes of a broad class of firearms other than those regulated, and the government's interest in regulating firearms like the machinegun to protect the public safety is paramount.

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[6] The difference between the court of appeals' standard and the standard advocated here can be analogized to the difference in approach between the concurring and majority opinions in *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995). While the concurrence surveyed the historical evidence of anonymous electioneering during the Founding era and advocated a categorical rule of protection, see *id.* at 358-367 (Thomas, J., concurring in the judgment), the Court invalidated the law by applying a more broadly applicable standard of review (there, strict scrutiny) that would allow some restrictions on anonymous electioneering speech, see *id.* at 348-353, 357. Whatever the merits of the competing views in *McIntyre*, a per se rule is clearly out of place in the Second Amendment context in light of the co-existence of the Second Amendment and reasonable restrictions on firearms dating back to the Founding. See, *e.g.*, *Robertson*, 165 U.S. at 281-282.

2. Congress Has Substantial Authority To Ban The Private Possession Of Firearms By Persons Whom Congress Deems Unfit To Keep Such Weapons

Heightened judicial scrutiny is not appropriate forall laws regulating the possession of firearms. As is true for other constitutional rights, in some contexts the underlying right has little or no application at all (*e.g.*, "fighting words" are not entitled to First Amendment protection). As the court of appeals recognized, some individuals, like convicted felons, simply do not enjoy Second Amendment rights. Pet. App. 52a. Because such individuals fall outside the protection of the Second Amendment, a law restricting gun ownership by felons need not satisfy the heightened scrutiny appropriate for laws prohibiting the possession of categories of guns by law-abiding citizens.

Abundant historical evidence makes clear that Section 922(g)(1)'s ban on firearm possession by felons—by far the most frequently applied of the prohibitions currently contained in 18 U.S.C. 922(g) (see pp. 2-3, *supra*)—is consistent with the Framers' intent. "Felons simply did not fall within the benefits of the common law right to possess arms. * * * Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them. All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent." Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983); see, *e.g.*, Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms]."). [7] The courts of appeals in the instant case and *Emerson*, which both correctly recognized that the Second Amendment secures an individual right, also recognized that the right simply does not extend to felons. See Pet. App. 52a; *Emerson*, 270 F.3d at 261 ("[I]t is clear that felons * * * may be prohibited from possessing firearms."). The validity of Section 922(g)(1) thus does not depend on the satisfaction of heightened scrutiny or on any empirical showing.

3. Congress Has Authority To Regulate The Manufacture, Sale, And Flow Of Firearms In Commerce

Licensing requirements such as those contained in the GCA (see p. 3, *supra*) generally do not present the same Second Amendment concerns as a direct prohibition on the possession of firearms by individuals. The Amendment's text and history suggest that the Framers were more concerned with securing the right of individuals to "keep and bear Arms" than with limiting the government's ability to regulate the manufacture or sale of such arms. Government restrictions on the importation and interstate transportation of firearms, see p. 3, *supra*, are even further afield from the Framers' concerns. In addition, as in the context of other individual rights, regulation of firearm-related *commercial* activities may present distinct constitutional considerations. See, *e.g.*, *New York* v. *Burger*, 482 U.S. 691 (1987) (recognizing exception to Fourth Amendment warrant requirement for administrative searches of certain business premises); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that commercial speech is entitled to reduced protection under the First Amendment). Accordingly, there is no basis here for questioning the constitutionality of the GCA's licensing provisions or federal limits on importation or transport of firearms. In any event, this case, which involves private possession, provides no opportunity for the Court to expound on the different principles that might govern efforts to regulate the commercial trade in firearms.

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[7] The current federal ban on possession of firearms by any person "who has been adjudicated as a mental defective or who has been committed to a mental institution," 18 U.S.C. 922(g)(4), likewise has a precise analog in Framing-era practice. And, of course, to the extent that federal law limits access to firearms by certain groups in the absence of a Framing-era analog, those restrictions would be subject to scrutiny under the Second Amendment, but would not be barred by any categorical rule.

C. THE COURT SHOULD REMAND THIS CASE TO THE LOWER COURTS TO PERMIT THEM TO ANALYZE THE CONSTITUTIONALITY OF THE D.C. LAWS AT ISSUE UNDER THE PROPER CONSTITUTIONAL INQUIRY

As discussed, a general prohibition on the possession of a type or class of firearms is subject to heightened judicial scrutiny that balances the impact of the challenged restrictions on protected conduct and the strength of the government's interest in enforcement of the relevant restriction. The greater the scope of the prohibition and its impact on private firearm possession, the more difficult it will be to defend under the Second Amendment.

Cf. *Burdick*, 504 U.S. at 434. Under that analysis, the D.C. ban may well fail constitutional scrutiny. The court of appeals appears to have applied instead a categorical rule, and the best course would be to remand for application of the proper standard of review in the first instance.

1. The heightened judicial scrutiny described above is materially different from the more categorical approaches taken by the district court and the court of appeals. The district court dismissed respondent's complaint based on the erroneous view that the Second Amendment does not secure any individual right "separate and apart from service in the Militia," Pet. App. 83a, and thus did not engage in intermediate scrutiny or indeed in *any* consideration (or fact-finding) on the constitutionality of the D.C. laws. The court of appeals appears to have erred in the opposite direction. Based on its determination that "handguns are 'Arms' referred to in the Second Amendment," the court of appeals appears to have ruled categorically that "it is not open to the District to ban them." *Ibid.*; see pp. 21-22, *supra*.

2. When this Court announces a legal standard significantly different from that applied by the court of appeals, the preferred course generally is to remand the case to allow the lower courts to apply the correct standard in the first instance. See, *e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995) ("Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced."); *O'Leary* v. *Brown-Pac.-Maxon, Inc.*, 340 U.S. 504, 508 (1951) ("When this Court determines that a Court of Appeals has applied an incorrect principle of law, wise judicial administration

normally counsels remand of the cause to the Court of Appeals with instructions to reconsider the record."). That exercise of restraint is simply an application of the principle that the Court ordinarily "do[es] not decide in the first instance issues not decided below." *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

Adherence to the Court's customary practice would be appropriate here. First and foremost, the Court's resolution of the extent to which the Second Amendment secures an individual right and, if so, its identification of the appropriate standard of review will be a substantial constitutional undertaking. Few issues in constitutional law have generated more historical research and scholarly comment, and of course the ratio of such historical and scholarly comment to extant Supreme Court doctrine has no parallel. Unlike most of the surrounding provisions of the Bill of Rights, there is scant case law interpreting the scope of the Second Amendment, much less precedent fleshing out and applying various principles or sub-doctrines giving effect to that right, as this Court has developed in other contexts. This Court's most extensive treatment of the Second Amendment is contained in a five-page discussion in an opinion issued nearly 70 years ago, which lacks any extended analysis or explication of Second Amendment rights. *Miller*, *supra*. Much of petitioners' briefing, and presumably an even greater percentage of amicus filings, will concentrate on these threshold issues.

If the Court takes the foundational steps discussed above, there would be virtue in remanding the case for application of a proper standard of review and permitting Second Amendment doctrine to develop in an incremental and prudent fashion as is necessary to decide particular cases that may arise. Allowing lower courts to develop doctrines to address issues concerning the scope of the Second Amendment, its application to a variety of circumstances, and the relevance of particular historical materials has much to recommend it. When lower courts differ as to the proper resolution of concrete and particularized disputes, the Court can grant plenary review and develop the law incrementally, as it does in other contexts. On the other hand, broad-based pronouncements in the context of adjudicating the details of a law that is far from typical could unduly skew the future course of Second Amendment adjudication.

3. Applying the heightened judicial scrutiny described above to the specific claims raised by respondent might warrant consideration of additional legal or factual issues that the court of appeals did not need to reach under its analysis. In contending that the challenged D.C. laws unconstitutionally prevent him from possessing functional firearms for personal self-defense in the home, respondent has focused throughout this litigation on the *combined effect* of the handgun ban and the trigger-lock provision. See J.A. 54a (complaint) (alleging that the challenged D.C.-law provisions violate respondent's Second Amendment "right to possess a functional, personal firearm, such as a handgun *or* ordinary long gun (shotgun or rifle) within the home") (emphasis added); J.A. 57a-58a; Br. in Opp. 2, 18-23 (emphasizing that respondent's challenge is to combined effect of D.C. laws on handguns *and* long guns). The determination whether those laws deprive respondent of a functional firearm depends substantially on whether D.C.'s trigger-lock provision, D.C. Code § 7-2507.02, can properly be interpreted (as petitioners contend, see Br. 56) in a manner that allows respondent to possess a func-

tional long gun in his home.[8] And if the trigger-lock provision can be construed in such a manner, the courts below would be required to address the factual issue—not fully explored during the prior course of the litigation—whether the firearms that *are* lawfully available to respondent are significantly less suited to the identified lawful purpose (self-defense in the home) than the type of firearm (*i.e.*, a handgun) that D.C. law bars respondent from possessing.[9]

To the extent necessary, further consideration of those questions should occur in the lower courts, which would be in the best position to determine, in light of this Court's exposition of the proper standard of review, whether any fact-finding is necessary, and to place any appropriate limits on any evidentiary proceedings. Moreover, even if the existing record proved to be adequate, initial examination of those issues is typically better reserved for the lower courts. Cf., *e.g.*, *Merck KGaA* v. *Integra Lifescis. I, Ltd.*, 545 U.S. 193, 208 (2005).[10]

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[8] The court of appeals suggested that, because D.C. Code § 7-2507.02 does not expressly authorize use of a firearm even in lawful self-defense in the home, respondent could not lawfully remove a trigger-lock and render a firearm functional even in response to an imminent threat. See Pet. App. 55a. Under established D.C.-law principles, however, the absence of an explicit self-defense exception within a particular prohibitory statute is not, standing alone, a proper ground for inferring that the defense is unavailable. See, *e.g.*, *Hernandez* v. *United States*, 853 A.2d 202, 205-207 (D.C. 2004) (reversing conviction for aggravated assault because trial court erroneously failed to instruct jury on right of self-defense). And, of course, the normal canon of construction is to construe statutes in a manner that *avoids* constitutional problems.

[9] The practical adequacy of long guns as a means of self-defense within the home will likely vary from individual to individual. Some disabled persons, as well as some individuals with less than average physical strength, might have particular difficulty using rifles or shotguns. Respondent himself has not alleged, however, that he is unable to use a long gun effectively. To the contrary, he has alleged that he owns long guns and seeks to use them for self-defense. J.A. 51a. The record compiled to this point does not appear to shed light on the question whether, and to what extent, long guns provide a functionally adequate alternative to handguns for self-defense in the home.

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[10] If the court of appeals ultimately holds that some or all of the challenged D.C.-law provisions are unconstitutional under the correct standard of review, a remand will also give that court the opportunity to state more precisely the scope of its remedial holding. With respect to D.C. Code § 22-4504(a), which prohibits the carrying of a pistol without a license, the court of appeals stated that it was declaring the law invalid only as applied to carriage within the home and was not addressing the question "whether the District can ban the carrying of handguns in public, or in automobiles." Pet. App. 54a. With respect to the other challenged provisions, however, the court did not make clear whether it was declaring the laws invalid on their face or only as applied to some particular set of circumstances.

CONCLUSION

The Court should affirm that the Second Amendment, no less than other provisions of the Bill of Rights, secures an individual right, and should clarify that the right is subject to the more flexible standard of review described above. If the Court takes those foundational steps, the better course would be to remand.

Respectfully submitted.

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In the
Supreme Court of the United States

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DISTRICT OF COLUMBIA, et al.,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

◆

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

◆

BRIEF OF ACADEMICS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

◆

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST

Amici curiae, academics representing a variety of fields of expertise including history, law, economics, business, political science and philosophy, submit this brief in support of the Respondent and assert that the empirical evidence concerning the murder rate in the District of Columbia, compared to other places, demonstrates convincingly that the District's handgun ban experiment was a failure.[1] The *amici* are:

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[1] No counsel for any party to this case authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than the *Amici Curiae* or their counsel made such a monetary contribution. This brief is filed with the written consent of all parties.

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Summary of Argument

The District of Columbia's gun ban was promoted as an effective method to lower violent crime, especially murder. If so, the policy has had ample time in the thirty years since 1977 to demonstrate its beneficial effects. However, looking at the data, there is no evidence that the District of Columbia's gun ban, which became effective in February 1977, reduced murder rates.[2] Indeed, there is only one year after the ban started that the murder rate is below what it was in 1976.

The District's murder rate has risen relative other cities, the neighboring states of Virginia and Maryland, or the rest of the country. In 1976, the District's murder rate was 15th among America's 50 most populous cities. Far from the ban lowering the District's murder rate, in only one of the year after the ban (1985) did the District rank as low as 15th. In 15 years of the next 29 years after the ban, the District's murder rate was 1st or 2nd; in another four years it was 4th. Similarly, the District's murder rate rose relative to the average murder rate.[3]

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[2] The District of Columbia's brief and various amici point to murder as the violent crime category that was reduced after the District of Columbia handgun ban that went into effect during February 1977. No other violent crime rate is pointed to.

[3] These results are not particularly surprising given other research (see e.g., John R. Lott, Jr., More Guns, Less Crime: Understanding Crime and Gun Control, Chicago, Illinois: University of Chicago Press (2000, second edition) at 113-114).

ARGUMENT

I.

COMPARING THE DISTRICT"S MURDER RATE TO MURDER RATES IN OTHER JURISDICTIONS

There are three obvious sets of comparisons: the District's murder rate relative to other large cities, the District's murder rate relative to neighboring Maryland and Virginia, and the District's murder rate relative to the rest of the United States. A study by Loftin *et. al.* (1991)[4] compared the mean homicide rates before and after the ban. They looked at the period from 1968 through 1987. Murders and homicides really took off in the District relative to the rest of the country in 1988, so excluding data after 1987 understates how much the District's murder rate rose after the ban. But because of their study we will look at the both the period from 1968 to 1987 as well as data after that point in time.[5] While this brief will discuss homicide data, its primary focus will be on murders since homicides include justifiable killings by police and civilians.

---

[4] Loftin, Colin, David McDowall, Brian Wiersema, & Talbert J. Cottey, "Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia," 325 New England Journal of Medicine 1615 (1991).

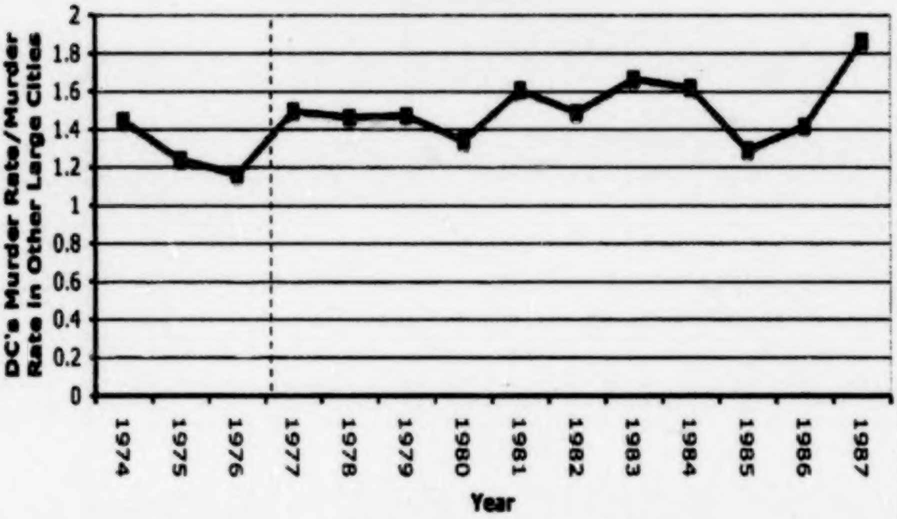
[5] Loftin et al's study also examined the number of homicides and not the rate. Given the large drop in the District's population during this period, it is important to examine changes in rates so as not to falsely attribute part of any change in murders to the decline in the number of people living in the District.

A.
The Fifty Largest Cities.

Figure 1 (below) shows how the District's murder rate has changed over time relative to the other 49 largest cities. In 1976, the last year before the ban, the District's murder rate was 16 percent greater than the average murder rate for the other large cities. A vertical line is drawn in the diagram to show that when the ban went into effect at the beginning of 1997.

After the ban, the District's murder rate between 1977 and 1987 averaged 55 percent greater than the average for these other cities, immediately rising to 50 percent above the average and getting as low as 29.4 percent greater in 1985. City level data from the FBI is only readily available from 1974 on so that is the period we start with. During the three years from 1974 to 1976, the District's murder rate averaged 28.5 percent more than the other cities, so there is not one single year after the ban where the ratio of the District's murder rate to the average for other cities fell below the pre-ban ratio.

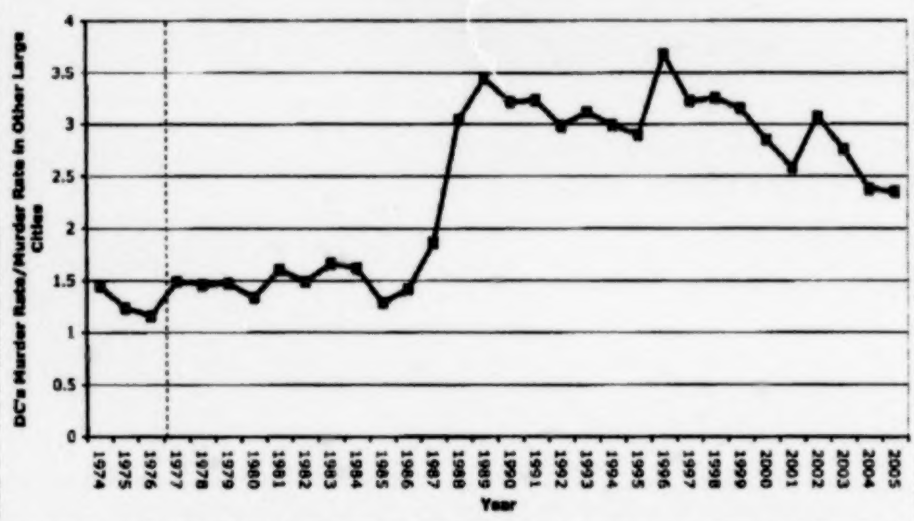
Figure 1: Changes in DC's Murder Rate Relative to the Other 49 Largest Cities



Source: FBI Uniform Crime Reports. The District's rates are easily available at http://www.disastercenter.com/crime/dccrime.htm

Extending the sample out past 1987 shows how the District's murder rate explodes above the rate in the rest of the cities (Figure 2). After the ban from 1977 to 2005, the District's murder rate averaged 144 percent greater than the other cities. A rate 5 times greater than it was in the pre-ban period.

Figure 2: Changes in DC's Murder Rate Relative to the Other 49 Largest Cities



Looking at these simple averages, there is no evidence in comparing the District's murder rate to the murder rate in other cities that the ban lowered murder rates. If anything, the ban appears to have been associated with an increase in murder rates.

The brief by Fox and McDowall argues that:

> The Respondent has argued that the rise in violent crimes in the District from 1980 to 1997 establishes that the DC Gun Control Law was ineffective. Brief in Response to Petition for Certiorari 27-28. However, the entire nation experienced an increase in violent crimes during this period because of the emergence of the crack cocaine market and related gang activity.

Brief of Professors of Criminal Justice as Amici Curiae in Support of Petitioner at 14.

Yet, the District's murder rate increased relative to other cities ***before*** crack cocaine became an issue in the last half of the 1980s. In addition, crack cocaine affected cities nationwide and after 1987 the District's murder rate still increased dramatically relative to the murder rate in other cities. While the crack cocaine epidemic clearly increased the District's murder rate, it is hard to see how cocaine can explain the District's relative increase in murder rates either anytime from 1977 to 1987 or afterwards. Nor can it explain why the District's murder rate was still almost 2.5 times that of the average of other large cities as late as 2005.

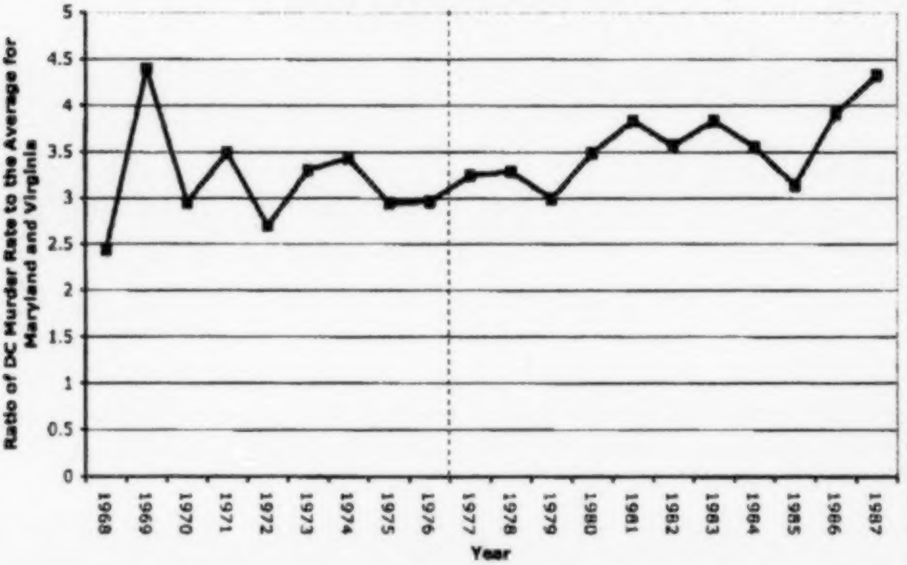
Not only are Fox and McDowall incorrect in their brief about the changes in the District's murder rates relative to other jurisdictions being due to the crack cocaine epidemic, but they are incorrect that past work on concealed handgun laws has not accounted for the impact of cocaine on crime rates. In fact, the work that they are discussing dealt extensively with the cocaine/crack issue. For example, see page 24, fn. 50 in the paper that they cite as the "Lott Study" (John R. Lott, Jr. and David Mustard, "Crime, Deterrence, and Right-to-Carry Concealed Handguns," 26 J. Legal Studies. 24 (1997). For a more extensive discussion on this see More Guns, Less Crime, John R. Lott, Jr., University of Chicago Press (2000, second edition) at 213-215.

B.

Comparison of the District to Maryland and Virginia.

Another obvious comparison is between the District and the two states that surround it, Maryland and Virginia. Figure 3 examines the period from 1968 through 1987. In the last year before the ban the District's murder rate was 197 percent greater than the average murder rate in Maryland and Virginia and the average during the period that the ban was in effect from 1977 to 1987 the District's murder rate was 257 percent greater than the average for these two states. Indeed, there was not one year after the ban was in place where the ratio was as low as it was in 1976. The average ratio from 1968 to 1976 was 219 percent compared to the average rate of 257 percent from 1977 to 1987.

Figure 3: Ratio of DC Murder Rate to the Average for Maryland and Virginia from 1968 to 1987

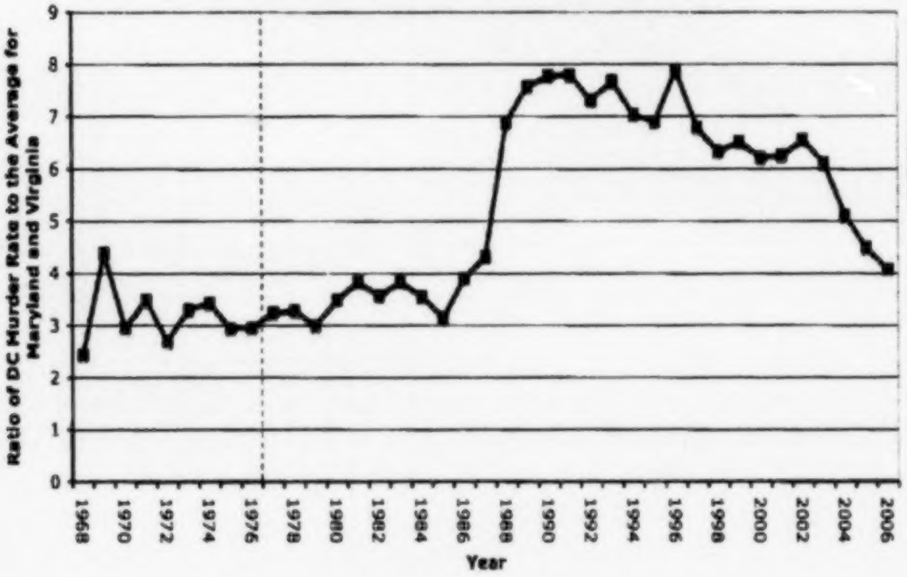


Source: FBI Uniform Crime Reports. The District's rates are easily available at http://www.disastercenter.com/crime/dccrime.htm. Maryland's data is available at http://www.disastercenter.com/crime/mdcrime.htm and Virginia's at http://www.disastercenter.com/crime/vacrime.htm.

Including data past 1987 shows a dramatic increase in the District's murder rate relative to Maryland and Virginia. The District's murder rate averaged 450 percent more than Maryland and Virginia's from 1977 to 2006, over twice the District to Maryland and Virginia ratio from 1968 to 1976.

Again, comparing the District to Maryland and Virginia provides no evidence that the ban reduced the District's murder rate. If anything, the District's murder rate increased after the ban.

Figure 4: Ratio of DC Murder Rate to the Average for Maryland and Virginia from 1968 to 2006



C.
Comparing the District's Murder Rate to that for the United States.

Examining the District's murder rate relative to the US's from 1968 to 1987 shows that the District's murder rate was declining before the ban and rising afterwards (Figure 5). The ban seems to be associated with this adverse change in the District's murder rate relative to the rest of the country. By 1976, the District's murder had fallen to being 3.08 times greater than the US's. There is only two years after that (1979 and 1985) when the ratio of the District's to the US's murder rate fell below what it was in 1976. Expanding the data to include the period after 1987 continues to show the increase in the District's murder rate relative to the US's that we observed in Figures 2 and 4. Again, whether one is looking at the period from 1968 to 1987 or including the later period, there is no evidence that the gun ban reduced the District's murder rates.

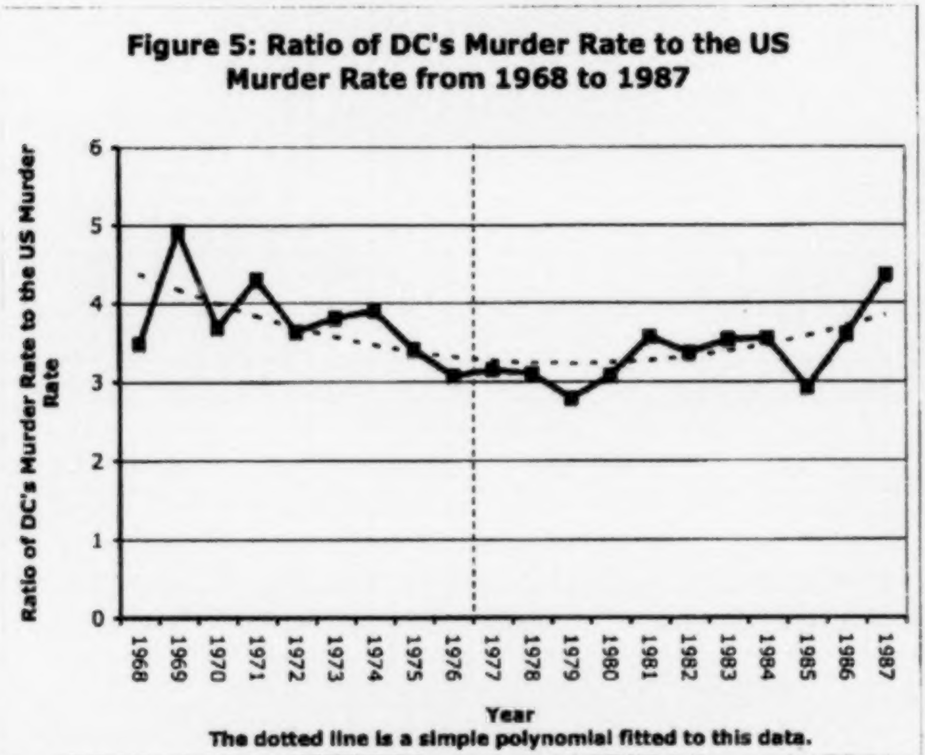


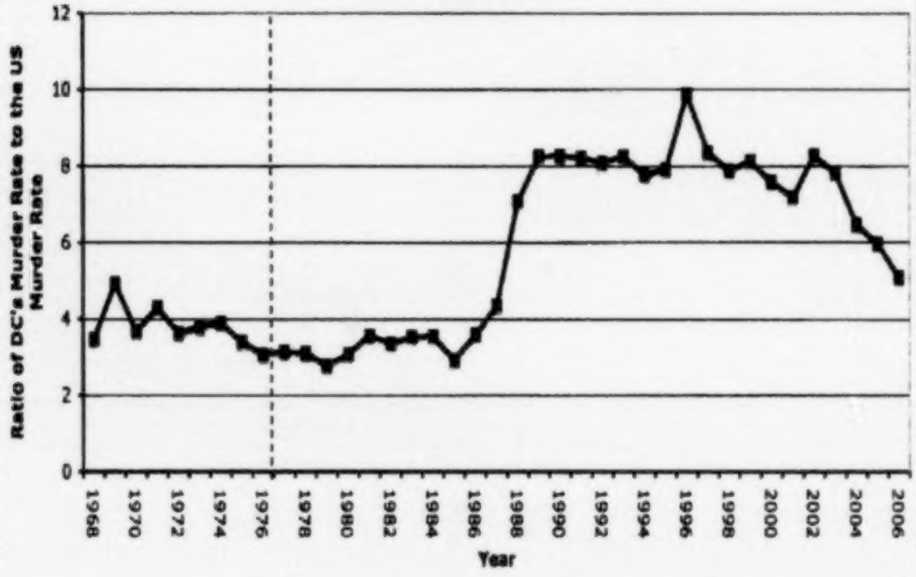
Figure 5: Ratio of DC's Murder Rate to the US Murder Rate from 1968 to 1987

The dotted line is a simple polynomial fitted to this data.

Source: FBI Uniform Crime Reports. The District's rates are easily available at http://www.disastercenter.com/crime/dccrime.htm. The United States data is available at http://www.disastercenter.com/crime/uscrime.htm.

Expanding the data past 1987 (Figure 6) shows the same large increase in the District's murder rate relative to the US murder rate that we saw in Figures 2 and 4.

Figure 6: Ratio of DC's Murder Rate to the US Murder Rate from 1968 to 2006



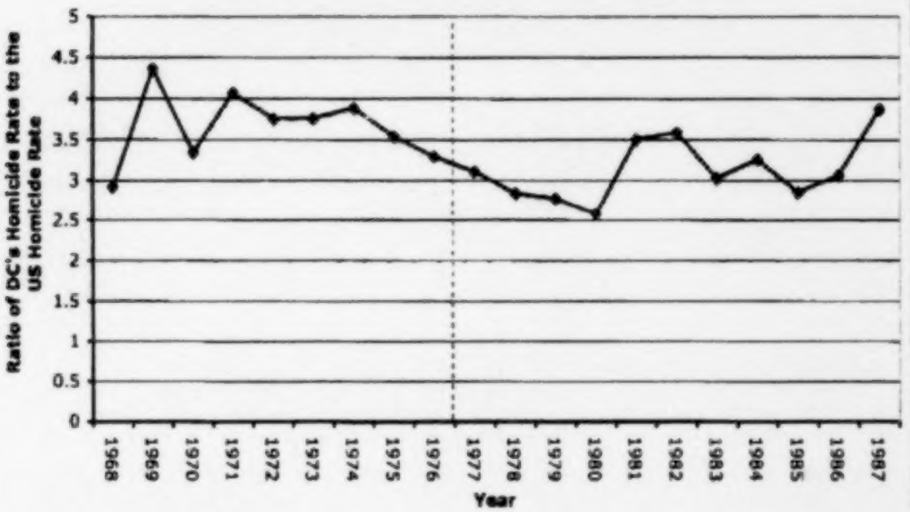
Thus, whether looking at the period from 1968 to 1987, or including the later period, there is no evidence that the District handgun ban reduced the District's murder rate.

D.
The District's Homicide Rate.

Finally, we compare the District's homicide rate to the US's for the years from 1968 to 1987. Murder rates seem like the more appropriate comparison because the difference between murder and homicides primarily involves the use and ownership of guns by police, something that is not being questioned by the District's gun ban. In addition, if criminals were previously being killed to stop them from doing some bad act, such as a victim stopping her rapist, a reduction in justifiable homicides could be viewed as a bad outcome.

In any case, while the District's homicide rate was declining relative to the US's after the ban went into effect, it was also declining before the ban. Indeed, it is very difficult to see even the slightest change in the rate of this decline as a result of the ban. It is hard to see any impact of the relative homicide rates as a result of the ban. Homicides surely did not fall "substantially and abruptly."[6] Continuing the data past 1987 shows the same increase in the District's relative homicide rate that we observed in Figures 2, 4, and 6.

Figure 7: Comparing DC's Homicide Rate to the US's Homicide Rate for the Years from 1968 to 1987



National Health Center, Vital Statistics of the United States, Vol. 2, various years.

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[6] Loftin *et. al.* make this claim at 1620, but they provide no statistical evidence of an abrupt change, only a comparison of the before and after ban homicide rates for two broad periods of time. No attempt was made to account for a pre-existing downward trend in homicide rates.

Whether one examines the District's murder rates relative to other large US cities, the neighboring states of Maryland and Virginia, or relative to the US as a whole there is no evidence that the ban reduced the District's relative murder rate. Indeed, if anything, the evidence points to the opposite conclusion. The District's rising murder rate cannot be explained as a result of the crack cocaine epidemic during the late 1980s because this increase started occurring right after the ban was instituted, long before crack cocaine became an issue.

Everyone wants to disarm criminals. However, the problem with bans is who is most likely to obey them. If the ban primarily disarms law-abiding citizens and not criminals, the ban can have the opposite effect of what was intended.

II.

NOTES ON OTHER CLAIMS

Fox and McDowall are incorrect when they write:

> If one extends Lott's statistical model by five years, for example, and applies it to the period in the mid-1990s when high crime rates reversed, 'suddenly shall-issue laws are associated with uniform increases in crime.

Brief of Professors of Criminal Justice as Amici Curiae in Support of Petitioner at 10-11.

Lott (2000, pp. 167-202) extends the data up through "the mid-1990s" (1996) and shows that the results are strengthened (John R. Lott, Jr., More Guns, Less Crime, Chicago, Illinois: University of Chicago Press (2000, second edition)).

Fox and McDowall further err when they note that:

> shall-issue states, which were mostly less populated states with limited urban areas, as compared to the states without shall-issue laws, which were mostly heavily populated states with large urban areas . . . . . The crack cocaine market had a greater impact on poor, urban areas, which are primarily located in states that do not have shall-issue laws.

Brief of Professors of Criminal Justice as Amici Curiae in Support of Petitioner at 10.

For the original "Lott study," the data was county level data and a large number of urban counties were in states with right-to-carry laws by 1992: such as Philadelphia, Miami, Atlanta, Seattle, Portland, Indianapolis, Pittsburgh. Indeed, all the states that passed right-to-carry laws had urban and rural areas. Over time more states adopted right to carry laws. The 2000 edition of More Guns, Less Crime studied additional large cities that were in states with right-to-carry laws such as Houston, Dallas, and Phoenix.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

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In The
Supreme Court of the United States

◆

DISTRICT OF COLUMBIA and
MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit**

◆

BRIEF OF *AMICUS CURIAE* ACADEMICS FOR THE SECOND AMENDMENT IN SUPPORT OF THE RESPONDENT

[Ratification And Original Public Meaning]

◆

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INTEREST OF THE *AMICUS*

Amicus Academics for the Second Amendment ("A2A"), is a §501(c)(3) tax-exempt organization. Formed in 1992 by law school teachers, A2A's goal is to secure the right to keep and bear arms as a meaningful, individual right. A2A has filed *amicus* briefs in this Court in *United States v. Lopez* and in the Fifth Circuit in *United States v. Emerson*. It has also published a series of "Open Letters" signed by college and university professors in the NEW YORK TIMES, the NATIONAL REVIEW, REASON, the NEW REPUBLIC, the NATIONAL LAW JOURNAL, and the CHRONICLE OF HIGHER EDUCATION.[1]

◆

SUMMARY OF ARGUMENT

Petitioners' position is that the otherwise-articulate Framers of the Second Amendment wrote "the people" when they meant "only those people serving in a sufficiently-organized militia."

---

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* is a non-membership not-for-profit, and obtained contributions from several hundred individual supporters via an internet appeal. If the Court desires, *Amicus* will provide a proprietary list. This brief is filed with the written consent of the parties. *Amicus* complied with the conditions by providing seven days advance notice.

Clayton E. Cramer, author of FOR THE DEFENSE OF THEMSELVES AND THE STATE (1994), provided historical assistance.

It is remarkable no Framer, and no contemporary, ever directly espoused this narrow reading for "right of the people." It is *inconsistent* with Madison's original organization of the Bill of Rights. It is *inconsistent* with Madison's notes on the document, with the actions of the First Congress, and with widely published contemporaneous writings. It is moreover *inconsistent* with Madison's grand purpose, to foreswear those actions the Federalists had no intention of taking, while preserving the new government's powers. **In 1789, for Congress to renounce any intent to disarm Americans would be no real loss; the same cannot be said of reopening the fight over control of the militia.**

To Petitioners, the Amendment creates a "right of the people" that is void where prohibited by law, indeed void unless authorized by law. What intent, one might ask, could possibly have motivated so remarkable a "right"? Petitioners answer that it must have been intended to ensure that States could arm the militia if Congress neglected to do so. Yet this is one intent we can absolutely rule out. The Virginia Ratifying Convention proposals, from which Madison worked, had a clause providing *precisely* that. Madison did not include it, and the First Senate voted down a motion to reinsert it.

Petitioners moreover mistake the relationship between arms and the militia. In 1789, Americans knew of "unorganized militias" – and required their members to have arms.

Petitioners' interpretative method is likewise flawed. Preambles expressing the principal purpose – not necessarily *all* purposes – of a right were commonplace in constitutions. To properly read the guarantee in light of the preamble we would posit that a well-regulated militia is necessary to liberty, and then ask whether a power to ban an entire class of arms, comprising over a third of all firearms, makes evolution of a well-regulated militia more or less likely.

Petitioners ultimately simplify into a single crabbed understanding a history that is actually as varied and complex as the Framers themselves. The Founding generation believed that the individual had a natural right to arms, that only an armed people would be free and virtuous, and that militias composed of those armed individuals were necessary to preserve free governments. Some Framers stressed protection of a militia system, others protection of an individual right to arms. That is precisely why the Amendment has two provisions, why both survived the tight edits of the First House, and why the last effort to narrow the scope of one, a motion to make it a right to arms "for the common defence," lost in the First Senate.

There is a reason why Petitioners' interpretation is in conflict with the historical record. The "individual rights for individual purposes" view of the Amendment held sole sway from the Framing until the early 20th century, when a rival view, the collective or States' rights approach, was invented.[2] The latter's credibility was, however, vulnerable to simple textualism (*i.e.*, "right of the people" was universally used in an individual sense) and attacked by scholarship. Its destruction was so complete that neither Petitioners nor any *amici* assert it here. The substitute theory which they now present to the Court is a creation of the last decade, a beta version of history subject to bugs its creators did not foresee. Acclaimed historian Robert Shalhope notes the substitute is driven by *quite* ***contemporary*** *ideological needs*.[3]

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[2] Its first judicial acceptance came in *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905), where neither side briefed the "collective right" because that theory did not yet exist. Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 UNIV. OF DAYTON L. Rev. 59, 76-77 (1989).

[3] Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENT. 269, 275 (1999).

ARGUMENT

I. PETITIONERS' ATTEMPT TO EXPLAIN THE PURPOSE OF THE SECOND AMENDMENT MISREADS THE HISTORICAL RECORD, MISTAKES THE RELATIONSHIP BETWEEN ARMS AND MILITIA DUTY, AND IMPROPERLY APPLIES THE VERY INTERPRETATIVE PRINCIPLE IT INVOKES.

A. The One Certainty in the Historical Record is that Madison and the First Congress did not Intend to Protect the Power of States to Arm the Militia if Congress Failed to Do So.

Petitioners' position is that the Framers intended the Second Amendment to protect only possession of arms in connection with a well-regulated, *i.e.*, government-organized, militia.

This presents us with an anomaly: an "individual right" that exists only if the government implements it by statute. Indeed, Petitioners argue that Respondent is himself outside the protection of the Second Amendment, because he is outside the Federal militia age range. Petitioners' Brief at 14 n. 2. Apparently this is a constitutional safeguard void where prohibited by law, indeed void unless authorized by law. Why would the Framers have created so peculiar and empty a "right of the people"?

Petitioners have an answer. "The fear that the Militia Clauses give Congress *exclusive* power to arm the militias, and thus the power to 'disarm' them, by failing to provide arms, engendered particularly contentious debates at the Virginia ratifying convention." Petitioners' Brief at 24. "The Amendment was a response to related fears raised by opponents of the Constitution: that Congress would use its powers under the Militia Clauses to disarm the state militias ... " *Id.* at 22. "[S]eeing a problem – the possibility of disarmed state militias – the Framers acted to address it." *Id.* at 33.

If there is one historical certainty to be had, it is that neither James Madison, nor the First Congress, had such an intent.

1. In Drafting the Bill of Rights, Madison Discarded Proposals to Provide for State Arming of the Militia.

In preparing his draft, although aware of the others, Madison worked primarily from the Virginia demands. The Virginia request had two parts. The first was a "declaration or bill of rights," setting out "the essential and unalienable rights of the people." This included:

> 17th. That the people have a right to keep and bear arms; that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defense of a free state; ....

3 ELLIOT'S DEBATES 659. The second was a series of proposed "Amendments to the Body of the Constitution," relating to intergovernmental distribution of

power rather than to individual *rights*. These included:

> 11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the Militia shall not be subject to Martial law, except when in actual service in time of war, invasion, or rebellion....

Id. at 660.[4] Madison had Virginia's language before him when he began. If Congressional neglect to arm the militia was his concern, he would have chosen the first sentence of the 11th Virginia proposal – *not* the bill of rights provision declaring a right of the people to keep and bear arms. He certainly took account of the second sentence of Virginia's 11th proposal, and incorporated its essence into his draft of the future Fifth Amendment.[5]

---

[4] North Carolina copied Virginia. 4 ELLIOT'S DEBATES 242-46.

[5] Virginia had requested a right to jury trial "except in the government of the land and naval forces." 3 ELLIOT'S DEBATES 658. Madison added "or the militia when on actual service in time of war or public danger," giving the militia a right to a jury except when called out. 12 PAPERS OF JAMES MADISON 202.

2. The First Congress Considered, and Voted Down, a Motion to Add Virginia's Militia-Arming Proposal to the Bill of Rights.

The First Senate considered – and rejected – a motion to attach language identical to Virginia and North Carolina's 11th proposal:

> On motion, To add the following clause to the Articles of Amendment to the Constitution of the United States, proposed by the House of Representatives, to wit:
>
> 'That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same, That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion or rebellion, and when not in the actual service of the United States, shall be subject only to such fines, penalties and punishments, as shall be directed or inflicted by the laws of its own state.'
>
> It passed in the Negative.

JOURNAL OF THE FIRST SENATE OF THE UNITED STATES at 75.[6]

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[6] Original title JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES (1820), reprinted as 1 JOURNAL OF THE SENATE (Martin Claussen, ed. 1977).

Petitioners do address this vote – in a footnote. Petitioners' Brief at 29 n. 6 first argues that this proposal "went much farther than the Second Amendment." This hardly explains why the Senate voted it down entirely, and why Madison failed to make use of its first sentence, when he borrowed from the second one.

Petitioners next argue the motion might have provoked disputes as to whether the Congress had failed to discipline the militia. Yet (1) Petitioners' own explanation of intent assumes that this concern existed and (2) the argument ignores that Congress had only existed for three months.

Petitioners finally submit that it might have been thought redundant with the Second Amendment. This is circular reasoning, and contradicted by the historical record.[7] The rejected language clearly expressed the alleged purpose, and the accepted language did not. It cannot moreover explain why Madison rejected the language *at the very beginning* of the drafting process, and instead chose to recognize a "right of the people."

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[7] Neither Virginia's nor North Carolina's ratifying conventions considered them redundant; each listed one as a *right*, the other as a *power*. Of this Senate vote, Senator John Randolph wrote that the Senate was "for not allowing the militia arms &c...." HELEN VEIT at 292. He did not think the militia-arming clause was already covered, nor apparently did the Senate.

3. The First Congress Considered Militia Armament a Key Federal Power, and Rejected Attempts to Allow States to Provide or to Require it.

There is additional direct evidence that the First Congress was not driven by the intent that Petitioners project upon it: Congress intended to directly control arming the militia. When, in its third session, the First Congress considered a militia bill, Rep. Fitzsimmons moved to replace the requirement that a militiaman "provide himself" with arms with the proviso he "shall be provided" with them.

Madison and five others objected, with the record reflecting: "It was said it would be destructive of the bill, as it would leave it optional with the States, or individuals, whether the militia should be armed or not. This motion was lost by a great majority." 1 Annals of Congress 1855-56.[8] This vote came a year after the *same* Congress approved the Bill of Rights.

Petitioners' explanation of the Framers' intent fails when tested against the legislative history. And this failure leads to the collapse of Petitioners' entire interpretative effort.

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[8] A concern might have been that States would require, or issue, firearms of varying caliber. That happened anyway; militiamen brought, and States issued, whatever they had. A roster of arms issued to Missouri militia during the Civil War lists guns of every caliber and description. http://www.slpl.lib.mo.us/libsrc/moquartermaster.htm

As Judge Cooley aptly noted a century ago, "if the right were limited to those enrolled [in the militia] the purpose of the guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check." THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 298-99 (3d ed. 1898). Why would the Framers have labored to create an empty "right of the people," protecting only those named by statute, and thus entirely useless as a check on government?[9]

B. Petitioners' Position Mistakes the Relationship Between Militia Organization and Arms: the Framing Generation Had Unorganized Militiamen, and Required Them to Keep Arms.

It is critical to realize that "unorganized militias" are *not* a modern concept, and that arms ownership requirements were *not* coextensive with membership in the organized militia.

Pre-1787 laws frequently exempted from training and muster government officials and key occupations such as ferrymen, merchant sailors, millers, and lawyers, but provided no such exception from their duty to procure arms. *See* Robert A. Churchill, *Gun Regulation, the Police Power, and the Right to Bear Arms in Early America*, 25 L. & HISTORY REV. 139, 145, 148, 166 (2007); LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX UPON DELAWARE 171-77 (Philadelphia 1741). Conversely, female householders were sometimes obligated to own militia arms for militia members in their household (*e.g.*, sons or servants). 1 WILLIAM HAND BROWNE, ED., ARCHIVES OF MARYLAND 77 (1885).

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[9] Petitioner might contend that the First Congress could have thought the States could use their militia as a check against the national government. This would, however, contradict Petitioners' argument against an "insurrectionary" intent. Petitioners' Brief at 15 n. 3. It would also contradict their suggestion that Respondent lacks Second Amendment rights because he is not in the Federally-defined militia.

The former concept was carried over into the 1792 Militia Act, whose first section required *all* able-bodied white males 18-45 to be armed, while its second section exempted from "militia duty" government officials, ferrymen and mariners, and any other persons whom a State chose to exempt. 1 Stat. 271-72. The *requirement* of arms ownership extended beyond those who were subject to militia duty; nor is there any reason to question that the *right* to arms was seen as similarly extensive.[10]

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[10] The exempted persons could be called up in an emergency. Robert H. Churchill at 145. The same holds true today: the entire militia, not only the organized portion, can be called to service. 10 U.S.C. §§332, 333; Va. Code §§44-75.1, 44-87; S.C. Code §25-1-1890; Ariz. Rev. Stat. §26-124. In fact, as *amicus* American Legislative Exchange Council points out, unorganized militias were called up during WWII and used their private arms.

C. Petitioners' Position Misapplies the Principles of Construction it Espouses.

Petitioners explain their purpose is to give effect to the Amendment's preamble. Petitioners' Brief at 17-18. This is certainly an acceptable interpretative methodology, well known to the Framers. 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION 363-374 (1953).

But Crosskey notes two relevant rules: (1) the preamble is considered only if the operative words admit of more than one equally-valid construction; and (2) in that event, the interpreter rejects whichever construction of the operative clause impairs the purpose stated in the preamble. *Id.* at 367, 373.

Respondent deals with (1), and we will discuss (2).

The preamble expresses a goal: the nation must have a well-regulated militia. What manner of *right* (for this was a Bill of Rights) could the Framers guarantee that would make this more likely? A broad individual right would ensure that Americans were armed, forming the infrastructure of a militia, which might well then evolve into a well-regulated one. This interpretation makes it more likely that the preamble's goal will be achieved. The District's approach makes it less likely: there is no right to arms until a well-regulated militia exists, yet having arms and being skilled with them is the first step to such a militia existing.

II. CITIZEN ARMS, CITIZEN ARMIES: THE INTELLECTUAL FOUNDATIONS OF THE SECOND AMENDMENT.

The Second Amendment did not erupt in a philosophical vacuum. The Amendment, like the remainder of the Bill of Rights, arose from widely shared judgments regarding citizenry, government, and the distribution of power. Three of these judgments are particularly relevant here.

Private possession of arms is not merely acceptable, but virtuous. Thus Jefferson advised his nephew to take up marksmanship since "it gives boldness, enterprise and independence to the mind." 8 PAPERS OF THOMAS JEFFERSON 407 (1950).

> Madison, in the FEDERALIST NO. 46, noted the "advantages of being armed, which Americans possess over the people of almost every other nation." Then he observed that in Europe "the governments are afraid to trust the people with arms." ... Joel Barlow, however, most eloquently articulated the vital role of arms in American political thought. He insisted that any government that disarmed its people "palsies the hand and brutalizes the mind: an habitual disuse of physical forces totally destroys the moral; and men lose at once the power of protecting themselves and of discerning the source of their oppression." To republicans, a dynamic relationship existed between the possession of arms and the virile, independent citizen

> considered the basis of America's superiority over Europe.

Robert E. Shalhope, *The Second Amendment and the Right to Bear Arms: An Exchange*, 71 J. OF AMERICAN HISTORY 587, 590 (1984).

Universal armament was further seen as the basis of republican equality. As Joel Barlow informed his European audience, from "the original, unalterable truth, that all men are equal in their rights," flowed the conclusion "that the people will be universally armed." JOEL BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE 46-47 (1792, reprinted 1956). Thus one British officer, shocked at American "peasants'" lack of deference to their colonel, was told that "every one who bore arms, esteemed himself on a footing with his neighbour." 2 THOMAS AUBREY, TRAVELS THROUGH THE INTERIOR PARTS OF AMERICA 370-71 (London 1789).

There is a natural right to arms, linked to that of self-defense. As demonstrated by *amici* Cato Institute and Joyce Malcolm, this consciousness was formed by Stuart monarchs' attempts to disarm their subjects, and was recognized by the 1688 Declaration of Rights and by Blackstone's exposition of it as the fifth auxiliary right.

Americans drew the corollary conclusion: a government that does not trust its citizens in this respect, itself cannot be trusted. Thus Madison wrote of oligarchies that they cannot be safe "without a standing army, an enslaved press, and a disarmed populace." RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 640 (1971).

A militia composed of all freeholders and voters is the only safe and effective defense of a republic. This derived not from common law, but from the Whig writers of the 18th century, and the Classical Republican movement. A professional army must either be sufficiently powerful to take over the republic, or too weak to defend it. A universal militia can be powerful yet safe; its members cannot seize the power they already have as voters, nor the property they have as freeholders.[11]

As Respondent demonstrates, British efforts to disarm the colonists reinforced these views. Moreover, in the desperate early days of the struggle, American governments used their military (not police) power of impressment to take private guns for their armies, leaving their owners defenseless and resentful: "The people hide their arms, and say they will risk their lives, rather than give up what few remain." Robert H. Churchill at 152; CLAYTON E. CRAMER, ARMED AMERICA 114-115, 117, 130-131, 143-144 (2007).

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[11] As we discuss below, Americans saw "select militias," comprised of a portion of the population with special training, to have the same risk as a standing army. To be safe, a militia must embody all voters and freeholders – the "body of the people," just as the House Committee of Eleven inserted into its right to arms proposal.

The Framers believed that a universal militia was essential to a free society, that possession of arms promoted civic virtue, and that individuals had a legal right to arms. The Revolution drove home another lesson: Americans could not trust a government – in moments of desperation, perhaps not even a friendly government – to keep its hands off their arms.

III. THE RIGHT TO ARMS IN EARLY AMERICAN STATECRAFT.

These consciousnesses played a prominent role in structuring the newly independent American governments. The early States, however, divided sharply on which aspect they emphasized: militia or individual arms.[12] The division is illustrated by the Virginia experience.

Thomas Jefferson submitted a draft state constitution which would have enfranchised nearly all free males, with a bill of rights that would have recognized "No freeman shall ever be debarred the use of arms." 1 PAPERS OF THOMAS JEFFERSON 344. Perhaps fearing poaching, Jefferson contemplated adding "within his own lands or tenements," *id.* at 363, making it still clearer that he had in mind purely personal uses.

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[12] *See generally* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 141-143 (1999). For a discussion of the influence of classical republicanism vs. Jeffersonianism upon the choice, *see* David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. OF LAW & POLITICS 1, 34-43 (1987).

The legislature, however, adopted a constitution that restricted voting rights to freeholders and a declaration of rights that recognized that "a well regulated militia, composed of the body of the people,[13] trained to arms, is the proper, natural, and safe defense of a free state...." Virginia Declaration of Rights §13. Delaware and Maryland followed the Virginia model.

In contrast, States more inclined toward what would come to be known as Jeffersonianism adopted declarations that stressed the individual right to arms. Pennsylvania's Declaration of Rights, Art. 13, recognized that "the people have a right to bear arms for the defense of themselves and the state...."[14] Its 1790 Constitution elaborated: "the right of citizens to bear arms, in defense of themselves and the State, shall not be questioned."[15]

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[13] *i.e.*, Jefferson's armed "freeman."

[14] Pennsylvania had no State-ordered mandatory militia in 1776; it had private "associations" for defense that were sometimes described as militia. Robert A. Churchill at 146 n. 17. Brief of *Amici* Jack Rakove, *et al.* at 12 asserts the Pennsylvania language was somehow meant to require a mandatory militia. But the Pennsylvanians handled that elsewhere, in Article 8 of the Declaration of Rights ("That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto ... ").

[15] As Jeffersonianism took hold, new States followed Pennsylvania's formulation. Vermont's 1777, 1786, and 1793 Constitutions recognized "That the people have a right to bear

(Continued on following page)

North Carolina and Massachusetts compromised, with the first recognizing a right to bear arms "for the defense of the State," and the latter recognizing a right to keep, as well as to bear, arms "for the common defense."[16]

American statecraft of the time thus recognized three relevant constitutional models: praise for the militia, or recognition of a right of the people to arms, or recognition of such a right with a qualifier such as "for the common defense." The First Congress would combine the first two, and vote down the last.

IV. THE RATIFICATION PROCESS AND PROPOSALS FOR A BILL OF RIGHTS

A. The Conflict Over Ratification; Of Armies and Citizens' Arms

After the passage of two centuries, it is easy to forget how nearly the Constitution failed of ratification. North Carolina and Rhode Island initially failed to ratify; Massachusetts ratified with a vote of 187-168; a shift of ten votes would have lost the day. Even after Federalists agreed to add calls for a bill of

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arms for the defence of themselves and the State...." Ohio's 1802 Constitution and Indiana's 1816 Constitution used identical language. Kentucky's 1792 and 1799 Constitutions used: "That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned."

[16] Whether "for the common defense" ambiguously narrowed the right to arms was vigorously debated in Massachusetts. *See* Robert H. Churchill at 169-171.

rights, votes remained close: ratification would have been lost in New York had two votes gone the other way, and in Virginia and New Hampshire had six done so.

The Antifederalists had no shortage of arguments. The Framers had given the new and untested government wide powers without the constraint of a bill of rights – "a colossal error of judgment," in the words of Leonard Levy.[17] Congress could raise, and the President command, a standing army in time of peace, and could extensively control the militia.[18]

The relevant portions of the ratification debates can be divided into three segments: the initial Antifederalist arguments, the Federalist response, and the Antifederalist reply.

The initial Antifederalist arguments. These were straightforward. A tyrannical national government would use the standing army, "that engine of arbitrary power," for oppression. 1 ELLIOT'S DEBATES 371. It might either neglect the militia, 3 ELLIOT'S DEBATES 381, or, at the other extreme, make its service so onerous that the public would "cry out 'give us a standing army.'" *Id.* Or it may form a select militia, rewarding its chosen few with special training and arms. LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 21-22, 124 (William Bennett ed. 1978). Federalists could not meet these objections directly. After all, the Constitution allowed Congress to do all these things by a simple majority vote.

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[17] LEONARD W. LEVY, ESSAYS ON THE MAKING OF THE CONSTITUTION 271 (2d ed. 1987).

[18] Seeing the militia as "State-regulated" is not entirely accurate. Federal standards would dictate who was enrolled, what equipment he held, and what rules of discipline his State-appointed officers could enforce. *See* 1 ELLIOT'S DEBATES 371; 5 AMERICAN STATE PAPERS (MILITARY) 241. *See generally,* Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 70 DET. MERCY L. REV. 39 (2001).

The "Federalist mantra." Faced with inability to deny, supporters of the Constitution instead developed a counter. "Federalists advanced arguments ... in part to claim that no bill of rights was necessary – that is, so long as the people were armed, no government could limit their freedom." LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 147 (1999). This argument became what one author has termed the "Federalist mantra." DAVID E. YOUNG, THE FOUNDERS' VIEW OF THE RIGHT TO BEAR ARMS 93 (2007). Perhaps Congress *could* abuse its power, but it *won't*, because it would be suicidal in a nation where everyone is armed; standing armies are dangerous in Europe only because the people are disarmed.

The theme developed early in the ratification process, indeed in the first Federalist pamphlet. There Noah Webster assured Americans that

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that

> can be, on any pretence, raised in the United States.

NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 43 (1787). In the Massachusetts Convention, Theodore Sedgwick asked delegates whether they imagined that a standing army "could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?" 2 ELLIOT'S DEBATES 97; in Virginia, a delegate argued it would prevent an establishment of religion: "The extent of the country is very great. The multiplicity of sects is very great likewise. The people are not to be disarmed of their weapons. They are left in full possession of them." 3 ELLIOT'S DEBATES 645-46.

The Federalist mantra reached its greatest development in Madison's FEDERALIST NO. 46, where the Father of the Constitution (and of the Second Amendment) considered the benefits both of universal citizen armament, and of the militia system. He begins by calculating that a standing army could not exceed 25,000-30,000 men, who would be opposed by 500,000 militia under State control. He then distinguishes between citizen armament ("the advantage of being armed") and the militia system:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia

> officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

Madison then sharpens the distinction. Citizen armament is a guarantee of liberties; that is why the monarchs of Europe cannot abide an armed people. Alone, it might not sweep them and their armies from power, but if they added to that a militia system, it would be sufficient even for that task:

> Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves ... and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.

Webster, Sedgwick, and Madison referred to individuals – "the people," "freemen," and "Americans" – as the source of a free society's ultimate security. Acknowledging that the armed citizenry has no status in the original constitution, the Federalists claimed none was needed. That claim didn't sell.

The Antifederalist reply. The reply to the Federalist mantra was simple. What would stop a tyrannous national government from removing the check by disarming the people?[19] Thus in Pennsylvania John Smiley argued that the Congress might form a select militia and then "the people in general may be disarmed." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 509 (M. Jensen, ed. 1976).

Likewise, George Mason warned the Virginia convention that British plans had been "to disarm the people – that was the most effectual way to enslave them – but that they should not do it openly; but to weaken them and let them sink gradually, by totally disusing and neglecting the militia." 3 ELLIOT'S DEBATES 380. Mason's first concern related to disarmament: neglect of the militia system would simply be a means to this more dangerous end.

Americans of the period thus knew: (1) Congress had unlimited power to raise a standing army; (2) Federalists had contended the check on this was civilian armament, but (3) Antifederalists had responded that Congress might remove the check by disarming the people. The question was how to resolve the problem, and the fear, posed by the last.

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[19] Petitioner suggests this could not have been a fear due to limits of enumerated Federal powers. Petitioners' Brief at 32. The same could be said of freedom of speech and religion. The Federalists sought to quiet fears by renouncing powers they never thought they had in the first place. The Senate added a preamble stating that the Bill of Rights was "to prevent misconstruction or abuse of ... powers ... " JOURNAL OF THE FIRST SENATE 73.

B. Proposals for a Bill of Rights

Petitioners suggest that Antifederalists pressed for a bill of rights after losing the fight over ratification. Petitioners' Brief at 26. The history is far more involved. Calls for such a bill of rights began by Virginia's George Mason in the 1787 Constitutional Convention, and continued to the last ratifying conventions. In Pennsylvania, a substantial minority of delegates called for a bill of rights with a provision

> 7. That the people have a right to bear arms for the defense of themselves and their own State, or of the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.

2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665 (1971). This was clearly a call for protection of an individual right. It employs "bear arms" in connection with indisputably private uses, and specifically forbade disarming "any" of the people, with exceptions keyed to individual personal characteristics of the citizen. The Minority *separately*, in Article 11, would have provided that the power to organize and arm the militia would remain with the States. *Id.*

Some *amici* scoff that the signers reflected only a third of the Convention. Brief of *Amici* Jack Rakove, *et al.* at 23. The proposal has, however, three significances. First, it illustrates that a *significant number* of Americans, if not in this case a majority, were concerned about disarmament. Second, the fear concerned private arms and private purposes. Third, the Minority proposals were reprinted and widely circulated in the remaining States, becoming a part of popular understanding nationwide. LEONARD LEVY, ESSAYS ON THE MAKING OF THE CONSTITUTION 278 (2d ed. 1987); EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 11 (1957).

The next call came in the Massachusetts Convention, from Federalist leader Samuel Adams. Adams unsuccessfully[20] called for guarantees

> [T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, except when necessary for the defense of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature for a redress

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[20] The complex history of the voting on Adams' proposal is explained in DAVID E. YOUNG at 263 n. 4. Antifederalists "hijacked" Adams' idea and he ended by voting against it.

> of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

2 BERNARD SCHWARTZ at 675. This also was clearly a call for protection of an individual right of "peaceable citizens."

New Hampshire's Convention is noteworthy for a number of reasons. Its ratification was the ninth vote that ensured there would be a Constitution of the United States. Moreover, Federalists hit upon the key compromise: they would accept a call for a bill of rights *provided* it was not an express condition of ratification. The New Hampshire proposal called for a guarantee that "Congress shall never disarm any Citizen except such as are or have been in Actual Rebellion." 1 ELLIOT'S DEBATES 326. Once again, this is clearly a call for protection of an individual right of "any Citizen." New Hampshire's language, like expressions in Pennsylvania and Massachusetts, is important evidence of the original public meaning of the Second Amendment's language.

In Virginia, as in New Hampshire, Federalists accepted a compromise of ratification plus a call for a bill of rights. It is noteworthy that they phrased the right to arms similarly to their calls for protection of other individual rights:

> 15th. *That the people have a right* peaceably to assemble....
>
> 16th. *That the people have a right* to freedom of speech, and of writing and publishing their sentiments....

> 17th. *That the people have a right* to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, are dangerous to liberty....

3 ELLIOT'S DEBATES 648-59. The Virginia drafters appear to have begun with the Pennsylvania Minority language. They then drew from the Massachusetts 1780 Declaration the clarifying term "keep" but *not* the ambiguous phrase "for common defense," thus making it the broadest statement of the right to date. Finally, they attached a militia reference from their own 1776 Declaration.

As we note above, Virginia *separately* proposed that the States have the power to arm militias if Congress failed to do so. It further proposed that authorizing a standing army would require a 2/3 vote of both houses. *Id.* at 660. Neither proposal would make it into Madison's draft. Both would also be rejected by the First Congress.

New York's Convention, in ratifying, adopted Virginia's individual right language with the broadening substitution of "capable of bearing arms" for "trained to arms." 1 ELLIOT'S DEBATES at 328. It, too, inserted a *separate* clause criticizing standing armies. *Id.*

V. THE DRAFTING OF THE AMERICAN BILL OF RIGHTS

Madison sought to prove that Federalists were "sincerely devoted to liberty and a republican government," while at the same time "leaving unimpaired the great Powers of the government." 12 MADISON PAPERS 198, 259. Madison was also acutely aware that he must avoid "all controvertible points," because he needed a two-thirds vote in both houses, and ratification by three-quarters of the States. HELEN VEIT, *ET AL.* ED. CREATING THE BILL OF RIGHTS 254 (1991).

His object was to leave untouched the powers that the Federalists *did* intend to exercise, while abjuring the "horrible hypotheticals" argued by their opponents. Federalists had sincerely argued Congress would have no power to establish a church or suppress newspapers or disarm the people: it cost them nothing to put it in writing.

Congress needed control over the militia; as Madison had argued in FEDERALIST NO. 46, it was to be the primary defense of the nation. He knew from the Convention that this would be a bitterly disputed topic.[21] In contrast, disavowing Congressional power to disarm individuals would be utterly uncontroversial. To do so, Madison chose language the well-known public meaning of which supported his intention. As Petitioner agrees, it is doubtful that anyone in the First Congress even thought Congress had this power anyway. Petitioners' Brief at 34. Giving it up would indeed be throwing a "tub to the whale."

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[21] As we note in Argument I(C) above, when a proposal merely hinting at allowing States to control militia arms arose in the First Congress, the motion "lost by a great majority." 1 ANNALS OF CONGRESS 1855-56. Even *if* Madison had wanted the States to arm the militia, he was not going to get a majority, let alone two-thirds.

A. Background to the Drafting Process

Americans of this period believed they had a personal, natural, right to arms for self-defense, saw a government that did not trust them with arms as itself untrustworthy, and had recent experience with a British ministry that had tried to disarm its American subjects.

Madison and the First Congress knew of the sensitivity of Americans on the arms issue. Calls for a right to arms had been voiced in five Conventions, compared to three calls for freedom of speech, and only one for a guarantee against double jeopardy. 2 BERNARD SCHWARTZ at 1167.

An illustration of this sensitivity: when the First Congress later considered a militia act, a proposal to issue arms to the indigent and the young was abandoned over the objection:

> Mr. Wadsworth ... The motion appeared at first to be in favor of poor men, who are unable to purchase a firelock; but now it seems minors and apprentices are to be provided for. Is there a man in this House who would

> wish to see so large a portion of the community, perhaps one-third, armed by the United States, and liable to be disarmed by them? Nothing would tend more to excite suspicion and arouse a jealousy dangerous to the Union.

1 ANNALS OF CONGRESS 1855. The mere *potential* that the government might recall *its own arms* had to be avoided at all cost.

B. Madison's Crafting of the Right to Arms.

Madison's 1789 draft, as introduced in the House, drew heavily from the Virginia language:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

1 ANNALS OF CONGRESS 451. Madison's work had several noteworthy points.

First, we are familiar with "right of the people" in connection with the individual right of assembly and that against unreasonable searches. But Madison also used a variant for freedom of expression: "The people shall not be deprived or abridged of their right to speak, to write, or publish their sentiments...." *Id.* "Right of the people," even combined with a plural "their," was used by Madison to identify individual rights.

Second, Madison's use of an explanatory clause was unexceptional. For freedom of press, he used "the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." *Id.* For civil jury trial, he used "the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." *Id.* at 453. Madison and Jefferson agreed that a bill of rights served to remind the people of their rights, 11 MADISON PAPERS 298-99: there was no harm to mentioning the more prominent reasons for them. But a mention was all the militia system would get; Madison was committed to a Bill of Rights that did not alter the Federal-State balance struck in the original militia clauses.

Third, what *did not* make it into Madison's draft is significant. As noted above, the Virginians also requested a State power to arm the militia should Congress neglect to do so, and a supermajority requirement to authorize a standing army. Neither proposal made it into Madison's draft. Madison would not re-open the contentious issues of State control over the militia, or of a standing army. The protections against the standing army would be the ones he outlined in FEDERALIST NO. 46: citizens with arms, and a universal militia.

Fourth: Madison's very organization shows the right to arms was seen as an individual right and not as militia-related. Madison's draft did not take the format with which we are today familiar, that of a numbered list of amendments following the Constitution. Rather, his draft designated where, within the

Constitution, each provision was to be inserted. 1 ANNALS OF CONGRESS 451-52.

For example, his provisions relating to the House of Representatives were to be inserted in Article I, Section 2. An unsuccessful proposal to forbid States to infringe the rights of conscience was to be inserted in Article I, Section 10, alongside its other "Restrictions Upon Powers of States." Provisions relating to jury trial, grand juries, and appeals were to be placed in Article III.

Thus, if Madison had seen the future Second Amendment as militia-related, he would have designated its place next to the Militia Clauses in Article I, Section 8.

Instead Madison grouped it with freedom of speech, press, assembly and other individual rights, and designated their place in Article I, Section 9, right after "No bill of attainder or ex post facto law shall be passed." Madison's arrangement is compelling evidence that he did not view the right to arms as a guarantee relating to States and militias; its militia reference was explanation, not an operative part of its guarantee. *See* LEONARD W. LEVY, ORIGINS at 145; Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROB. 125, 135 (1986).

Petitioners assert that no one has brought forth a person directly connected with the drafting who asserted that the right to arms covered private purposes. Petitioners' Brief at 34. We note Petitioners and their *amici* have been unable to bring forth one such person who asserted that the right was restricted to militia uses. We would, however, rise to the challenge, with two nominees.

The first is James Madison himself. As *amici* Cato Institute and Joyce Malcolm demonstrate, the British 1688 Declaration of Rights, which guaranteed the right – of Protestant subjects[22] – to have arms "for their defense," had no militia linkage; indeed, it was the Royal militia who had carried out the disarmament giving rise to the Declaration.

In Madison's notes for his floor speech, he discusses why the 1688 Declaration is inadequate protection:

> fallacy on both sides – espcy as to English Decln of Rts –
>
> 1. Mere act of parlt.
>
> 2. no freedom of press – Conscience
>
> Gl. Warrants – Habs corpus
>
> Jury in Civil Cause – criml.
>
> Attainders – arms to Protestts.

---

[22] Protestants then comprising about 98% of the English population. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 184 n. 3 (1994).

12 MADISON PAPERS 193. The last can only be read as "inadequate because the right to arms is guaranteed to Protestants only."

Our second nominee is William Rawle, who sat in the Pennsylvania Assembly when it ratified the Bill of Rights. ELIZABETH BAUER, COMMENTARIES UPON THE CONSTITUTION 1790-1960, 61 (1965). In his book A VIEW OF THE CONSTITUTION, Rawle bifurcated his Second Amendment discussion, discussing first the militia portion with qualified praise, and then turning to the remainder:

> The corollary, from the first position is that the right of the people to keep and bear arms shall not be infringed. The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to Congress a power to disarm the people.

WILLIAM RAWLE, A VIEW OF THE CONSTITUTION 125 (2d Ed. 1829).

C. The First Congress and the Second Amendment.

The parties, and other *amici*, extensively discuss editorial changes made by the First Congress. We note there were three significant events.

First, the Congress brutally trimmed Madison's draft to reduce its size and eliminate his explanations for, or praises of, many rights. Only the Second

Amendment's explanatory clause survived. This is suggestive that the two clauses had two different purposes, or viewed practically, were necessary to allay two different fears. If Congress had only meant to protect a militia system, it would have stopped with "necessary to a free state."

Second, the House Committee of Eleven, to whom it was initially referred, rejected a rival proposal by Rep. Roger Sherman to guarantee that "The militia shall be under the government of ... the respective States, when not in actual service of the united States...." HELEN VEIT at 267. The future Second Amendment remained Madison's *right* "of the people" not Sherman's *power* of the "state."[23]

Third, the Senate rejected any idea of linking the "right of the people" to militia or collective defense:

> On motion to amend article the fifth, by inserting these words, 'for the common defence,' next to the words 'bear arms:'
>
> It passed in the negative.

JOURNAL OF THE FIRST SENATE OF THE UNITED STATES 77. Petitioners' attempts to reconcile this vote with their position, Petitioners' Brief at 19, are unconvincing. The District *speculates* that the proposal might have impaired use of militias for law enforcement; yet as it notes several States had this language in their own Bills of Rights, *id.* at 30, and the issue seems never to have arisen. Or perhaps, Petitioners assert, it would have impaired use of militias by individual States. Yet this is a Bill of Rights, not a statute empowering State militia uses.

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[23] The Committee retained Madison's concept of inserting the amendments into the body of the Constitution. They also voted to insert "composed of the body of the people" after "militia." HELEN VEIT at 30.

The most natural reading of the Senate's action is that (given the extreme sensitivity of the issue) it did not wish to be seen as limiting "right of the people to keep and bear arms" to matters involving the ambiguous phrase "the common defense."

VI. THE ORIGINAL PUBLIC MEANING OF THE SECOND AMENDMENT INCORPORATED THE ARMS AMENDMENTS PROPOSED IN THE VARIOUS STATE RATIFYING CONVENTIONS

In the 1780s the individual *right* to have personal arms for personal purposes was simply not questioned by anyone, anywhere. As cultural historians observe, such a situation is commonplace: "the most elemental and important facts about a society are those that are seldom debated and generally regarded as settled."[24] The Pennsylvania Minority, Massachusetts minority, and New Hampshire proposals as well as Virginia's (and North Carolina's) have to be understood against this background. The *right* existed, so any "bill of rights" however worded was understood to preserve that personal right. Had anyone publicly suggested otherwise, all hell would have broken loose. *And it did not.*

---

[24] Louis Wirth, *Preface* to Karl Mannheim, IDEOLOGY AND UTOPIA xxiv (1946).

We turn here to original public meaning, rather than Madison's personal thoughts. Petitioners cite no contemporaneous source for the proposition that the First Congress's language was seen as embodying a guarantee distinct from the earlier proposals. Madison and the First Congress were attempting to allay popular concerns, and not merely those of the delegates to the Virginia Ratifying Convention. Madison would hardly have written that his proposal would "kill the opposition every where," and "put[ ] an end to the dissatisfaction with the Gov't itself," HELEN VEIT at 282, had he ignored the concerns of a third of the Pennsylvania convention and a majority of the New Hampshire ratifiers.

To the contrary, all evidence of the original public meaning indicates that the final Congressional language was seen as incorporating the earlier proposals.

Even as the Bill of Rights was under consideration, the Philadelphia Independent Gazetteer reprinted an article from the Boston Independent Chronicle, reproducing Madison's draft, with the preface:

> It may well be remembered that the following 'amendments' were introduced to the convention ... by ... SAMUEL ADAMS.... To

> the honor of this gentleman's ... just way of thinking ... every one of his intended alterations, but one,[25] have already been reported by the committee of the House of Representatives in Congress, and will probably be adopted by the federal legislature.

The article followed with a reproduction of Adams' proposals, including "or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Philadelphia Independent Gazetteer, Aug. 20, 1789, reprinted in DAVID E. YOUNG at 701-02. Others in Massachusetts drew similar conclusions. *See* HELEN VEIT at 260-61.

Also during the House deliberations, a newspaper article written by Tench Coxe appeared in the *New York Packet*. Given its timeliness and distribution – "reprinted throughout the nation," LEONARD W. LEVY, ORIGINS at 147 – and the fact that Madison wrote back with gratitude, the article is of exceptional importance to identify the original public meaning of the text. Coxe wrote that Madison's proposals guaranteed the people the "right to keep and bear their private arms," *id.* at 146; STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS 85 (1989).

A third indicator: the Speaker of the First House was Frederick Muhlenburg of Pennsylvania, and toward the end of the House debates he wrote to Benjamin Rush that

---

[25] Adams had also proposed a bar on standing armies.

> [A]s it is now done I hope it will be satisfactory to our State, and as it takes in the principal amendments which our [Pennsylvania] Minority had so much at heart, I hope it may restore harmony & unanimity amongst our fellow citizens ...

HELEN VEIT at 280-81.

Finally, we have the testimony of George Mason who had expressed the fear that the people might be disarmed with the government "disusing and neglecting the militia" as a first step. Mason had no hesitation proclaiming that he had "received much satisfaction from the amendments to the federal constitution, which have lately passed the House of Representatives ... " 3 PAPERS OF GEORGE MASON 1172 (Robert Rutland, ed. 1970). He would hardly have expressed such satisfaction, had he believed that the government still had the power to neglect the militia, and use that as a justification for disarming the people, precisely as he had feared.

All evidence suggests that Americans of the Framing period viewed the public meaning of the Second Amendment as incorporating the earlier requests of Samuel Adams and the Pennsylvania Minority. Petitioners and their *amici* invoke not a scintilla of contemporary *evidence* to the contrary.

◆

CONCLUSION

The operative clause of the Second Amendment is as unambiguous as any command of the First Amendment. Read in light of its preamble, it is meant to guarantee the existence of an armed citizenry, the militia infrastructure from which the Republic could obtain (and would be more likely to create) a well-regulated militia. Rather than giving effect to both the Amendment's clauses, Petitioners propose that this Court give effect to neither. Under its reading, there is no duty to create a well-regulated militia, and absent that, the people have no right to arms, either.

Petitioners' interpretation of the Second Amendment moreover disregards its history: Madison and Congress *rejected* language creating a power of the States to arm the militia, just as they *rejected* language limiting it to a right "for the common defense."

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA AND
MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

BRIEF OF THE ALASKA OUTDOOR COUNCIL, ALASKA FISH AND WILDLIFE CONSERVATION FUND, SITKA SPORTSMAN'S ASSOC., JUNEAU RIFLE AND PISTOL CLUB, JUNEAU GUN CLUB, AND ALASKA TERRITORIAL SPORTSMEN, INC. AS AMICI CURIAE SUPPORTING THE RESPONDENT

◆

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INTEREST OF AMICI CURIAE[1]

The Alaska Outdoor Council, Inc. is an association of small Alaska clubs and individual Alaskans, first incorporated in Alaska in 1955; it is dedicated to the preservation of outdoor pursuits in Alaska such as hunting, fishing, trapping and shooting sports. It is also dedicated to public access to and conservation of the habitats on which these activities take place.

The Alaska Fish and Wildlife Fund is a charitable organization; its mission is to use education, research, and in some cases litigation, to protect and preserve Alaska's unique heritage of hunting, fishing and trapping. It also supports the private ownership of firearms as part of America's hunting heritage.

The Sitka Sportsman's Association is an Alaskan non-profit corporation located in Sitka, Alaska; it traces its origin to the 1950's. The Sitka Sportsman's Association's mission is to promote, protect and encourage outdoor recreational facilities and shooting sports in the Sitka area. The Sitka Sportsman's Association sponsors pistol shooting leagues, skeet and trap shooting and an annual running/shooting biathlon. The Association also sponsors education classes on hunter safety and the safe handling of firearms.

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[1] The parties in this case have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the Amici Curiae, their members, and their counsel, contributed money or services to the preparation or submission of this brief.

The Juneau Rifle and Pistol Club is an Alaskan organization located in Juneau, Alaska. Its purpose is to educate the community about the safe handling and proper care of firearms, to encourage and facilitate organized rifle and pistol shooting matches in the Juneau community, and to sponsor instruction programs to improve marksmanship.

The Juneau Gun Club is an Alaskan non-profit corporation located in Juneau, Alaska whose purpose is to encourage the sport of trap shooting and educate its members about this sport. The Juneau Gun Club also sponsors a trap shooting league and operates a local trap shooting range.

The Territorial Sportsmen, Inc. is an Alaskan organization located in Juneau, Alaska. Its mission is to promote the conservation and maintenance of healthy fish and wildlife populations and their habitats. It also sponsors educational programs in the community related to fish and wildlife conservation. The Territorial Sportsmen also promotes equitable fishing and hunting rights for Alaskans and compliance with hunting and fishing regulations; the Territorial Sportsmen also encourages firearm safety.

All of these Alaskan organizations are concerned with promoting hunting and shooting sports among its members and in the community at large; they have a particular interest in the Court having an informed understanding of a principal purpose of the Second Amendment and its relation to the right of an individual to own and possess firearms.

◆

SUMMARY OF ARGUMENT

> *"[Tyrannies] . . . mistrust the people, and therefore deprive them of their arms."*
>
> *Aristotle*[2]

Mr. Heller resides in the District of Columbia in a high crime area; open-air drug markets are located in the vicinity of his home. J.A.76a. He wants to keep a functional handgun in his home for self-protection. J.A.77a. However, he is prohibited from doing so because of certain laws enacted by the District of Columbia.

The District justifies Mr. Heller's situation by claiming 1) there is no Second Amendment right for an individual citizen to keep a firearm for private purposes, and 2) even if there is such a right, the District's laws are a reasonable regulation of this right.

The Alaskan amici will argue that the District of Columbia's claim that the Second Amendment only guarantees the collective right of states to organize and equip their militias has no basis in a logical analysis of the text of the Amendment. According to the District, the word "militia" and the phrase "well regulated militia" both mean the same thing: a military force organized and equipped by the state. This is a mistake. In order to understanding the phrase "well regulated militia", one must first understand the meaning of the word "militia". And at the time the Second Amendment was drafted, "militia" referred to an unorganized and unregulated body of armed citizens – an armed citizenry. In order for a well regulated militia to exist, there must first be a body of armed citizens. So it is that the substantive clause of the Second Amendment guarantees "the right of the people to keep and bear Arms". Simply put, the existence of a well regulated militia rests on the prior existence of an armed citizenry.

---

[2] Aristotle, *The Politics of Aristotle*, Book V, Chap. 10, 171 (B. Jowett, trans., Oxford, Clarendon Press 1885).

A second problem with the District's collective right theory is that it undercuts a principal purpose of the Second Amendment. Political philosophers throughout history, from Aristotle to Justice Story, have remarked on the importance of an armed citizenry in resisting tyranny. Drawing on their knowledge of the history of earlier republics as well as their familiarity with classical political thought, the founding generation concluded that the long-term security of a free state necessarily depends upon an armed citizenry. An armed citizenry, they thought, will act as a check and deterrent against usurpation of legitimate government and the arbitrary power of overly ambitious rulers. They did not believe that an armed state exercising political power over an unarmed citizenry will always act out of benevolence.

The District's claim that the Second Amendment guarantees only a collective right of the states to organize, regulate and equip militias draws no support from the political thought that influenced the founding generation. To the contrary, the collective rights theory is a twentieth century notion that is heavily influenced by German political thought that understands the state as a political institution that *must* have an exclusive monopoly on the use of legitimate force. The short answer to the District's position is this: the Constitution does not enact Max Weber's social and political theories.

Given that the logic, the text, and the historical background of the Second Amendment provide no support for the District's collective right theory, the Second Amendment must be understood to guarantee the right of an individual to "keep and bear" arms for private purposes unrelated to any affiliation with a state-regulated militia.

Lastly, the amici argue that the scope of the Second Amendment's guarantee of an individual's "right to keep and bear Arms" necessarily encompasses the fundamental right of self-defense, a right also recognized by the Ninth Amendment. The Second Amendment, therefore, guarantees the fundamental right of self-defense together with its corollary, "the right to keep and bear Arms" for self-defense. The District of Columbia's three laws under review, then, since they amount to an outright prohibition of the guaranteed right of an individual "to keep and bear" a functional firearm for the private purpose of self-defense, constitute a *per se* violation of the Second Amendment. They eviscerate this right and render it worthless.

Alternatively, the amici argue that the District's laws must meet the standard of strict scrutiny. The argument concludes that none of the three laws meet this standard and that all three laws under review must be found to violate the Second Amendment's guarantee of Mr. Heller's right to "keep and bear Arms".

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ARGUMENT

I. THE DISTRICT'S CLAIM THAT THE SECOND AMENDMENT DOES NOT PROTECT AN INDIVIDUAL RIGHT TO "KEEP AND BEAR ARMS" IS NOT SUPPORTED BY A LOGICAL ANALYSIS OF THE TEXT OF THE AMENDMENT.

The Second Amendment reads as follows: *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

The District's position that the Second Amendment protects only the collective right of the states to maintain an effective militia is often termed the states' rights view.

To prove the truth of this claim, the District must show that the ordinary meaning ascribed to the language of the Second Amendment demonstrates that it does not protect an individual right to "keep and bear" arms.

In other words, the District must show that the first and second propositions below are logically equivalent to the third proposition:

> 1) A well regulated Militia, being necessary to the security of a free State, the right of the States to organize, arm and equip its Militias shall not be infringed.
>
> 2) Congress shall have no power to prohibit state-organized and directed Militias.
>
> 3) A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

But the problem for the District is that third proposition has an entirely different meaning from the first two. There is no logical equivalence here.

A. The District's Argument overlooks the Fact that the Word "Militia" has an Entirely Different Meaning from the Phrase "a Well Regulated Militia".

Despite the lack of logical equivalence, the District proceeds to construct an argument based on the assumption that it is reasonable to believe that the following premises are true:

> a) the word "militia" *and* the phrase "well regulated militia", as it appears in the prefatory clause of the Second Amendment, mean the same thing: "an organized and trained military force led by state-chosen officers";[3]
>
> b) the phrase "keep and bear" in the Second Amendment's guarantee of " . . . the right of the people to keep and bear Arms" guarantees the right of members of a well-organized state militia to "keep" arms so that they can " bear" them for military purposes,[4] and
>
> c) the meaning of the prefatory clause of the Amendment shapes and completely defines the meaning of the substantive clause, i.e., "the right of the people to keep and bear Arms shall not be infringed."[5]

Using the above premises in its argument, the District concludes the term "people" in the substantive clause of the Amendment refers to individuals who are members of an organized military force established and actively maintained by the state. There is only one problem. The District has failed to show that it is reasonable to believe that the three premises of its argument are true.

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[3] Petitioners' Brief at 12-14.

[4] *Id.* at 16-17.

[5] *Id.* at 17-18.

The District's attempt to derive a collective right of the states from the language of the Second Amendment works only if one views the phrase "well regulated militia" as a single word that is logically equivalent to the term "militia". In other words, the District conflates the meaning of "militia" with that of a "well regulated militia".

But it is difficult to see how this can be done in a rational way. The adjective/verb "well regulated" modifies and tells us something about the noun "militia". For the entire phrase to be intelligible, one must first understand the meaning of the word "militia". For example, consider the sentence "Alaska has a well regulated militia". This sentence makes two assertions: 1) Alaska has a militia and 2) Alaska's militia is well regulated. In order to understand the meaning of the full sentence, one must understand the meaning of "well regulated" and the meaning of "militia".

If, then, the term "militia" means something other than "an organized and trained military force led by state-chosen officers", if, for example, it refers to an unorganized body of armed citizens, then a clear distinction must be drawn between a "militia" and a "well regulated militia". And if the word "militia" refers to an armed body of citizens, then any question about the meaning of the Second Amendment is easily resolved: the Amendment, by protecting the individual right of citizens to keep arms, makes the existence of a well organized militia possible. In other words, the former is a necessary condition for the existence of the latter.

In fact, this is exactly how the word "militia" was understood at the time the Second Amendment was drafted. As evidenced by its common usage at this time, the ordinary meaning of "militia" was understood by the founding generation to refer to "the whole body of the people".[6] Richard Henry Lee, proposing that a Bill of Rights be part of the Constitution before ratification, argued that "to preserve liberty, it is essential that the whole body of the people always possess arms."[7] George Mason, at the ratification convention in Virginia, asked and answered his own question: "Who are the militia, they consist now of the whole people, except a few public officers."[8]

The Second Militia Act of 1792 also makes it clear that a militia at this time was understood to be an unorganized body of armed males that make up the raw material out of which a regulated and organized military force can be formed.[9] Sec. 1 of the Act called for all male citizens of the states between 18 and 45 years of age be enrolled or listed as members of the militia and required each of these citizens to arm himself.[10] Section 3 of the Act required that this unorganized body of citizens then be regulated and organized "into divisions, brigades, regiments, battalions and companies. . . ."[11] And Section 4 of the Act further defined how each battalion should be organized:

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[6] Donald B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L.R. 204, 216 n.51 (1982).

[7] Richard H. Lee, *An Additional Number of Letters From the Federal Farmer* 170 (1788).

[8] 3 *Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 425-26 (Jonathan Elliot ed., 2d ed. 1891).

[9] Act of May 8, 1792, ch. XXXIII, 1 Stat. 271.

> *And be it further enacted*, That out of the Militia enrolled as is herein directed, there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen;. . . .[12]

At the time the Second Amendment was drafted and adopted, it is clear that the word "militia" simply referred to a body of armed citizens, unorganized and unregulated. The purpose of the Second Militia Act was to turn this unorganized and unregulated body into a regulated and disciplined fighting force.

This meaning of "militia" continued up through the passage of the Dick Act in 1903 that created today's National Guard.[13] The Act "divided the class of able-bodied male citizens" of a certain age into an "organized militia" and "unorganized militia":

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[10] *Id.*, Section 1.

[11] *Id.*, Section 3.

[12] *Id.*, Section 4.

[13] The Act of January 21, 1903, 32 Stat. 775.

> The Dick Act divided the class of able-bodied male citizens between 18 and 45 years of age into "organized militia" to be known as the National Guard of the several States, and the remainder of which was then described as the "reserve militia", which later statutes have termed the "unorganized militia."

Perpich v. Department of Defense, 496 U.S. 334, 342 (1990).

Moreover, the District's understanding of "militia" to be "a military force established and maintained by the government" makes the phrase "well maintained" superfluous, adding nothing to the word "militia". (As an aside, what makes the District's position in this regard even more puzzling is that it is fully aware of the semantic distinction between a "militia" and "well organized militia". It concedes this point in its brief: "The unorganized militia has no duties and receives no training or supervision by state-appointed officers." Petitioners' Brief at 14, note 2.

Given the term "militia", as it was understood at the time the Second Amendment was drafted and adopted, referred to the class of armed citizens, the language of the Amendment makes perfect sense; it draws a clear distinction between the body of ordinary citizens possessing arms ("the people") and a "well regulated militia". Aware that the former is necessary before the latter can even come it into existence, the Framers sought to protect the right of ordinary citizens to "keep and bear Arms". And they intended to protect the right of ordinary citizens to "keep and bear Arms" because citizens, as a body of armed people, may at some future time find it necessary to defend "the security of a free State". And even if the body of armed citizens is organized into a "well regulated Militia" for this defense, the point remains that the right "to keep and bear Arms" is guaranteed for individual citizens, and not the state.

It is only by disregarding the definition of "militia" as an unorganized body of armed citizens, that the District is able to draw the conclusion that the word "people" in the substantive clause of the Second Amendment refers to members of state-organized militias.

B. The District's Assertion that the Words "Keep and Bear" in the Second Amendment simply mean "Keeping" Arms for the purpose of "Bearing Arms" in a Military Context is without Foundation.

The District attempts to make the case that at the time of the drafting of the Amendment, the word "bear" in the phrase "bear Arms", meant using arms in connection with military service. But Judge Silberman, writing for the Court of Appeals for the District of Columbia in the decision below, convincingly refuted this assertion by noting that "it is equally evident from a survey of late eighteenth- and early nineteenth-century state constitutional provisions that the public understanding of 'bear Arms' also encompasses the carrying of arms for private purposes such as self-defense."[14] *See Parker v. District of Columbia*, 478 F.3d 370, 384 (D.C. Cir. 2007) (citations omitted) (emphasis added); cert. granted, *District of Columbia v. Heller* (same case), 76 USLW 3266 (U.S. November 20, 2007) (No. 07-290).

The District also argues that the Second Amendment's guarantee of "the right of the people to keep . . . Arms" refers to the right of militia members to "keep" arms so that they can bear them in a military sense. Rather than focus on the meaning of the word "keep", the District instead comes up with a circular and idiosyncratic definition of the word "keep" to mean "keeping arms for the purpose of bearing them in a military context". Judge Silberman concisely and persuasively dismisses this argument: "We think 'keep' is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use." *See Parker v. District of Columbia,* 478 F.3d at 385-86 (citations omitted).

The logic and plain text of the Second Amendment, then, clearly supports the view that it guarantees an individual right to "keep and bear Arms".

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[14] The "survey" that Judge Silberman is referring to here is to is found in *United States v. Emerson*, 270 F.3d 203, 230, n.29 (5th Cir. 2001).

C. The District's Notion that the Nature of a Right Specifically Guaranteed by the Constitution should be Understood by an Intended Purpose of the Guarantee is Mistaken.

The understanding that the Second Amendment guarantees an individual right is consistent with the rule of reason that a right guaranteed by the Constitution should be measured by the language of the substantive clause creating the guarantee, rather than by resorting to contrived definitions for words that are used in a description of an intended effect, or intended purpose, of the guarantee. But the District dismisses this common sense rule. It ignores the specific meaning of the word "militia" as it appears in the prefatory clause of the Second Amendment and instead assumes the word "militia" means "a well regulated militia". It then uses the meaning of a "well regulated militia" to define "people" in the substantive clause of the Amendment. This circular approach allows the District to effectively eliminate the individual right that is specifically guaranteed by the substantive clause.

The notion that one can discern the nature of a right that is specifically guaranteed by the Constitution by relying on something other than the plain meaning of the language that is used to guarantee the right, such as a word or phrase used to describe an intended effect of the guarantee, opens the door to eliminating the right. *See Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) ("This reasoning abstracts from the right to its purpose, and then eliminates the right.") Hence the First Amendment's guarantee of "the right of the people peaceably to assemble" so they might "petition the Government for a redress of grievances"[15] has never been construed to mean that the people can only assemble for that purpose alone or, if the government is made aware of their grievances by some other means, the people have no right to assemble. Similarly, if there were a constitutional provision that read "A well schooled electorate being necessary to the security of a free State, the right of the people to keep and read books shall not be infringed", no one would think that this right belonged collectively to only those enrolled in state-sanctioned schools and not to each individual person.

II. THE DISTRICT'S CLAIM THAT THE SECOND AMENDMENT DOES NOT PROTECT AN INDIVIDUAL RIGHT "TO KEEP AND BEAR ARMS" IS UNSUPPORTED BY THE PRINCIPAL PURPOSE OF THE AMENDMENT.

The Framers certainly could have drafted the Second Amendment so that it read like either one of the following propositions:

a) A well regulated Militia, being necessary to the security of a free State, the right

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[15] U.S. Const. amend. I.

> of the States to organize, arm and equip its Militias shall not be infringed.
>
> b) Congress shall have no power to prohibit state-organized and directed Militias.

Had they done so, there would be no question that the intent of the Amendment was to protect the collective right for state-organized militias to "keep and bear Arms". But they did not. And they did not because the Framers had no intention to protect only a collective right for the states.

The Framers, then, must have had a purpose that is quite different from the one that is asserted by the District. And this brings us to the second reason why the District's reading of the Second Amendment is wrong.

Just what the Framers had in mind when they linked "the right of the people to keep and bear Arms" with "the security of a free State" has much to do with how they viewed the relationship between arms and the citizens of a republic. And how they viewed this relationship was most certainly informed by the political thought of early writers on republicanism.[16]

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[16] The petitioners dismiss what these early thinkers wrote on this subject as " . . . wildly scattered expressions by individuals not directly involved in drafting the language [of the Second Amendment]." *See* Petitioners' Brief at 22. It is difficult to see how a willful disregard of the observations of some of the most insightful political philosophies that Western Civilization has produced is helpful in resolving a matter of this significance.

Thomas Jefferson wrote that the principles set out in the Declaration of Independence rested in part on "the elementary books of public right, as Aristotle, Cicero, Locke & Sidney. . . ."[17] It is a fair inference to suppose that the thinking of these same writers, in no small way, influenced the meaning and intent of the Bill of Rights and, in particular, the meaning of the Second Amendment.

Aristotle observed that it is the nature of tyranny to "mistrust the people, and therefore deprive them of their arms."[18] John Locke speaks of the right of self-preservation as a natural right growing out of the "natural Inclination . . . to preserve his Being".[19] Locke also argued that individuals have a natural right to defend their life, liberty, and property from criminals and oppressive governments.[20] Sidney proposed that "in a popular or mixed government . . . the body of the people is the publik defense, and every man is armed and disciplined. . . ."[21] Other early writers on republicanism reached the same conclusion. Machiavelli believed "the citizen-warrior" to be "the staunchest bulwark of a republic."[22] The English political writers John Trenchard and Thomas Gordon, in their *Cato's Letters*, stressed that "The Exercise of despotick Power is the unrelenting war of an armed Tyrant upon his unarmed Subjects"; and James Burgh, a political theorist well known by the founding generation, wrote "there is no end to observations in the difference between measures likely to be pursued by a minister backed by a strong army and those of a court awed by the fear of an armed people." According to Burgh, "No Kingdom can be secure otherwise than by arming the people."[23]

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[17] Thomas Jefferson, *Living Thoughts*, 42 (J. Dewey ed. 1940).

[18] Aristotle, *The Politics of Aristotle*, Book V, Chap. 10, 171 (B. Jowett, trans., Oxford, Clarendon Press 1885).

[19] John Locke, *Locke's Two Treatises of Government*, First Treatise of Government, Book I, Chap. IX, section 86 at 223-24 (Peter Lanslett ed. Cambridge Univ. Press 1967) (1698).

[20] *Id.*, Second Treatise of Government, Chap. III, sections 16-19 at 296-300 and Chap. XIX, sections 222-23 at 430-32.

[21] Algernon Sidney, *Discourses Concerning Government*, Chap. 2, section 21 at 199 (Thomas G. West ed. Liberty Classics 1990) (1698).

It was this principle, the principle that an armed citizenry was absolutely necessary to the continuing political health of a free republican state, that formed a significant part of the philosophical understanding of republics that existed at the time the Second Amendment was drafted and adopted. Indeed, Madison himself, the very person who drafted the Second Amendment, relied on this proposition in his answer to the concern raised by the anti-federalists that the federal government, using its standing army, might turn against the states (and the people) themselves. Madison answered this objection in Federalist No. 46:

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[22] Robert E. Shalope, *The Ideological Origins of the Second Amendment*, 69 The Journal of American History 599, 601 (1982).

[23] *Quoted in* Robert E. Shalope, *supra* note 22, 603-04.

> To these [the standing army] would be opposed a militia amounting to near half a million citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. . . . *Besides the advantage of being armed, which Americans possess over the people of almost every other nation,* the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. *Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.*

The Federalist No. 46, 299 (Madison) (Clinton Rossiter ed., 1961) (emphasis added).

The founding generation knew that they were engaged in a momentous project – the creation of a new Republic in a new land. Drawing on their knowledge of earlier republics and their defects, they thought long and hard about what they believed was necessary to safeguard the long-term viability of the republic they were founding. History, they thought, demonstrated that the long-term security of a free republic necessarily depends upon an armed citizenry. And so it is clear that a principal purpose of the

Second Amendment is to constitutionalize a "third component of republican government" – that of an armed citizenry that "stands ready to defend republican liberty against the depredations of the other two. . . ."[24] This understanding reflects the founding generation's rejection of the ahistorical belief that an armed state exercising political power over an unarmed citizenry will always act benevolently.

During the eighteenth and nineteenth centuries, not a single American political theorist or legal commentator on the Constitution ever suggested a collective rights interpretation of the Second Amendment. Joel Barlow, for example, writing in 1792, argued that in a democracy "the people will be universally armed: they will assume these weapons for security, which the art of war has invented for destruction".[25] Only tyrants, he wrote, "disarmed their people"; "[a] republican society", he argued, "needed armed citizens".[26] Similarly, Justice Joseph Story, in his *Commentaries on the Constitution*, stressed the connection between armed citizens and a check against the "arbitrary power of rulers":

> The right of citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a

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[24] Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 651 (1989).

[25] *Quoted in* Robert E. Shalope, *supra* note 22, 607-08.

[26] *Id.*

> strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[27]

Judge Thomas M. Cooley took the same view of the Second Amendment:

> The amendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1698, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.
>
> The Right is General – It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia but this would be an interpretation not warranted by the intent. . . . But the law may make provision for

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[27] 3 Joseph Story, *Commentaries on the Constitution of the United States with Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution*, §1890, 746-47 (Boston, 1833).

> the enrollment of all who are fit to perform military duty, or a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is that the people from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.[28]

There can be little doubt that the meaning of the Second Amendment, from its inception until well into the twentieth century, was understood to guarantee the protection of an individual "right of the people to keep and bear Arms".

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[28] Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America*, Chap. XIV, §4, 297-98 (3d ed. 1898).

III. THE "COLLECTIVE RIGHT" INTERPRETATION OF THE SECOND AMENDMENT RESTS ON AN IMPORTED IDEOLOGY TAKEN FROM GERMAN SOCIAL AND POLITICAL THEORY AND STANDS WHOLLY OUTSIDE AMERICAN POLITICAL THOUGHT AND TRADITIONS.

During the latter part of the twentieth century the Second Amendment came to be understood in some circles as guaranteeing a collective right of the states to maintain an effective militia. What made this view plausible to some contemporary American academics and legal commentators was due to the influence of the social and political theories of the German social scientist Max Weber.[29] Weber understood the nature of the modern political state to be "the repository of a monopoly of the legitimate means of violence":[30]

> . . . to-day, the use of force as legitimate only in so far as it is either permitted by the state or prescribed by it. . . . The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization.[31]

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[29] Sanford Levinson, *supra* note 24, 650.

[30] *Id.*

[31] Max Weber, *The Theory of Social and Economic Organization*, 156, (T. Parsons ed. 1947) *quoted in* Sanford Levinson, *supra* note 24, 650, n.68. *Also see* Allan Bloom, *The Closing of the American Mind*, 212, 219 (Simon & Schuster, 1987) ("Weber,

(Continued on following page)

The District itself reflects Weber's political views when it opines that " . . . choosing among [which] arms [to allow] is the *government's duty*."[32]

If one accepts Weber's definition, it does not take much effort to reformulate the Second Amendment, recast its meaning so that it comports with a particular view about the use of firearms that is popular in certain intellectual circles today, and then read it as guaranteeing only a collective right of the states. After all, the state, as Weber tells us, has, and should have, a monopoly on the legitimate use of violence.[33]

But this notion of a state monopoly on the use of force has no American pedigree; it is an imported ideology taken from the "German tradition of the (strong) state".[34] It has nothing to do with, and flatly contradicts, the "American political tradition that is fundamentally mistrustful of state power, and vigilant about maintaining ultimate power, including the power of arms, in the populace."[35] The notion that the Second Amendment protects only a collective right of the state to organize and regulate a militia is, essentially and profoundly, a foreign idea that stands wholly outside

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of course, meant that all societies or communities of human beings require such violent domination – as the only way order emerges from chaos. . . .").

[32] Petitioners' Brief at 47.

[33] Sanford Levinson, *supra* note 24, 650.

[34] *Id.*

[35] *Id.*

of American traditions and American political thought.

To paraphrase Justice Holmes remark in *Lochner v. New York* about Herbert Spencer's social statistics,[36] the short answer to the District's argument that the Second Amendment guarantees only a collective right is this: The Second Amendment does not enact Mr. Max Weber's political theories.

IV. IF THE SECOND AMENDMENT IS UNDERSTOOD TO PROTECT THE RIGHT OF INDIVIDUALS, WHO ARE NOT AFFILIATED WITH ANY STATE-REGULATED MILITIA, TO "KEEP AND BEAR" FIREARMS, THEN EACH OF THE DISTRICT'S THREE LAWS UNDER REVIEW VIOLATE MR. HELLER'S SECOND AMENDMENT RIGHTS.

If it is true that the Second Amendment protects an individual's right to "keep and bear" firearms for private use (unrelated to any affiliation with a state-regulated militia), then the question becomes whether this right includes the right to keep functional firearms for the purpose of self-defense and personal protection. And if it does, are the District's laws under review a *per se* infringement of this right?

Alternatively, if there is no *per se* violation here, then the next question becomes whether the right to keep functional firearms for the purpose of self-defense and protection is a fundamental right. And if it is a fundamental right, what is the correct standard of review of a law that is said to infringe upon this right? And lastly, using the appropriate standard of review, do any, or all, of the District's three laws under review violate Mr. Heller's Second Amendment right to possess a functional firearm for the purpose of self-defense and protection.

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[36] 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

A. The Second Amendment Recognizes a Pre-Existing Right of the People to Keep and Bear Arms.

The operative clause of the Second Amendment reads as follows: "the right of the people to keep and bear Arms, shall not be infringed." Unless the Second Amendment *creates* this right, the Amendment must refer to a pre-existing right.

Some have made the argument that the source of all human rights is the state. However, the notion that the origin of important individual rights is the state, in the sense that such rights owe their very creation and existence to the state, is not an idea that is supported by either American history or tradition. When the Declaration of Independence speaks of men being "endowed by their Creator with certain unalienable rights", it is not talking about rights that are created by the state. Similarly, when the Ninth

Amendment refers to unenumerated rights "retained by the people"[37], it is not referring to rights created by the state. The plain meaning of the operative clause of the Second Amendment, then, is that it recognizes a pre-existing individual right "to keep and bear Arms", a right that pre-dates the Bill of Rights and is a member of that class of *pre-existing* human rights that the Ninth Amendment references, and then classifies, into rights that are enumerated by the Constitution and those that are not enumerated, but are "retained by the people."

B. The "Right of the People to Keep and Bear Arms" Encompasses the Common Law Right of Self-Defense and its Corollary, the "Right to Keep and Bear Arms" for Self-Defense.

The scope of the pre-existing individual right "to keep and bear Arms" guaranteed by the Second Amendment is not exhausted by the Amendment's prefatory clause. To be sure, the right of an individual to resist a tyrannical regime together with the reasonable means to do so is surely a fundamental right. *See* The Declaration of Independence para. 2 (U.S. 1776). But it would be a mistake to assume that the only individual right guaranteed by the Second Amendment is the right of individuals "to keep and bear Arms" to resist tyranny. The phrase "the right of the people to keep and bear Arms" directly implies another right, the right of self-defense.

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[37] U.S. Const. amend. IX.

This Court, in *Ex Parte Grossman*, 267 U.S. 87 (1924), has recognized that questions of constitutional interpretation that involve common law terms should be resolved "by reference to the common law" as it was "when the instrument was framed and adopted":

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention . . . were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

Ex Parte Grossman, 267 U.S. 108-09.

Cicero recognized the right of self defense as part of Roman law: " . . . the wisdom of the law itself . . . permits self-defense . . . a man who has used arms in self-defense is not regarded as having carried them with a homicidal aim."[38] The right of self-defense has long been a part of English common law. Blackstone, writing in Chapter 1 of Book I of his *Commentaries on the Law of England*, a chapter titled "Of the Absolute Rights of Individuals", points out that the "rights" or "liberties of Englishmen . . . consist primarily in the free enjoyment of personal security, personal liberty, and private property."[39] He further remarks that "to vindicate these rights, when actually violated or attacked the Subjects of England are entitled . . . *to the right of having and using arms for self-preservation and defense*" (emphasis added).[40] The right of "Self-defense", he says, " . . . is justly called the primary law of nature so it is not, neither can it be, in fact, taken away by the laws of society."[41]

The common law recognition of the right "of having and using arms for self-preservation" was not simply asserted without any justification. Rather, its justification rests on the philosophical explanation provided by John Locke. Locke understood the right to preserve oneself against danger to be a fundamental natural right growing out of the natural inclination that a person has to preserve his own existence, i.e., his "Life and Being".[42] "A Man", said Locke, "... cannot subject himself to the Arbitrary Power of another"[43]. A "... Rational Creature", he wrote, "cannot be supposed when free, to put himself into Subjection to another, for his own harm".[44]

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[38] Cicero, *Selected Political Speeches*, 222 (M. Grant trans., 1969). *Quoted in* Stephen P. Holbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason L.R. 1, 5-6 (1981).

[39] William Blackstone, Blackstone's Commentaries, Bk. I, Chap. 1, 143-44 (2 St. George Tucker ed. 1803) (1765-1769).

[40] *Id.*, at 144 (emphasis added).

[41] *Id.*, Book III, Chap. 1, 3 (4 Tucker ed. 1803).

Given that the right of self-defense was considered to be a natural right by the common law, and by Cicero and Locke as well, the "right to keep and bear Arms", as it is recognized by the Second Amendment, should be understood to encompass the common law right to keep and bear arms for self defense.

C. The Right to Keep and Bear Arms for Self-Defense is a Fundamental Right.

If the right to keep and bear arms for self-defense is encompassed by the Second Amendment, then the question becomes whether this right, a right thought to be primary and fundamental by John Locke and recognized as such in English common law, should be recognized in American constitutional law as a fundamental right.

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[42] John Locke, *supra* note 19.

[43] John Locke, *supra* note 19, Second Treatise of Government, Chap. XI, section 135 at 375.

[44] John Locke, *supra* note 19, Second Treatise of Government, Chap. XIV, section 164 at 395.

This Court has said that the Constitution recognizes and protects a non-textual right if it is a right " . . . so rooted in the traditions and conscience of our people as to be ranked as fundamental",[45] if it is "a strong tradition" that is reflected by "[t]he history and culture of Western Civilization" and "is now established beyond debate as an enduring American tradition",[46] and if it is "deeply rooted in this Nation's history and tradition."[47]

The right to use arms for self-defense surely meets these criteria. Locke noted that the right to self-defense stems from a human being's natural inclination to preserve his very existence and he thought that it is related to freedom in this sense: a citizen cannot be free if he is put into "Subjection to another, for his own harm."[48] Prosser traces the right of self-defense in English law back to 1400.[49] Blackstone, in his Commentaries published in the 1760's, describes this right as "the primary law of nature".[50] And without exception, our nation has recognized the right to use arms in self-defense ever since the very beginning of our legal institutions and traditions. The right of self-defense and its corollary, the right to use arms in exercising this right, are certainly "deeply rooted in this Nation's history and traditions." The right of self-defense can hardly be anything less than fundamental.

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[45] *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

[46] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

[47] *Moore v. Cleveland*, 431 U.S. 494, 503-04 (1977).

[48] John Locke, *supra* note 19, Second Treatise of Government, Chap. XIX, section 164 at 395.

[49] Prosser, W., *The Law of Torts*, 4th ed., Chap. 4, section 19 at 108 (West, 1971).

[50] Blackstone, *supra* note 39, Book III, Chap. 1, 3 (4 Tucker ed. 1803).

Contrary to the assertions of some, the right at issue here is not a mere property right. Rather the right to use arms in self-defense is a fundamental right; it is guaranteed by the Second Amendment, the liberty/due process clause of the Fifth Amendment, and by the Ninth Amendment's recognition of rights "retained by the people."[51] The Second Amendment's guarantee of the right of an individual who is not affiliated with any state-regulated militia to "keep and bear Arms" must therefore be understood to guarantee an individual's fundamental right to "keep and bear Arms" for the purpose of self-defense.

D. The District's Three Laws under Review are *Per Se* Violations of Mr. Heller's Second Amendment Rights.

A complete ban on a firearm, such as a handgun (D.C. Code §7-2502.02(a)(4)), that can be easily and readily used for self-defense, is clearly a *per se* unconstitutional violation of the individual right to "keep and bear Arms" guaranteed by the Second Amendment.

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[51] U.S. Const. amend. V; U.S. Const. amend. IX.

Similarly, a prohibition on carrying a handgun from room to room in one's own residence as well as a requirement that all firearms in lawful possession in one's own residence must be kept unloaded and locked or disassembled are *per se* violations of the Second Amendment. *See* D.C. Code §22-4504(a) and §7-2507.02. Such prohibitions make a handgun, as well as any firearm, dysfunctional and absolutely useless in a self-defense situation.

The District's three laws eviscerate a citizen's guaranteed constitutional right "to keep and bear" a functional firearm for the purpose of self-defense and render it worthless.

E. Alternatively, if there is no *Per Se* Second Amendment Violation here, then the Correct Standard of Review of the District's Laws is Strict Scrutiny.

If the inquiry moves from whether an outright ban on handgun ownership, or a ban on a functional firearm, is a *per se* violation of the Second Amendment to whether the District's ban on handguns and functional firearms is a lawful regulation under its police powers, then the question becomes what is the correct standard of review of this ban.

More than half a century ago, this Court announced that legislation that appears "to be within a specific prohibition of the Constitution, such as those of the first ten Amendments," a more searching review is required than merely "some rational basis". *United*

States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938). Moreover, the regulation of "certain 'fundamental rights' . . . may be justified only by a 'compelling state interest'." *Roe v. Wade,* 410 U.S. 113, 155 (1973). Lastly, the government "must demonstrate that its" regulation "is narrowly tailored to achieve" its compelling interest. *Miller v. Johnson,* 515 U.S. 900, 920 (1995). In other words, the government has the burden of proof in showing both that it has a compelling government purpose and that the law is reasonably necessary to achieve this purpose. *See Miller,* 515 U.S. at 920-21.

Since the right to use arms in self-defense is a fundamental right guaranteed by the Second Amendment, the District must first prove that it has a compelling interest in regulating Mr. Heller's Second Amendment rights. Second, the District must show each of its three laws under review is "narrowly tailored to achieve" the compelling objective that the District intends to accomplish. *See Miller,* 515 U.S. at 920.

F. The District has Failed to Carry its Burden of Proof as Required by the Standard of Strict Scrutiny.

The District claims that the objective of its three gun laws under review is to reduce gun violence. But the District has been unable to reasonably quantify, either the deterrent effect of allowing the private possession of a handgun in one's residence, or the number of times that an armed intruder, a home invasion assault or a robbery has been thwarted because a resident had access to a functional handgun. Nor has the District quantified the deterrent value of a criminal knowing that a citizen has a protected right to have quick and lawful access to a functional handgun in his home or, conversely, whether a law prohibiting individuals from possessing a handgun in their homes likely increases the probability of a home invasion for unlawful purposes. And lastly, the District has not shown how its gun laws would have any real effect on keeping guns out of the hands of criminals. Unless this kind of information is reliably quantified, all the focus is on the costs, and none on the benefits. A statistical analysis that lacks this kind of data is not persuasive.

In sum, the District has failed to prove that any of its three laws under review will actually achieve its objective, much less that they are necessary to achieve its objective.

◆

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

◆

BRIEF OF MAJOR GENERAL JOHN D. ALTENBURG, JR., LIEUTENANT GENERAL CHARLES E. DOMINY, LIEUTENANT GENERAL TOM FIELDS, LIEUTENANT GENERAL JAY M. GARNER, GENERAL RONALD H. GRIFFITH, GENERAL WILLIAM H. HARTZOG, LIEUTENANT GENERAL RONALD V. HITE, MAJOR GENERAL JOHN. G. MEYER, JR., HONORABLE JOE R. REEDER, LIEUTENANT GENERAL DUTCH SHOFFNER, GENERAL JOHN TILELLI, AND THE AMERICAN HUNTERS AND SHOOTERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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INTEREST OF *AMICI*

Amici are former high-ranking military officers and a civilian leader in the United States Army and an organization that advocates rational regulation of firearms.[1] *Amici* are deeply interested in the present case, not because its outcome could affect the way in which the Second Amendment is viewed and applied, but rather because *amici* believe that facility with rifles and pistols is a predictor of success in basic training and in the military, and that lawful and regulated practice with appropriate firearms is a critical component of national defense. The judgment of individual *amici* is based on decades of experience and accomplishment at the very highest positions of our nation's military leadership. The responsibilities and experiences of *amici* are highlighted below.

Major General John D. Altenburg, Jr.: retired Army 2-star; Army Deputy Judge Advocate General and former civilian Appointing Authority, Military

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[1] Pursuant to Rule 37, the parties have consented to the filing of this brief. *See* Standing Consents from the Petitioners and Respondent on file with this Court. *Amici* have advised counsel for Petitioners and Respondent of their intent to file this brief more than seven days prior to said filing. In accordance with Rule 37.6, *amici* state: No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

Commissions, Guantanamo Bay, Cuba; former enlisted soldier, Vietnam.

Lieutenant General Charles E. Dominy: retired Army 3-star; Director, Army Staff, responsible for coordinating Army Staff functions, including training.

Lieutenant General Tom Fields: retired Army 3-star; Deputy Commander-in-Chief & Chief of Staff U.S. Pacific Command (1991-94).

Lieutenant General Jay M. Garner: retired Army 3-star; Director, Office for Reconstruction & Humanitarian Assistance for Iraq (2003); Assistant Vice Chief of Staff of the Army (1996).

General Ronald H. Griffith: retired Army 4-star; Vice Chief of Staff, Army Inspector General and Gulf War Commanding General, 1st Armored Division.

General William H. Hartzog: retired Army 4-star; Commanding General, Army Training & Doctrine Command; Deputy Commanding General, Atlantic Command & Commanding General, 1st Infantry Division.

Lieutenant General Ronald V. Hite: retired Army 3-star; Program Executive Officer, Combat Support; Commanding General, White Sands Missile Range & U.S. Army Test & Evaluation Command; Military Deputy to the Assistant Secretary of the Army for Research, Development, & Acquisition; Director, Army Acquisition Corps.

Major General John G. Meyer Jr.: retired Army 2-star; Chief of Army Public Affairs (1996-01); Commander, Army Community & Family Support Center (1993-96).

Honorable Joe R. Reeder, 14th Under Secretary of the Army (1993-97), was President of the National Board for the Promotion of Rifle Practice, the governmental entity responsible for administering the Civilian Marksmanship Program (1993-96).

Lieutenant General Dutch Shoffner: retired Army 3-star; Commanding General, Combined Arms Center & Commandant, U.S. Army Command & General Staff College; Commanding General, 3rd Infantry Division & Director, Army Force Development.

General John H. Tilelli: retired Army 4-star; Commanding General, U.S. Army Forces Command; Commander in Chief, Korea; Army Vice Chief of Staff; Gulf War Commanding General, 1st Calvary Division.

The American Hunters and Shooters Association ("AHSA") is non-partisan organization that advocates sensible public policies for gun ownership and use. AHSA seeks to balance Americans' right to possess firearms with the need to ensure sensible and mature ownership, including keeping guns out of the hands of children, criminals, and those who lack the ability to responsibly own a weapon. AHSA does not support unfettered access to all types of weapons.

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SUMMARY OF ARGUMENT

The Petitioners and Respondent are asking this Court to select among two mutually exclusive interpretations of the Second Amendment: one establishing an individual's right to bear arms and, the other memorializing society's right to organize a force for its collective defense. *Amici* suggest that this dichotomy, pitting individual rights against group rights, is not ordained by the language of the Second Amendment, which is a cogent blend of both individual rights and community rights, with each depending on the other. A well-regulated militia – whether *ad hoc* or as part of our organized military – depends on recruits who have familiarity and training with firearms – rifles, pistols and shotguns. *Amici* suggest that the Second Amendment ensures both the individual's right to possess firearms, subject to reasonable regulation, and the constitutional goal of collective defense readiness. Based on decades of military experience, *amici* have concluded that the District of Columbia's Gun Law ("D.C. Gun Law"), D.C. Code § 7-2502.01 *et seq.*, directly interferes with various Acts of Congress aimed at enhancing the national defense by promoting martial training amongst the citizenry.

For over a century, Congress has authorized and funded programs to promote the marksmanship of young Americans so that they might make the transition from civilian to military life more effectively and at less cost to our national defense. This pre-military training has become an integral part of national defense aimed at preparing, as civilians, "every able-bodied male [and female]." Pub. L. No. 57-33, 32 Stat. 775 (Jan. 21, 1903); *see* Pub. L. No. 64-242, 39 Stat. 619, 643 (Aug. 29, 1916) (all "able bodied males"). The D.C. Gun Law, by barring individuals from owning handguns and using other firearms at reasonable times and places, is inconsistent with these congressional mandates and, when in enacted in 1976, impeded the Department of the Army's Civilian Marksmanship program ("DCM").[2] The D.C. Gun Law's categorical prohibition on pistol ownership by D.C. residents not only conflicts with the Second Amendment and the Defense, Raise and Support Clauses of the Constitution, but also with the District of Columbia Home Rule Act § 602(a)(3), Pub. L. No. 93-198; 87 Stat. 777 (Dec. 24, 1973), codified at D.C. Code § 1-201 *et seq.*, which precludes the District of Columbia City Council from enacting legislation that affects any function of the federal government. *See* U.S. CONST. amend. II, and art. I, § 8, cls. 1, 12, 13, and 16; D.C. Code § 1-233(a)(3). As this Court has consistently recognized, "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *Rumsfeld v. Forum*

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[2] Congress originally created the Office of Director of Civilian Marksmanship ("DCM") in 1916. The DCM was modified in 1996 and renamed the Civilian Marksmanship Program ("CMP"). *See* Pub. L. No. 104-450, To avoid confusion, we refer to the program as established in 1916 as "DCM," the post-1996 amendment program as the "CMP," and both programs or the program generically as the Civilian Marksmanship program.

for Academic and Institutional Rights, Inc., 547 U.S. 47, 58 (2006) (citing *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981)). Thus, this Court need not reach the constitutional question posed by Petitioners: to the extent that it affects federally sponsored and operated marksmanship and training programs, the D.C. Gun Law is not authorized by the D.C. Home Rule Act and therefore, is void *ab initio*. *See International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 392 (1986).

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ARGUMENT

I. Military Pre-Training is Critical to the National Defense.

A. Marksmanship Facilitates Military Training.

This Court has recognized that a "highly qualified . . . officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security" and that the Reserve Officer Training Corps ("ROTC") programs at various colleges and universities are critical to ensuring a continuous cadre of trained and diverse officers for our military. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003). While ROTC programs train officers, no comparable program exists for those who enlist. Those who enlist in the military undergo extensive and costly training. Yet, in *amici's* experience, recruits with prior pistol and rifle training tend to move through basic training with greater ease than those who lack that training and, subsequently, demonstrate superior performance in safety, marksmanship, and weapon maintenance. Every soldier has an inherent right of self-defense under the laws of war. Pre-military practice with firearms better enables our soldiers to exercise that right meaningfully. *Amici's* observations, gleaned from extensive military experience, are confirmed by empirical evidence and history.

1. The Framers of the Second Amendment Inherited a Tradition of Legally Mandated Pre-Induction Weapons Training.

The notion that prior pistol and rifle experience is a significant factor in predicting the success of a recruit during his or her first year in the military should come as no surprise. History teaches that competence with weapons does not occur magically; it normally requires significant pre-military expertise honed through assiduous practice.

The English recognized this relationship early on, largely out of necessity. Their weapon of choice, the yew longbow, was not easily mastered and proved to be a difficult weapon to use. To ensure a sufficient cadre of a well-trained archers, the Crown, over the course of three centuries, encouraged and later required rich and poor alike to improve their longbow skills through regular practice. For example, Edward III (r. 1312-1377) required "the use of the bow" in target practice, usually in the form of monthly events in each town. *See* Order that Archery Should Be Practised, 1346, 19 Edw. 3 c. 6.[3] Institutionalized practice by English bowmen proved critical in a number of battles waged during the Hundred Years' War, especially the Battles of Crecy and Agincourt. In both of those encounters, the English prevailed in no small measure because of their prowess with the longbow.

The lessons learned from the longbow were transferred easily when gunpowder began to replace arm-power and bows gave way to muskets. The ability to load the complicated new weapon quickly, using powder, ball, and wad, and accurately fire an unrifled pistol or musket required constant practice. As weapons – handguns and rifles – became more sophisticated, the need to practice did not diminish. Improved weapons required different skills; skills, though, of whatever nature, are honed through practice. Again, the English promoted marksmanship training among the entire male citizenry largely because it relied on a volunteer militia especially starting in the mid-17th century. *See* Joyce Lee Malcolm, *The Role of the Militia in the Development of the Englishman's Right to be Armed – Clarifying the Legacy*, 5 J FIREARMS & PUB. POL'Y 139, 141 (1993) ("Men resented having to serve and tried to avoid spending their leisure hours at mandatory target practice. Not surprisingly, there were complaints of 'to much bowling and to little shoting' and in the 1620s Charles I was obliged to close ale houses on Sundays to keep men at their shooting practice."); WILLIAM BLACKSTONE, 1 Commentaries *412 ("The general scheme of [the militia laws] is to discipline a certain number of the inhabitants of every county, chosen by lot for three years . . . under a commission from the crown."); *see generally* Bernard D. Rostker, AMERICA GOES TO WAR: MANAGING THE FORCE DURING TIMES OF STRESS AND UNCERTAINTY (RAND 2007) (Prepared for the Office of the Secretary of Defense).

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[3] Even monarchs antedating Edward III recognized this need for constant practice and therefore, promoted civilian training through various edicts and statutes. King Henry I (r. 1100-1135) issued a law that absolved any archer of criminal culpability if he "[killed] another with a missile or some such accident." 1118, 18 Hen., c. 88, § 6; *see* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 978-79 (1932); Thomas Atkins Street, THE FOUNDATIONS OF LEGAL LIABILITY: THEORY AND PRINCIPLES OF TORT 77 (1906). In such cases, the archer merely had to compensate the family of the deceased.

2. Colonial America Emulated the English Experience and Promoted Small Arms Proficiency Among Its Citizens.

Not surprisingly, the American colonies adopted the English custom of universal arms training for all able-bodied males. In 1774, George Mason and George Washington formed the Fairfax County Militia Association, which was not under the control of the Royal Governor. A contemporary editorial praised their unofficial militia by opining that "[with] the English troops in our front, and our governors forbid giving assent to militia laws, make it high time that we enter into **associations for learning the use of arms**, and to chuse officers; so that if ever we should be attacked, we may be able to defend ourselves, and not be drove like sheep to the slaughter." WILLIAMSBURG VA. GAZETTE, Oct. 27, 1774, at 2, col. 2. Another contemporary commentator echoed the need for weaponry practice: "The inhabitants of this colony . . . ought therefore never be without the most ample supply of arms and ammunition," [and should prepare] "for the defence of this valuable country, by a diligent application to acquire a thorough knowledge of the use of arms and discipline, which might easily be obtained, without materially interfering with business, by devoting every Saturday afternoon to training." WILLIAMSBURG VA. GAZETTE, Dec. 1, 1774, at 2, col. 3.

During the constitutional ratification debates in Virginia, George Mason proposed the following reservations of rights and limitations on Federal power: "That the people have a right to keep and bear arms; that **a well-regulated militia, composed of the body of the people trained to arms**, is the proper, natural and safe defence of a free state. That standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided." *Amendments Proposed by the Convention of Virginia, 1788, in* Alexander Hamilton, James Madison & John Jay, THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, app. at 635 (Paul Leicester Ford ed., 1898) (emphasis supplied); Stephen P.

Halbrook, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 74 (1984).

Writing in Federalist No. 29, Alexander Hamilton rejected the notion that the National government could require a large standing Army. "Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped." THE FEDERALIST, NO. 29 (Alexander Hamilton). "This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude **that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms,** who stand ready to defend their rights and those of their fellow citizens." *Id.* (emphasis supplied).[4]

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[4] Tench Coxe, a prominent Federalist and friend of James Madison, wrote in favor of ratification in the PENNSYLVANIA GAZETTE in February 1788:

> The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for the powers of the sword are in the hands of the yeomanry of America from sixteen to sixty. The militia of these free commonwealths, **entitled and accustomed to their arms**, when compared with any possible army, must be tremendous and irresistible. Who are the militia? Are they not ourselves? Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of every American. . . ."

Halbrook, *supra*, at 68-69 (emphasis supplied).

Anti-Federalists also accepted the assumptions that standing armies were dangerous to liberty and that the most trustworthy system of national defense should be grounded in an armed citizenry, trained and practiced in the use of small arms. Richard Henry Lee's *Letters from the Federal Farmer* (1788) were highly influential writings against the ratification of a Constitution without a bill of rights. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 365 (1995) (Thomas, J., concurring). Since Lee proposed specific rights later incorporated in the Bill of Rights, his writings are accepted as valuable guides to the original understanding of the Bill of Rights. According to Lee, "[t]o preserve liberty, it is essential that the **whole body of the people always possess arms, and be taught alike, especially when young, how to use them**." Halbrook, *supra*, at 72 (emphasis supplied).

B. Congress Promotes Small-Arms Marksmanship Among the Civilian Population.

1. Congress Creates the Civilian Small-Arms Marksmanship Training Programs.

The colonial experience memorialized in the Federalist Papers and later in the Second Amendment carried over into the twentieth century. Recognizing the importance of civilian marksmanship to national preparedness, Congress, as part of the Department of War Appropriations Act of 1903, Pub. L. No. 57-33, 32 Stat. 775 (Jan. 21, 1903), codified the obligation of all male citizens, whether in uniform or not, to take up arms in defense of their country. In 1905, Congress implemented this mandate by authorizing the Secretary of War to sell ammunition to private rifle clubs to improve the marksmanship of the citizenry. *See* Pub. L. No. 58-149, 33 Stat. 986 (March 3, 1905). And, with the nation on the brink of entering the First World War, Congress, in the Army Appropriations Act for Fiscal Year 1916-17, Pub. L. No. 64-242, 39 Stat. 619, promoted private marksmanship in three significant ways. First, Congress appropriated funds to construct shooting galleries that would be open to "organized rifle clubs." 39 Stat. at 638. Second, it appropriated an additional $3,000,000 for "ammunition, targets, target materials, and other accessories [as] may be issued for small-arms[5] target practice and instruction of able-bodied males capable of bearing arms . . . " 39 Stat. at 643. At the time, this was an enormous sum, given that the entire defense budget for FY 1916-17 was $377 million. *See* William J. Durch & Pamela L. Reed, *The Boundaries of Choice: Domestic Constraints on Decisions Affecting the Armed Forces in* THE AMERICAN MILITARY IN THE 21ST CENTURY 113 (Barry M. Blechman *et al.* eds., 1993). And third, it authorized the President to appoint a Director of

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[5] The term "small-arms" means any weapon used by a single individual, as opposed to a crew and as such, includes rifles, pistols and shotguns. *See* 14 U.S.S.G. § 2M5.2(a)(2) (defining non-fully automatic small arms as "rifles, handguns, or shotguns.")

Civilian Marksmanship who would be responsible for developing and implementing programs to promote "marksmanship" amongst the citizenry through "the purchase of materials, supplies, and services." 39 Stat. at 648.

In addition to maintaining shooting ranges for civilian use, the Director of Civilian Marksmanship was required, among other things, to organize annually a national rifle and pistol competition open to members of the military, "rifle clubs, and to civilians." 10 U.S.C. § 4312(a) (recodified by Pub. L. No. 105-225, 112 Stat. 1253 (Aug. 12, 1998) at 36 U.S.C. § 40725). A similar "junior" competition is also open to those under 18 years of age. *See* 10 U.S.C. § 4313 (recodified by Pub. L. No. 105-225, 112 Stat. 1253 (Aug. 12, 1998) at 36 U.S.C. § 40726).

In 1996, Congress amended and modified the Civilian Marksmanship program by establishing, through congressional charter, a private non-profit entity to oversee and operate the same sorts of programs that had existed since 1916. *See* National Defense Authorization Act for Fiscal Year 1996, § 1601 *et seq.*, Pub. L. No. 104-450, 110 Stat. 186, 515 (Feb. 10, 1996), recodified at 36 U.S.C. § 40701 *et seq.*; 32 C.F.R. § 578.102. Having removed the programs from the direct control of the Department of Defense, though, required CMP to strengthen its ties with private gun enthusiasts as a way of ensuring continued logistical support for the program. The 1996 revisions to and re-authorization of the program required the Army to provide logistical support, as well as facilities and personnel for the training program and national marksmanship competitions.

2. Training and Marksmanship Programs Prove Highly Successful.

The Civilian Marksmanship program has been remarkably successful, both as it existed from 1916-1996 and as it currently exists and has fulfilled congressional expectations when measured either subjectively or objectively. During both World Wars, the DCM's pre-military training was credited with giving many recruits a leg up on in basic training and made their transition to the military faster, less costly, and safer for the recruits. President Truman and General George C. Marshall both attested to the importance of the CMP in the overall war effort. *See* Federal Firearms Act: Hearings on S.1 before Subcommittee to Investigate Juvenile Delinquency of the Senate Judiciary Committee, 90th Cong. 1st Sess. pp. 484-5 (1967), cited in *Gavett v. Alexander*, 477 F. Supp. 1035, 1038 (D.D.C. 1979).

In the early 1960s, the Army commissioned a study to determine the efficacy of the DCM program. The study, undertaken by the Arthur D. Little Company under the direction of former General James Gavin, concluded that those who were involved in the programs operated by the Office of the Director of the Civilian Marksmanship, when compared to those who were not, (i) had fewer casualties in battle, (ii) were more likely to use their weapons in battle, (iii) qualified in training more quickly with small arms, (iv) learned how to field strip their weapons and learned the essential nomenclature of gun components more quickly, and (v) were able to clear jammed or obstructive weapons more rapidly. *See* ARTHUR D. LITTLE, A STUDY OF THE ACTIVITIES AND MISSIONS OF THE NBPRP, REPORT TO THE DEPARTMENT OF THE ARMY (Jan. 1966) ("Little Report") cited in James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 969-70 (1992). The Little Report revealed that while 13.1% of ordinary recruits qualified as "Expert," the highest category of marksmanship, 68.6% of recruits who had been DCM participants qualified as "Expert." Little Report at 18 (Table II-1). The Report confirmed what common sense and nearly a millennium of military history have consistently taught: soldiers with superior training and practice are superior in battle. *See* Little Report at 23-24 ("the more marksmanship instruction . . . the more effective . . . in combat and the fewer the casualties").

Firearms training is especially effective in reducing the rate of gun-related accidents which are a constant concern to any military commander. Army General David H. Petraeus, the Commanding General, Multi-National Force – Iraq, was nearly killed as a result of a training accident. On a Saturday in 1991, while observing an infantry squad practice assaulting a bunker, Petraeus was hit by an errant bullet from an M-16 that had been fired accidentally. *See* Rick Atkinson, IN THE COMPANY OF SOLDIERS 37-38

(2005). The bullet entered directly above the "A" in Petraeus' name tag on the right side of his chest; it exited through his back.[6] *See id.* DCM pre-military training with pistols and rifles reduced the rate of gun-related accidents in the military. *See* Little Report at 261 (Table IV-64).

II. The District of Columbia Gun Law Impedes Small-Arms Training and Undermines Military Preparedness.

The federal Civilian Marksmanship programs, as they existed in 1976, when the law at issue was enacted by the District of Columbia, and as they currently exist, include both rifles and pistols. The D.C. Gun Law permits one to own a gun provided that it is duly registered with the District of Columbia. The law, though, precludes, subject to certain exceptions not relevant here, the District Government from registering any "[p]istol not validly registered to the current registrant in the District prior to September 24, 1976." D.C. Code § 7-2502.02(a)(4). The law permits one to own a registered rifle in the District provided it is "unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of

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[6] Gen. Petraeus was transported by medevac helicopter to Vanderbilt University Medical Center, where the surgeon, William Frist, had rushed to hospital from the golf course to operate.

Columbia[.]" D.C. Code § 7-2507.02. Under any interpretation, the law at issue effectively precludes one from owning a pistol in the District of Columbia and imposes significant constraints, in addition to registration, on ownership of a rifle.

The inability of a District resident to own a pistol precludes that individual from participating in any pistol training program in the District of Columbia, any pistol marksmanship program in the District of Columbia, and in the national matches originally sponsored by the Department of Defense and now sponsored by the CMP. The D.C. Gun Law contains no exception that would reach the Civilian Marksmanship program, as it existed in 1976, and as it exists today. The D.C. Gun Law is particularly pernicious because it permits non-residents to carry a firearm to a "lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction[,]" but does not extend that same benefit to residents of the District of Columbia. D.C. Code § 7-2502.02(b)(3). Therefore, the Department of Defense could sponsor a pistol marksmanship contest in the District, but no District resident could participate in that event with his or her own pistol. The D.C. Gun Law does not similarly disable non-residents of the District. Residents of Maryland or Virginia or California or any other jurisdiction could enter the District with their pistols to participate in that event. These non-D.C. residents can cross through the District with pistols provided they are en route to a firearms event in another jurisdiction. D.C. residents, by contrast, are precluded from attending those same events in another jurisdiction.

The D.C. Gun Law permits members of the organized reserve or organized militia (*i.e.*, the National Guard) to possess a firearm, without registration, "while on duty in the performance of official authorized functions[.]" D.C. Code § 7-2502.02(b)(1). But the D.C. Gun Law does not extend this exception to the "reserve or unorganized militia," consisting of all able-bodied men not in the military. The reserved militia, however, was the target and intended beneficiary of both the 1903 and 1916 Acts, noted above. Each law promoted marksmanship and "small-arms target practice" among all "able-bodied males capable of bearing arms." 39 Stat. at 643. In short, those residing in the District could not then, and cannot now, meaningfully participate in the Department of Defense Civilian Marksmanship program and Civilian Marksmanship Program, respectively, aimed at ensuring a cadre of citizens trained in the use of small-arms – pistols, rifles and shotguns.

III. The District of Columbia Gun Law Impedes the Federal Government's Function of Training Citizens for National Defense and Therefore, Is Barred by the D.C. Home Rule Act.

Petitioners do not deny that the D.C. Gun Law has these effects. Instead, Petitioners argue that the Second Amendment does not pertain because that

Amendment does not create an individual right and, even if it did, the D.C. Gun Law imposes reasonable restrictions on gun ownership. *Amici* suggest that these arguments are not relevant. Rather, the D.C. Gun Law is not authorized by the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code § 1-211 *et seq.*, commonly known as the Home Rule Act. The Home Rule Act creates the D.C. local government and authorizes it to pass certain legislation. The D.C. Council has "no authority to . . . [e]nact any act, or enact any act to amend or repeal any act of Congress which *concerns the functions* or property of the United States." D.C. Code § 1-233(a)(3) (emphasis supplied).[7] In 1976, when the

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[7] In *Techworld Dev. Corp. v. District of Columbia Pres. League*, 648 F. Supp. 106 (D.D.C. 1986), the district court held that the limitation imposed by D.C. Code § 1-233 did not preclude the District of Columbia from closing a street even where title to that street vested in the federal government. The court reasoned that unlike other authorities, the authority to close streets had been continuously exercised by the District of Columbia government for more than 150 years and had been expressly upheld by this Court as a valid exercise of local governmental authority. *See Van Ness v. City of Washington*, 29 U.S. (4 Pet.) 232, 281 (1830) ("Among these are certainly the authority to widen or alter streets"). Categorically prohibiting pistol ownership is not a power that has been exercised, continuously or otherwise, by the District government prior to home rule. Indeed, the *Techworld Dev. Corp.* court expressly recognized, as have other courts since, that a local undertaking, at least with respect to the National Historic Preservation Act, can become a "'federal undertaking when a federal agency lends its' . . . approval, sanction, assistance, or support." Here, the programs upended by the D.C. Gun Law were entirely federal

(Continued on following page)

D.C. Gun Law was enacted, the Civilian Marksmanship program was operated by the Department of the Army. As discussed above, the Gun Law when enacted effectively precluded and continues to preclude District residents from participating in Civilian Marksmanship program-sponsored pistol events. As such, the D.C. Gun Law "concerne[d] the functions" of the Department of Defense (*see* 10 U.S.C. §§ 4312, 4313 (1995)) and is, therefore, void *ab initio* as "concern[ing]" a federal function.

This is not to say that a gun law similar to one enacted by the District of Columbia could not pass muster under a traditional implied preemption analysis; nor is it to say that the District could not have crafted a gun law consistent with its Charter and with the Second Amendment by not intruding into federal functions.[8] *See Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992). A normal implied preemption analysis seeks to balance the federal interest affected by a state law with those fundamental notions of federalism that

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through 1996, and still receive approval, sanction and support from the Department of Defense. In short, even under *Techworld*, the D.C. Gun is not a "local undertaking," and runs afoul of D.C. Code § 1-233.

[8] *Amici* suggest that laws which reasonably require handgun registration and which restrict civilian possession of uniquely military arms would likely pass muster under both an implied preemption and Second Amendment analysis, provided such laws permit District residents to possess pistols, rifles and shotguns and permit their use in CMP events and competitions.

authorize states to exercise their inherent police powers. *See Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996); *Hillsborough Cty. v. Automated Med. Labs.*, 471 U.S. 707, 715 (1985). However, as a federal district, D.C. enjoys none of the indicia of statehood absent congressional legislation to the contrary and, therefore, basic notions of federalism cannot logically or semantically apply to the District. *See United States v. Carter*, 409 U.S. 418, 419 (1973); *Nat'l Ins. Co. v. Tidewater*, 337 U.S. 582 (1949); *LaShawn A. by Moore v. Barry*, 144 F.3d 847, 853 n. 7 (D.C. Cir. 1998) (holding that the District of Columbia is not a State for Eleventh Amendment purposes); *cf. Clarke v. Washington Metro. Area Transit Auth.,* 654 F. Supp. 712 (D.D.C. 1985) *aff'd,* 808 F.2d 137 (D.C. Cir. 1987) (holding that the District can exercise indicia of statehood provided Congress authorizes it). As in the U.S. Territories, Congress has plenary authority in the District of Columbia. *See* U.S. CONST. art. I, § 8, cl. 17; U.S. CONST. art. IV, § 3, cl. 2; *see also, e.g., Binns v. United States*, 194 U.S. 486, 491 (1904). Correspondingly, laws enacted by the District are much the same as regulations issued by a federal agency given that their legal basis is an act of Congress and not, as is the case with States, the Constitution or retained authority. *Compare* D.C. Code § 1-233(c) (requiring D.C. Council to submit its legislation to Congress for its review before taking effect) *with* the Congressional Review Act, 5 U.S.C. § 801 *et seq*. (requiring administrative agencies to submit significant final rules to Congress for its review before taking effect).

This Court has consistently held that federal regulations, like D.C. laws, are only valid if they are authorized by Congress. In this case, that authorization is not only absent, but the legislation itself affirmatively withdraws authorization of the type necessary to support the D.C. Gun Law. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 647 (1986); *Ridgway v. Ridgway*, 454 U.S. 46, 57 (1981) (regulations must not be "unreasonable, unauthorized, or inconsistent with" the underlying statute). Further, the D.C. Council's action is not entitled to deference when the issue is whether that action is authorized by congressional action. *See United States v. Mead Corp.*, 533 U.S. 201, 226-27 (2001) (holding that *Chevron* deference presupposes that "Congress delegated authority to the agency generally to make" the law at issue); *Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (*Chevron* "deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'") (*quoting Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984)).

Inasmuch as the D.C. Gun Law prevents D.C. residents from participating in federally-operated, federally-supervised, and federally-mandated programs, it necessarily affects a unique federal function and therefore is expressly barred by the D.C. Home Rule Act. The argument advanced by *amici* would in no way prevent the D.C. Council from enacting reasonable regulations relating to possession, safety, and registration of firearms in the District. Indeed, it has a responsibility to the public to do so. *Amici* believe that the District's Gun Law was a laudable effort. However, insofar as it improperly impedes Defense Department programs vital to the national defense, it exceeds the bounds of the D.C. Home Rule Act.

◆

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN ACADEMY OF PEDIATRICS, THE SOCIETY FOR ADOLESCENT MEDICINE, THE CHILDREN'S DEFENSE FUND, WOMEN AGAINST GUN VIOLENCE AND YOUTH ALIVE! AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN ACADEMY OF PEDIATRICS, THE SOCIETY FOR ADOLESCENT MEDICINE, THE CHILDREN'S DEFENSE FUND, WOMEN AGAINST GUN VIOLENCE AND YOUTH ALIVE! AS AMICI CURIAE IN SUPPORT OF PETITIONERS

This amicus curiae brief is submitted on behalf of the American Academy of Pediatrics ("AAP"), The Society for Adolescent Medicine ("SAM"), the Children's Defense Fund ("CDF"), Women Against Gun Violence ("WAGV"), and Youth Alive! ("YA!") in support of the Petitioner.[1]

STATEMENT OF INTEREST OF AMICI CURIAE THE AMERICAN ACADEMY OF PEDIATRICS, THE SOCIETY FOR ADOLESCENT MEDICINE, THE CHILDREN'S DEFENSE FUND, WOMEN AGAINST GUN VIOLENCE AND YOUTH ALIVE!

These *amici* are not-for-profit organizations united by a commitment to protecting the health, safety and well-being of America's children and youth. Each is dedicated to preventing youth violence and injury by removing handguns from homes and communities across the country.

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[1] Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. Amici curiae further state that no one other than AAP, SAM, CDF, WAGV, YA! and their counsel made a monetary contribution to the preparation or submission of this brief.

The American Academy of Pediatrics represents a membership of 60,000 primary care physicians, pediatric medical subspecialists, and pediatric surgical specialists. In connection with its goals of preventing violence against children and reducing accidental injury to children, AAP believes that the absence of guns from children's homes and communities is the most reliable and effective measure to prevent firearms-related injuries to children and youth.[2]

The Society for Adolescent Medicine's membership consists of health care professionals specializing in the field of adolescent health. Consistent with its objective of improving adolescent health, SAM advocates that reducing the availability of firearms in general, and handguns in particular, will reduce the frequency of youth gun violence.[3]

The Children's Defense Fund provides a strong, effective voice for America's children and encourages preventive investment in children's health. CDF monitors gun violence against children in its annual report, *Protect Children Not Guns,* which reported that 2,825 children and teens died from gunfire in the United States in 2004. CDF believes that it is up to adults to protect children from firearms in our homes, schools, communities, and nation by supporting common sense gun safety measures, removing guns from homes, and focusing public attention on child gun deaths.[4]

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[2] *See* Am. Acad. of Pediatrics, Comm. on Inj. & Poison Prevention, *Firearm-Related Injuries Affecting the Pediatric Population,* 105 Pediatrics 888, 888 (2000).

[3] *See* Naomi Duke et al., Soc'y for Adolescent Med., *Adolescent Firearm Violence: Position Paper of the Society for Adolescent Medicine,* 37 J. of Adolescent Health 171, 173 (2005).

Youth ALIVE! is a public health agency dedicated to preventing adolescent violence and generating youth leadership through counseling, education and mentoring. Youth Alive! trains youth about the causes and effects of violence, particularly the menacing effects of handgun violence, and provides crisis intervention to youth who are hospitalized due to violent injuries in order to help break the cycle of violence. YA! actively assisted the community of Oakland, California in banning 113 gun dealers operating in residential neighborhoods.[5]

Women Against Gun Violence is a California-based coalition of individuals and organizations that work to reduce gun violence through outreach and education. WAGV's programs include an "Empowerment Group," a group of individuals who have experienced the devastation of gun violence and who visit schools and community organizations to share their personal stories. WAGV also distributes data about gun violence in its online memorials and publications.

Due to their long-standing and continuing commitment to protecting children and youth, and their recognition that handguns pose a particular threat to America's young people, AAP, SAM, CDF, WAGV, and YA! are actively involved in developments that seek to control access to all firearms, most importantly handguns. These *amici* firmly believe that the absence of handguns from children's homes and communities is the most reliable and effective method to prevent firearms-related injuries to children and adolescents.

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[4] *See* Children's Defense Fund, *Protect Children Not Guns* 2-4 (2007), http://www.childrensdefense.org/site/DocServer/gunrpt_revised06.pdf?docID=1761.

[5] *See* http://www.youthalive.org/index.html.

SUMMARY OF THE ARGUMENT

Handgun-related injuries and fatalities to children are significant public health problems in terms of both impact on children's physical and mental health, and impact on the cost to the public health system. Because of their accessibility, manageability, and physical appeal, handguns in the home pose a unique threat to children and youth. Moreover, the dangers of handguns cannot be overcome by gun safety instruction, as studies show that such instruction has little effect in preventing children from handling guns. Statistics also reveal that the presence and accessibility of handguns stunningly increase the rates of suicide, accidental injury and death among children and youth. As set forth fully below, these considerations further establish that the District of Columbia's handgun law is a reasonable restriction.

Accordingly, regardless of whether the Second Amendment protects the right to possess guns for private purposes, for the reasons described below, and based on their collective interest in preventing handgun injuries to children and youth nationwide, AAP, SAM, CDF, WAGV, and YA! respectfully urge the Court to reverse the decision of the Court of Appeals for the District of Columbia Circuit.

ARGUMENT

The District of Columbia reasonably has enacted legislation to attempt to curtail death among its children and adolescents by preventing lawful access to a principal means of the cause of death: handguns. The prohibition of access to a young person's death delivery system reflects the multiple realities of the fascination handguns hold for children, the proven failure of gun safety education, and the lethal character of those weapons.

Consistent with the responsibilities of municipal government confronted with a public health crisis among its most vulnerable, the District of Columbia enacted narrow legislation to staunch the contagion. Moreover, available statistics demonstrate the success of the District of Columbia's legislative formula among the youthful group most affected. No less restrictive alternative could reasonably be expected to be as successful in controlling the health crisis among the afflicted youthful group. Nothing in the jurisprudence of this Court, or in the intentions of the Framers, can mandate a reading of the Second Amendment to require a municipality to abandon a successful, reasonable public health measure and substitute a policy certain to increase the risk that the most vulnerable will be the most harmed.

I. Handguns Are More Lethal Than Other Types of Firearms and Are Particularly Dangerous to Children and Youth

Handguns are strikingly more lethal than other types of firearms. Of the one million Americans who died by firearms violence between 1962 and 1994, more than two out of three were killed by handguns—a total of more than 670,000 unnecessary deaths. Robin M. Ikeda et al., *Fatal Firearm Injuries in the United States, 1962-1994* (Nat'l Ctr. for Inj. Prevention & Control 1997). Yet, although handguns are responsible for approximately two-thirds of all deaths by firearms violence, handguns only account for one-third of the 192 million firearms owned in America, Philip J. Cook & Jens Ludwig, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms*, May 1997, at 4, *available at* http://www.ncjrs.gov/pdffiles/165476.pdf. Thus, the majority of American gun owners own either a rifle or a shotgun. As these statistics demonstrate, while fewer in number, handguns are more lethal than other types of firearms and disproportionately responsible for firearms deaths in America.

Handguns are more likely than any other type of gun to be used in interpersonal violence and crime, as well as self-directed injury. Firearm & Inj. Ctr. at Penn, *Firearm Injury in the U.S.*, at 7 (Oct. 2006), http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf. Indeed, handguns are used in nearly 70 percent of firearms suicides and 75 percent of firearms homicides in the United States. *See* Garen J. Wintemute et al., *The Choice of Weapons in Firearm Suicides*, 78

Am. J. Pub. Health 824, 825 (1988), *available at* http://www.ajph.org/cgi/reprint/78/7/824; Stephen W. Hargarten et al., *Characteristics of Firearms Involved in Fatalities*, 275 JAMA 42 (1996).[6] Further, handguns account for 77 percent of all traced guns used in crime. Firearm & Inj. Ctr. at Penn, *supra*, at 8.

While these statistics reflect the devastating impact of handguns on people of all ages, handguns pose a unique danger to children and adolescents. Handguns are light, portable, and easy to handle—they are also accessible, romanticized in media accessible to adolescents, and fascinating to children. Seventy-five percent of 8-12 year old boys will handle a gun when they find one, and approximately half of those will pull the trigger—even if they have been told about gun safety. Geoffrey A. Jackman et al., *Seeing Is Believing: What Do Boys Do When They Find A Real Gun?*, 107 Pediatrics 1247, 1250 (2001), *available at* http://pediatrics.aappublications.org/cgi/reprint/107/6/1247.pdf. There is simply no way to make guns "safe" for children—gun safety programs have little effect in reducing firearms death and injury. Josh Sugarmann, *Every Handgun Is Aimed at You: The Case for Banning Handguns* 113 (New Press 2001) (citing Joseph F. Sheley & James D. Wright, Nat'l Inst. of Justice, *High School Youths, Weapons, and Violence: A National Survey*, Oct. 1998, at 6). Death of and injury to America's children and youth are undeniably linked to the presence and availability of handguns, particularly in America's homes.

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[6] For additional data, see U.S. Dep't of Justice, Fed. Bureau of Investigation, *Crime in the United States, 2005*, at Table 7 (Murder Victims by Weapon, 2001-2005) (2006), *available at* http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_07.html.

A. Handguns in the Home Are Deadly to Children

A study conducted in 2005 revealed that over 1.69 million children under age 18 are living in homes with *loaded* and *unlocked* firearms. Catherine A. Okoro et al., *Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings from the Behavioral Risk Factor Surveillance System, 2002*, 116 Pediatrics e370, e371-72 (2005), *available at* http://pediatrics.aappublications.org/cgi/content/full/116/3/e370. In fact, an estimated one out of three handguns is kept loaded and unlocked. Cook & Ludwig, *supra*, at 7.[7] In one 2006 study, 73 percent of children under age 10 reported knowing the location of their parents' firearms and 36 percent admitted that they had handled the weapons. Frances Baxley & Matthew Miller, *Parental Misperceptions About Children and Firearms*, 160 Archives of Pediatric & Adolescent Med. 542, 544-45 (2006), *available at* http://archpedi.ama-assn.org/cgi/reprint/160/5/542.pdf. Accordingly, it is not surprising that 89 percent of childhood unintentional shooting deaths occur in the home, or that most of these deaths occur when children are playing with a loaded gun in their parents' absence. Guohua Li et al., *Factors Associated with the Intent of Firearm-Related Injuries in Pediatric Trauma Patients*, 150 Archives of Pediatric & Adolescent Med. 1160, 1162 (1996).

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[7] A 2006 study found that 28.8 percent of parents with children 12 years or younger—and 41.7 percent of parents with children ages 13 to 17—kept an unlocked firearm in the home. Renee M. Johnson et al., *Are Household Firearms Stored Less Safely in Homes with Adolescents*, 160 Archives of Pediatric & Adolescent Med. 788, 789 (2006).

Moreover, contrary to the popular myth that guns are necessary in the home for self-defense, one study found that there are four unintentional shootings, seven criminal assaults or homicides, and 11 attempted or completed suicides for every time a gun kept in the home is used in self-defense. *See* Arthur L. Kellermann et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. Trauma, Infection, & Critical Care 263 (1998).

It is simply undeniable that access to firearms in the home increases the risk of both accidental injuries as well as intentional shootings. A study of youth suicide found that more than 75 percent of guns used by youth in suicide attempts and unintentional injuries were kept in the home of the victim, a relative, or a friend. David C. Grossman et al., *Self-Inflicted and Unintentional Firearm Injuries Among Children and Adolescents: The Source of the Firearm*, 153 Archives of Pediatric & Adolescent Med. 875, 875 (1999), *available at* http://archpedi.ama-assn.org/cgi/reprint/153/8/875. Another study, published by the U.S. Secret Service, of 37 school shootings in 26 states found that, in more than 65 percent of the cases, the shooter got the gun from his or her home or that of a relative. United States Dep't of the Treasury, U.S. Secret Service, *An Interim Report on the Prevention of Targeted Violence in Schools*, Oct. 2000, at 6, *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/a6/d6.pdf.[8]

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[8] The jurisprudence of this Court offers no support for the notion that the ban of handguns offends the constitutional right to privacy. *See Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir.

(Cont'd)

Handguns are also undeniably the "firearm of choice" among teens. A 1996 survey of high school students by the National Institute of Justice found that high-school aged youth who carried guns outside the home most frequently carried an automatic or semiautomatic *handgun* (50 percent) and next most likely carried a revolver (30 percent). Joseph F. Sheley & James D. Wright, U.S. Dep't of Justice, Nat'l Inst. of Justice, *High School Youths, Weapons, and Violence: A National Survey*, Oct. 1998, at 3, Ex. 2, *available at* http://www.ncjrs.gov/pdffiles/172857.pdf. In addition, of those students who admitted to carrying a gun, 43 percent

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(Cont'd)

1982) (Coffey, J. dissenting). Indeed, government regularly limits the manner in which occupants of homes may act within the home. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding federal regulation of home-consumption of marijuana); *Osborne v. Ohio*, 495 U.S. 103 (1990) (upholding child pornography statutes). Government-imposed restrictions on the sale and distribution of certain goods, regardless of whether these goods are privately consumed, also have been upheld. *See, e.g., Purity Extract & Tonic Co v. Lynch*, 226 U.S. 192 (1922) (recognizing broad police powers regarding intoxicating beverage laws); *Gabree v. King*, 614 F.2d 1, 2 (1st Cir. 1980) (upholding Massachusetts age restrictions on alcohol, noting "[t]hat Massachusetts has a legitimate interest in controlling alcohol use and abuse among adults and minors is beyond dispute."). Thus, the maxim that a "man's home is his castle" provides no constitutional sustenance for a "free fire" zone where handgun owners are exempted from reasonable health and safety restrictions that routinely govern conduct within and without the home on the supposition that, despite all empirical evidence to the contrary, handguns render the home and its occupants "safe." The lack of factual or constitutional basis explains why this rogue doctrine—that a privacy right prevents reasonable gun control legislation—has never been adopted by an American court.

indicated that they were carrying a gun as protection, while 36 percent boasted to carrying a gun to "scare someone" or "get back at someone." *Id.* at 6. Most significantly, 52 percent of the armed youth stated that they had received or borrowed a gun from a family member or had taken it from their home without their parent's permission. *See id.* at 4.

B. The District of Columbia Handgun Law Is a Reasonable Restriction Because Children Cannot be Taught Gun Safety

Because of the inherent developmental and behavioral vulnerabilities of adolescents—such as belief in invincibility, curiosity, and impulsiveness—researchers have determined that gun safety education is not likely to prevent firearms death and injury in teenagers and younger children. *See* Katherine Kaufer Christoffel, *Toward Reducing Pediatric Injuries from Firearms: Charting a Legislative and Regulatory Course*, 88 Pediatrics 294, 299 (1994). The simple and frightening truth is, when children find guns, they play with them. *See* Marjorie S. Hardy et al., *A Firearm Safety Program for Children: They Just Can't Say No*, 17 J. Dev. & Behav. Pediatrics 216 (1996).

In 1988, the National Rifle Association launched the Eddie Eagle GunSafe Program to teach children in pre-K through third grade four important steps to take if they find a gun. *See* Nat'l Rifle Ass'n website *at* http://www.nrahq.org/safety/eddie/. The program's mascot, Eddie Eagle, informs children what to do if they see a gun: (1) STOP!; (2) Don't Touch; (3) Leave the Area; and (4) Tell an Adult. *Id.* Evaluations of the Eddie Eagle

GunSafe Program found that while the campaign may teach 4-7 year olds to repeat safety messages, the messages do not lead to actual changes in the children's behavior. *See generally* Michael B. Himle et al., *An Evaluation of Two Procedures for Training Skills to Prevent Gun Play in Children*, 113 Pediatrics 70 (2004), *available at* http://pediatrics.aappublications.org/cgi/reprint/113/1/70; Brian J. Gatheridge et al, *Comparison of Two Programs to Teach Firearm Injury Prevention Skills to 6- and 7-Year-Old Children*, 114 Pediatrics e294 (2004), http://pediatrics.aappublications.org/cgi/reprint/114/3/e294.

In another study, boys aged 9-15 were warned not to touch guns. When left alone, however, approximately 25 percent picked up the gun and played with it, while none of the boys touched any other item that they had been instructed not to touch. Marjorie S. Hardy, *Effects of Gun Admonitions on the Behaviors and Attitudes of School-Aged Boys*, 24 J. Dev. & Behav. Pediatrics 352, 354 (2003). The researchers concluded that "guns hold a unique allure and cast further doubt on the ability of gun admonitions to keep children safe around guns." *Id.* at 352.

A 1996 study analyzed the behavior of 48 preschool children aged 4- to 6-years before and after a lecture by a law enforcement officer on firearms-safety. The officer warned the children of the dangers of guns and told them that they should *never* touch a gun without their parents' supervision and permission. Immediately following the lecture, the children were sent to a playroom containing both real and toy guns—most of the children found a real gun and played with it. Hardy et al., *A Firearm*

Safety Program for Children: They Just Can't Say No, *supra*, at 218. These researchers concluded that instructing a child not to touch guns is ineffective in preventing gun injury. *Id.* at 220. The researchers also found that, although children with access to firearms are better able to distinguish between real and toy guns, this knowledge does not deter them from playing with the real guns. *Id.* In fact, in the study, 19 percent of the children whose parents owned a firearm had played with the gun without their parents' knowledge. *Id.*

Other pediatric researchers similarly have concluded:

> There is no evidence that safety lessons are retained by children at the critical times when they confront a loaded weapon. Indeed, the combination of the high stakes involved, death or disability, and the propensity of children to forget rules while playing or upset makes this [safety education] a dubious approach at best. Because children cannot be made "gun safe," their environments must be made safe by removing the most dangerous guns [*i.e.*, handguns].

Judith Cohen Dolins and Katherine Kaufer Christoffel, *Reducing Violent Injuries: Priorities for Pediatrician Advocacy*, 94 Pediatrics 638, 646 (1994).

Gun-safety messages also must compete with the sensationalized portrayal of handguns in the American media. Television, movies, videos, and computer games "normalize carrying and using weapons and glamorize them as a source of personal power." Robert H. DuRant et al., *Violence and Weapon Carrying in Music Videos: A Content Analysis*, 151 Archives of Pediatric & Adolescent Med. 443 (1997). According to Nielsen Media Research data, in 1998, the average child or adolescent watched an average of nearly 3 hours of television per day. *See* Flaura Koplin Winston et al., *Actions Without Consequences: Injury-Related Messages in Children's Programs*, 154 Archives of Pediatric & Adolescent Med. 366, 366 (2000), *available at* http://archpedi.ama-assn.org/cgi/reprint/154/4/366, (citing Nielsen Media Research, *1998 Report on Television* (1998)). Another study estimated that, in 1999, American children between the ages of two and 18 years spent an average of six hours and 32 minutes each day engaged with some form of media (television, video, movies, video games, print, radio, recorded music, computer, and the Internet). *See* The Henry J. Kaiser Family Foundation, *Kids and Media at the New Millennium: A Kaiser Family Foundation Report* (1999), *available at* http://www.kff.org/entmedia/upload/Kids-Media-The-New-Millennium-Report.pdf. Studies also show that children and adolescents are particularly vulnerable to the messages conveyed through television. George Gerbner et al., *Growing Up with Television: The Cultivation Perspective in Media Effects: Advances in Theory and Research* 17-41 (Jennings Bryant & Dolf Zillmann, eds., Lawrence Erlbaum Assocs. 1994). In effect, gun safety messages are literally overwhelmed by the alluring messages about handguns and violence delivered through the most popular and accessible channels of entertainment.

In sharp contrast to the wealth of data demonstrating that gun safety messages are ineffective in preventing children from handling guns, 87 percent of parents believe their children would not touch a gun if they found one. Susan M. Connor & Kathryn L. Wesolowski, *They're Too Smart for That: Predicting What Children Would Do in the Presence of Guns*, 111 Pediatrics e109 (2003), *available at* http://pediatrics.aappublications.org/cgi/reprint/111/2/e109. Researchers concluded that parents' beliefs and unrealistic expectations of children's developmental levels and impulse control may influence storage decisions or the inclination to address gun safety issues. *Id.*

Linda Erwin, M.D., an experienced trauma surgeon at a Level One trauma center in Portland, Oregon, observes:

> I think one of the big issues when we talk about handguns is how uninformed most adults are about the nature of children, even the children right in front of them that they see every day. They're unaware of how [children's] brains work, how they think, what they can and can't do intellectually, what they can and can't do in terms of good judgment. We know that most children are pre-rational creatures until about age 12. They're pretty impulsive and curious and have to hear something over and over and over for it to sink in. They need protecting and they need adults to create a safe environment for them. And even though adults will protect children from other dangers they see in the environment, they will ignore the danger that

> a handgun represents by living in denial about how their child is going to interact with that weapon. Sugarmann, *supra*, at 11-12.

C. The District of Columbia Handgun Law Is a Reasonable Restriction Because Handguns Make Suicide More Likely and Suicide-Attempts More Injurious to Children and Adolescents.

Access to firearms, and handguns in particular, increases the risk that children will die in a firearms-related suicide. In 2004, 846 children committed suicide using a firearm, and 46 percent of all suicides in adolescents 15 through 19 years of age were committed with a firearm. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Vital Statistics Sys., Nat'l Ctr. for Health Statistics, Web-Based Injury Statistics Query and Reporting System (WISQARS), http://www.cdc.gov/ncipc/wisqars/. In 1996, handguns were involved in 70 percent of teenage suicides in which a firearm was used. Am. Acad. of Pediatrics, *supra* n.2, at 889; *see also* Wintemute et al., *supra*, at 824, Fig. 1 (case study of types of weapons used in firearm suicides indicating that handguns are the more frequently used type of firearm across all groups).

Case studies reveal that suicide by firearms is strongly associated with the presence of a gun in the home of the victim. *See generally* Matthew Miller et al., *Household Firearm Ownership and Suicide Rates in the United States*, 13 Epidemiology 517 (2002); Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 New Eng. J. Med. 467 (1992). In fact, the risk of suicide is five times greater in households with guns. David A. Brent et al., *Firearms and Adolescent Suicide*, 147 Am. J. of Diseases of Child. 1066, 1068 (1993). A study on adolescent suicide and firearms found that while 87.8 percent of suicide victims who lived in a home with a gun died by firearms, only 18.8 percent of suicide victims that did not have a gun died by firearms. *Id.* Even more telling is that homes with handguns have a risk of suicide almost twice as high as the risk in homes containing only long guns. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, *supra*, at 470.

Given these statistics, it is not surprising that the restrictions on access to handguns in the District of Columbia have been found to significantly reduce the incidence of suicides by firearms. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615, 1617 (1991). A study by the Institute of Criminal Justice and Criminology at the University of Maryland showed a decline of 23 percent in the number of suicides by firearms in the District of Columbia from 1968 to 1987. *Id.* at 1616, Table 1. Tellingly, the number of non-firearms-related suicides in the District of Columbia during that same time frame did not decline; nor did the number of firearms-related suicides in neighboring communities that were not subject to a similar ban on handguns. *Id.* at 1617-18. Additionally, the reduction in the number of suicides by firearms in the District during this time did not result in a corresponding increase in the incidents of suicides by other means. *See id.* at 1619. Thus, researchers concluded from the study that restricting access to firearms reduced the number of suicides committed: "restrictions on access to guns in the District of Columbia prevented an average of 47 deaths each year after the law was implemented." *Id.*

In addition, between 2000 and 2002, no child under the age of 16 died from suicide by firearms in the District of Columbia. In contrast, states without handgun bans (and less restrictive guns laws generally), such as Alaska, Montana, and Idaho, led the country with 14, 15, and 15 firearms suicide deaths respectively in the same population in the same time period. Violence Policy Ctr., Press Release, *New Study Shows District of Columbia's Tough Gun Laws Work to Prevent Youth Suicide—No Child 16 Years of Age or Younger in DC Was the Victim of Firearm Suicide According to Most Recent Federal Data*, July 12, 2005, http://www.vpc.org/press/0507dc.htm. Given that in 2004, the third leading cause of death nationwide among youth aged 10 to 24 was suicide and that the risk of suicide is five times greater in homes with guns, invalidation of the law will almost certainly increase the number of children that die from suicide. U.S. Dep't of Health & Human Servs. (WISQARS), *supra*, http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html.

D. The District of Columbia's Handgun Law Is a Reasonable Restriction Because Handguns Increase the Likelihood and Deadliness of Accidents Involving Children.

The increased accessibility to handguns that will result if the District of Columbia handgun ban is struck down will increase the number of children who will be harmed in accidents involving firearms. Studies have shown that fewer than half of United States families with both firearms and children maintain the firearms separate from ammunition. *See, e.g.*, Mark A. Schuster et al., *Firearm Storage Patterns in U.S. Homes with Children*, 90 Am. J. of Pub. Health 588, 590-91 (2000), *available at* http://www.rand.org/news/Press/588-594.schuster.pdf. This practice is especially troubling because children as young as three are able to pull the trigger of most handguns. Sara M. Naureckas et al., *Children's and Women's Ability to Fire Handguns*, 149 Archives of Pediatric & Adolescent Med. 1318, 1320 (1995). Approximately 70 percent of all unintentional firearms injuries and deaths are a result of handguns. *See* Am. Acad. of Pediatrics, *supra* n.2, at 889.

Unintentional firearms death disproportionately affects children: In 2004, firearms accounted for 27 percent of the unintentional deaths among youth aged 10-19, while accounting for only 22 percent of unintentional deaths among the population as a whole. *See* U.S. Dep't of Health & Human Servs. (WISQARS), *supra*, http://www.cdc.gov/ncipc/wisqars/.[9] Additionally, between 2000 and 2004, 143 to 193 children were killed each year from unintentional shootings. *See id.* Most unintentional firearms-related deaths among children occur in or around the home—50 percent at the home of the victim and 40 percent at the home of a friend or relative—and occur when children play with loaded and accessible guns. Children's Hospital Boston, *Firearm Safety, 2005-2006*, http://www.childrenshospital.org/az/Site905/printerfriendlypageS905P0.html. Moreover, between 2000 and 2004, 22,864 children sustained unintentional, non-fatal firearms-related injuries. *See* U.S. Dep't of Health & Human Servs. (WISQARS), *supra*, http://www.cdc.gov/ncipc/wisqars/.

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[9] Compare search for unintentional firearm deaths for all ages to search for unintentional firearm deaths for ages 10-19.

The more guns a jurisdiction has, the more likely children in that jurisdiction will die from a firearm accident. In a study of accidental firearms deaths that occurred between 1979 and 1999, children aged four and under were 17 times more likely to die from a gun accident in the four states with the most guns versus the four states with the fewest guns. Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 333 Accident Analysis & Prevention 477, 481, Table 3 (2001). Thus, if the handgun ban in the District of Columbia is struck down, the number of children who will die or be injured by handguns accidentally will increase significantly.

E. The District of Columbia Handgun Law Is a Reasonable Restriction Because Firearms and Especially Handguns Increase Homicide and Nonfatal Assault Rates Among America's Youth.

Firearms-related homicides and assaults affect children, adolescents, and young adults in staggering measure. Between 1987 and 1992, adolescents aged 16 to 19 had the highest rate of handgun crime victimization, nearly three times the average rate. Michael R. Rand, U.S. Dep't of Justice, Bureau of Justice Statistics, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, NCJ 147003 (Apr. 1994, rev. Sept. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/hvfsdaft.txt. Between 1993 and 1997, those aged 19 and younger accounted for 20 percent of firearms homicide victims and 29 percent of victims of nonfatal firearms injury from assault. Marianne W. Zavitz & Kevin J. Strom, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearm Injury and Death from Crime, 1993-1997*, at 3, NCJ 182993 (Oct. 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fidc9397.pdf. For the period 1993-2001, of the average 847,000 violent victimizations committed with firearms each year, 87 percent were committed with handguns. Craig Perkins, U.S. Dep't of Justice, Bureau of Justice Statistics, *Nat'l Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime*, at 3, NCJ 194820 (Sept. 2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf. In 2005, 25 percent of the nation's 10,100 firearms homicide victims were under the age of 22, and handguns were responsible for 75 percent of those homicides. U.S. Dep't of Justice, Fed. Bureau of

Investigation, *Crime in the United States, 2005*, at Table 7 (Murder Victims by Weapon, 2001-2005), *available at* http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_07.html, and Table 8 (Murder Victims by Age by Weapon, 2005) (2006), *available at* http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_08.html.

Moreover, nationally, children and young adults are killed by firearms more frequently than almost any other cause of death. In 2004, firearms homicide was the second leading cause of injury death for persons 15 to 24 years of age, second only to motor vehicle crashes. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Injury Prevention and Control, Web-Based Injury Statistics Query and Reporting System (WISQARS), *Leading Causes of Death Reports, 2004*, *available at* http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html. Incredibly, in that same year, firearms homicide—not car accidents—was the leading cause of death for African American males between the ages of 15 and 34. *Id.*

Children and youth are murdered with handguns more often than by all other weapons combined. Violence Policy Ctr., *Kids in the Line of Fire: Children, Handguns, and Homicide*, Nov, 2001, at Introduction, *available at* http://www.vpc.org/studies/firecont.htm. And, for every child murdered by a gun, four more sustain firearm assault injury. *See* U.S. Dep't of Health & Human Servs. (WISQARS), *supra*, http://www.cdc.gov/ncipc/wisqars/.

Firearms (particularly handguns) also represent the leading weapon utilized by both children and adults in the commission of homicide. *See* Fox Butterfield, *Guns Blamed for Rise in Homicides by Youths in the 80's*, N.Y. Times, Dec. 10, 1998, at 29.[10] Between 1985 and 2002, the firearms homicide death rate increased 36 percent for homicides committed by 15 to 19 year olds nationwide. *See* U.S. Dep't of Health & Human Servs. (WISQARS), *supra*, http://www.cdc.gov/ncipc/wisqars/.[11] In each year after 1985, handguns have been the most used homicide weapon by juveniles (those age 17 and under) nationwide. Alfred Blumstein, *Youth, Guns, and Violent Crime*, 12 The Future of Child. 39, at Figure 5 (2002), *available at* http://www.futureofchildren.org/usr_doc/tfoc_12-2d1.pdf. Scholars note that the dramatic increase in the rate of homicide committed by juveniles is attributable largely to the increase in attacks with firearms. Alan Lizotte, *Guns & Violence: Patterns of Illegal Gun Carrying Among Young Urban Males*, 31

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[10] The article cites statistics from Professor James Alan Fox, Dean of the College of Criminal Justice at Northeastern University, demonstrating that "the rate of homicide by juveniles 14 to 17 years old jumped from 8.5 per 100,000 in 1984 to 30.2 per 100,000 in 1993, then declined to 16.5 per 100,000 in 1997" and emphasizing that "virtually all the increase in homicides by juveniles in the late 1980's was attributable to crimes committed with handguns, not to a change in the nature of teen-agers."

[11] Compare search for homicide firearm deaths for 15-19 year olds in 1985 to search for homicide firearm deaths for 15-19 year olds in 2002, which shows increase in death rate from 5.68 deaths per 100,000 in 1985 to 7.69 deaths per 100,000 in 2002.

Val. U. L. Rev. 375, 375 (1998).[12] University of California, Berkeley law professor Franklin Zimring has observed, "the most important reason for the sharp escalation in homicide [among offenders thirteen to seventeen] was an escalating volume of fatal attacks with firearms." Franklin E. Zimring, *American Youth Violence* 35-36 (Oxford Univ. Press 1998).

Importantly, researchers at the Institute of Criminal Justice and Criminology at the University of Maryland found that gun-related homicides in the District of Columbia dropped 25 percent after the enactment of the ban. Loftin et al., *supra*, at 1616, Table 1. Statistics also reveal that on America's elementary and secondary school campuses, where guns are banned, relatively low incidence of gun-related violence is reported. For example, in each year between 1992 and 2000, children and youth aged five to 19 were at least 70 times more likely to be murdered away from school than at school. Jill F. DeVoe et al., U.S. Dep't of Justice, Bureau of Justice Statistics & U.S. Dep't of Education, Nat'l Ctr. for Ed. Statistics, *Indicators of School Crime and Safety: 2004*, at 1, NCES 2005-002/NCJ 205290 (2005), *available at* http://nces.ed.gov/pubs2005/2005002.pdf. College campuses also reflect similarly lower rates for on-campus as compared to off-campus violence. Katrina Baum & Patsy Klaus, U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Victimization of College Students*

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[12] Lizotte found that, "[s]ince the mid-1980s the homicide rate for those fifteen to twenty-one years of age has increased rather substantially ... This increase has, for the most part, been due to the dramatic rise in homicides in which a firearm was used."

1995-2002, at 1, NCJ 206836 (2005) (finding that 93% of violence against college students occurs off-campus), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vvcs02.pdf.

II. Comparing the Experience of Children and Youth in Foreign Countries

The firearms death rate in the United States far surpasses that of other democratic nations. A 1997 study analyzing firearms deaths for children aged 14 or under in 26 industrialized countries found that 86 percent of all deaths occurred in the United States. Sugarmann, *supra*, at 111 (citing *Rates of Homicide, Suicide, and Firearm-Related Death Among Children—26 Industrialized Countries*, 46 Morbidity & Mortality Weekly Report 101, 103 (1997)). The rate for firearms homicide alone was 16 times higher in the United States, while the firearms suicide rate was 11 times higher and the firearms unintentional death rate was nine times higher. *Id.*

In 1995, the firearms death rate in the United States was 13.7 per 100,000. Lois A. Fingerhut et al., *International Comparative Analysis of Injury Mortality*, Advance Data No. 303, October 7, 1998, at 15, *available at* http://www.cdc.gov/NCHS/data/ad/ad303.pdf. In comparison, the firearms death rates in countries that severely limit access to handguns were significantly lower. For example, in 1995, Canada had a firearms death rate of 3.9 per 100,000; Australia had a rate of 2.9 per 100,000; and England and Wales had rates of 0.4 per 100,000. *Id.* One of the most glaring distinctions between these countries and the United States is the significantly lower incidents of lethal violence caused by handguns. Sugarmann, *supra*, at 17-18. For instance, handgun homicide rates are 15.3 times higher in the United States than in Canada. Firearms Research Unit, Canada Firearms Centre, *Firearms: Canada/United States Comparison*, June 1998, http://www.cfc-cafc.gc.ca/pol-leg/res-eval/other_docs/notes/canus_n_e.asp. For 1989-95, the average handgun homicide rate was 4.8 per 100,000 in the U.S., compared to 0.3 per 100,000 in Canada. *Id.*

In addition, while adolescents in other industrialized countries are just as likely as adolescents in the United States to engage in violent behavior, such as fighting and weapon carrying, violence related mortality in the United States is substantially higher than that of other industrialized countries. Eleanor Smith-Khuri et al., *A Cross-National Study of Violence-Related Behaviors in Adolescents*, 158 Archives of Pediatric & Adolescent Med. 539, 543 (2004), *available at* http://archpedi.ama-assn.org/cgi/reprint/158/6/539. This can be explained, in large part, by the ease with which adolescents in the United States have access to firearms compared to adolescents in other such countries.[13] For example, in 2007, Canada had approximately 31 firearms per 100 persons compared to approximately 90 firearms per 100 persons in the United States. Geneva Graduate Inst. of Int'l Studies, *Small Arms Survey 2007: Guns and the City*, 47 (Cambridge Univ. Press 2007), *available at* http://www.smallarmssurvey.org/files/sas/publications/year_b_pdf/2007/CH2%20Stockpiles.pdf.

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[13] Despite having less than 5% of the world's population, the United States has nearly half of the world's civilian-owned firearms. Geneva Graduate Inst. of Int'l Studies, *Small Arms Survey 2007: Guns and the City*, 46 (Cambridge Univ. Press 2007), *available at* http://www.smallarmssurvey.org/files/sas/publications/year_b_pdf/2007/CH2%20Stockpiles.pdf.

Thus, even where behavior patterns are similar, access to handguns increases the mortality rate of incidents involving youth by making violent interactions more deadly.

Although other nations have lower incidence of handgun violence, these weapons remain a problem worldwide, and the continued threat posed by firearms has caused several countries to impose a series of gun control measures. For example, in Australia, a series of mass killings in 1996 prompted federal and state governments to ban semiautomatic and pump action shot guns and rifles. S. Chapman et al., *Australia's 1996 Gun Law Reforms: Faster Falls in Firearm Deaths, Firearm Suicides, and a Decade Without Mass Shootings*, 12 Inj. Prevention 365, 365 (2006), *available at* http://injuryprevention.bmj.com/cgi/reprint/12/6/365. The government also funded a gun buyback program where more than 700,000 guns were surrendered by Australia's adult population of 12 million. *Id.* at 365.

The Australian gun control measures have been successful. A 2006 study by the University of Sydney School of Public Health found that the gun control laws and government buyback programs coincided with an end to mass shootings and dramatic decreases in shooting deaths in Australia. *Id.* at 367. Specifically, the report found that gun-related deaths per capita had been declining 3 per cent annually in the 18 years before the new gun laws were announced and that the rate of decline doubled to 6 percent in the seven years after the new laws were introduced. *Id.* at 365. As a result, the annual reduction in firearms homicides accelerated from 3 to 7.5 percent annually and firearms suicides from 3 to 7.4 percent. *Id.*

Japan represents another powerful example of gun control effectiveness. Japan has one of the most stringent gun laws in the democratic world. The weapons law begins by stating "No-one shall possess a fire-arm or fire-arms or a sword or swords," and very few exceptions are allowed. *Law Controlling Possession, Etc. of Fire-Arms and Swords*, Law No 6, Art 3, EHS Law Bulletin Series, No 3920 (1978), *available at* http://www5.cao.go. jp/otodb/english/houseido/hou/lh_05050.html. Civilians can never own handguns. *Id.* Tellingly, in 2005, Japan had a total of 19 firearms-related homicides, of which only five were non-gang related. Mark Schreiber, *Japan Holds the Line Against Gun Violence*, Japan Times, May 3, 2007, *available at* http://search.japantimes.co.jp/cgi-bin/eo20070503a2. html. More importantly, none of the victims was under the age of 18. *Id.*

III. The District's Handgun Law Is A Reasonable Restriction Because of the Economic, Societal and Psychological Costs of Handgun Violence Upon Children.

For every person killed by a firearm, nearly three others require medical treatment for nonfatal wounds. Joseph L. Annest et al., *National Estimates of Nonfatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 JAMA 1749, 1751 (1995). Between 2000 and 2004, 337 children age 14 or younger died from unintentional shootings. *See* U.S. Dep't of Health & Human Servs. (WISQARS), *supra*, http://www.cdc.gov/ncipc/wisqars/. More than eighteen times that number were treated for nonfatal injuries relating to firearms, many of which may result in permanent disability or disfigurement. *Id.* On average, each American loses 104 days of life because of firearms deaths. Eliminating firearms deaths would increase male life expectancy more than the eradication of all colon and prostate cancers. Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs*, 72 J. Risk & Ins. 359 (2005).

One conservative estimate places the annual cost of immediate medical care for all gunshot wounds at $4 billion. Kenneth W. Kizer et al., *Hospitalization Charges, Costs, and Income for Firearm-Related Injuries at a University Trauma Center*, 273 JAMA 1768, 1773 (1995). Other estimates that take into account lifetime care and long-term economic loss, place the overall cost of gun violence in excess of $20 billion per year. Wendy Max & Dorothy P. Rice, *Shooting in the Dark: Estimating the Costs of Firearm Injuries*, Health Affairs 171, 181 (Winter 1993), *available at* http://content.healthaffairs. org/cgi/reprint/12/4/171.pdf.

As demonstrated above, handguns are directly responsible for increasing the number of deaths and injuries to children and families from violent crime, suicide and accidents. The most serious harm resulting from youth violence is caused by firearms; most firearms-related injuries, in turn, involve handguns.

The economic, societal and psychological costs of youth violence also are well established. According to the Centers for Disease Control and Prevention, the consequences of youth violence include:

- Direct and indirect costs of youth violence (e.g., medical, lost productivity, quality of life) exceed $158 billion every year. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control &

Prevention, *Youth Violence: Fact Sheet*, http://www.cdc.gov/ncipc/factsheets/yvfacts.htm (citing Children's Safety Network Econ. & Data Analysis Res. Ctr., *State Costs of Violence Perpetrated By Youth* (2000)).

- In a nationwide survey of high school students, about six percent reported not going to school on one or more days in the 30 days preceding the survey because they felt unsafe at school or on their way to and from school. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States, 2005*, 55 Morbidity & Mortality Weekly Report, June 9, 2006, at 8, *available at* http://www.cdc.gov/mmwr/PDF/SS/SS5505.pdf.

- In addition to causing injury and death, youth violence affects communities by increasing the cost of health care, reducing productivity, and disrupting social services. U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Youth Violence: Fact Sheet*, *supra*, (citing James A. Mercy et al., *Youth Violence*, *in The World Report on Violence and Health* 25 (James A Mercy et al., eds., World Health Org. 2002)).

The public bears the majority of these costs. A recent study found that, in 2000, the average cost for each: (i) homicide was $4,906 in medical costs, and $1.3 million in lost productivity; (ii) non-fatal assault resulting in hospitalization was $24,353 in medical costs and $57,209 in lost productivity; (iii) suicide was $2,596 in medical costs and $1 million lost productivity; and (iv) non-fatal self inflicted injury was $7,234 in medical costs and $9,726 in lost productivity. *See* Phaedra S. Corso et al., *Medical Costs and Productivity Losses Due to Interpersonal Violence and Self-Directed Violence*, 32 Am. J. of Preventive Med. 474 (2007), *available at* http://www.cdc.gov/ncipc/factsheets/images/Medical_ Costs.pdf; *see also* Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 281 JAMA 451, 451-52 (1999) (finding that private insurance pays less than 20 percent of the costs associated with gunshot injuries), *available at* http://jama.ama-assn.org/cgi/reprint/282/5/447. For both men and women, firearms and gunshot-related injuries caused the greatest burden on productivity. Corso et al., *supra*, at 476. Moreover, the study found that slightly over 50 percent of the total economic costs of injuries due to violence are associated with fatalities among males aged 15 to 44 years, a majority of which are inflicted by firearms. *Id.* at 478.

Economic costs provide, at best, an incomplete measure of the toll of violence and injuries caused by handguns. Children, like all victims of violence, are more likely to experience a broad range of mental and physical health problems not reflected in these estimates resulting from post-traumatic stress disorder, depression, cardiovascular disease, and diabetes. *See generally* Corso et al., *supra*; Carole Goguen, U.S. Dep't of Veterans Affairs, Nat'l Ctr. for Posttraumatic Stress Disorder, *The Effects of Community Violence on Children and Adolescents*, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_child_com_viol.html (last updated May 22, 2007).

CONCLUSION

Because of the proven harm attributable to handguns and especially because of the unique risk handguns create for children and adolescents, the District of Columbia reasonably enacted legislation to mitigate a pervasive public health crisis. The reasonableness of the District of Columbia's attempt to preserve the public's health is confirmed by both domestic and foreign data. Neither the precedents of this Court, nor the intention of the Framers of the Constitution support striking down the District of Columbia's ordinance. These *amici* respectfully request that the Judgment of the Court of Appeals be reversed and judgment be entered for Petitioners.

Respectfully submitted,

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DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits that the decision of the divided panel of the D.C. Circuit should be reversed, because the decision improperly rejected the long and consistent line of precedent on which this Nation has built its entire matrix of gun regulation.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 413,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2] The ABA's mission is "to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html (last visited Jan. 10, 2008). Among the ABA's goals are to "increase public understanding of and respect for the law, the legal process, and the role of the legal profession" and "advance the rule of law in the world." *Id.*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of the brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Consistent with its mission, the ABA has two significant interests in this case. *First*, the ABA has placed a high priority on furthering the rule of law by promoting *stare decisis* in this country and around the world. The ABA has served as a resource in ensuring that the public respects judicial decisions and recognizes the importance of adherence to established constitutional principles in our governmental system of checks and balances. The ABA is concerned that the decision below undermines *stare decisis* by rejecting a long and consistent line of precedent absent any change in circumstances or other "special justifications" for overturning existing law. *See Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006).

Second, the ABA performs an educational function by explaining judicial decisions to the public, the legal profession, and interested institutions, and by advising these bodies regarding implications of these decisions. For more than forty years, the ABA has predicated its educational and advisory efforts regarding gun control on the constitutional principle articulated in this Court's opinions: that the Second Amendment ties the right to bear arms to maintenance of a well-regulated militia. Consistent with this accepted principle, the ABA has advised Congress, counseled state and local regulators, and educated the public and the legal profession regarding the constitutionality of enacted and proposed gun control legislation.

The ABA adopted its first policy on the regulation of firearms in 1965, supporting legislation that eventually became the Federal Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* Since then, as the ABA has adopted several policies in favor of reasonable gun restrictions, it has relied upon the courts' longstanding interpretation that the Second Amendment relates to the maintenance of a militia.

In formulating such policies, and in assisting in the development of laws to reduce the toll that gun violence exacts, the ABA has called upon prosecutors, defense lawyers, judges, and others who deal every day with the consequences of gun violence and who have a direct interest in the consistent application of constitutional principles.

The ABA thus has marshaled its significant expertise to help governments at every level in fashioning reasonable regulation of firearms. The ABA's reliance in those efforts on the consistent judicial interpretation of the Second Amendment mirrors the similar faith that legislators place on the courts' longstanding decisions on this issue. That reliance and that faith highlight the importance of stability in constitutional adjudication.

SUMMARY OF ARGUMENT

As this Court has recognized, the rule of law requires that courts enunciate clear legal principles of general applicability, principles that do not change absent special justifications, and principles that allow legislatures, courts, and other institutions to conduct their business in compliance with constitutional standards. The Court has repeatedly stressed the importance of this tenet of *stare decisis* in deciding constitutional questions.

Stare decisis is directly at issue in this case. This Court and other courts have interpreted the Second Amendment's right to bear arms as related to maintenance of a well-regulated militia. *See, e.g., United States v. Miller*, 307 U.S. 174 (1939); *see also Presser v. Illinois*, 116 U.S. 252 (1886) (confining the Second Amendment to actions of the federal government). Consistent with that interpretation, no federal appellate court prior to the decision below has invalidated a gun control law based on the Second Amendment. Those advocating legislative and executive action to regulate firearms -- as well as government officials taking such action -- have relied on this precedent and, consistent with this constitutional understanding, have crafted hundreds of federal and state laws and regulations to abate the serious hazards of gun violence.

The decision below, in rejecting this long line of precedent, leaves in doubt the constitutionality of a vast federal and state statutory framework of gun control laws and could impede efforts by federal and state legislatures to enact other public safety and crime-fighting legislation. By upsetting the rules on which this regulatory system is predicated, without articulating any special justifications for such a change, the decision undercuts the principle of *stare decisis* and defeats long-settled expectations.

Furthermore, a key part of the standard the court of appeals applies -- whether the weapons subject to the challenged regulation are "lineal descendants" of revolutionary era firearms --

compounds this problem by leaving the boundaries of the Second Amendment indeterminate. As a matter of judicial administration, this test would require courts to decide whether categories or even individual models of firearms bear sufficient similarities with early flintlock pistols and muskets to warrant a privileged constitutional status. The proliferating questions that courts will have to face are technical and fact-based, lack any precedential basis or guidance, can be overtaken by evolving technology, and yet such determinations would now be endowed with constitutional significance so as to threaten all regulation of firearms.

At the very least, taking this approach under the Second Amendment would prompt decades of litigation. Moreover, it would involve the courts in second-guessing legislative and executive policy judgments in an area vital to public health and safety. Accordingly, changing the longstanding interpretation of the Second Amendment would frustrate settled expectations, require courts to perform historically legislative functions, and would compromise important values of certainty and finality.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THE RULE OF LAW BY FAILING TO PROVIDE SPECIAL JUSTIFICATIONS FOR ABANDONING CONSISTENT AND LONGSTANDING PRECEDENT UPON WHICH LEGISLATORS, REGULATORS, AND THE PUBLIC HAVE RELIED.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court advised lawmakers that they can and should rely on the Court's rulings as a durable framework for legislative action. As Justice Kennedy wrote, "When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." 521 U.S. at 536.

The experience of numerous institutions with the Court's precedents regarding regulation of firearms demonstrates how these institutions rely on longstanding judicial interpretations of constitutional provisions in enacting laws, adopting regulations, and formulating policies. Throughout the Nation's history, the democratically elected branches of federal, state, and local government have regulated firearms based on the consistent interpretation of the Second Amendment, as articulated by this and other courts and reflected in congressional statements, that limitations on firearms are permitted unless the restrictions interfere with the maintenance of a well-regulated militia. The number, diversity, and long history of regulatory enactments demonstrate that this principle of Second Amendment law has become "embedded" in our "national culture." *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).

Again and again, this Court has emphasized why judges should eschew constitutional interpretations that would defeat such settled expectations regarding governing legal principles.

First, respect for precedent imposes discipline in judicial decision-making and prevents disruption of the political process. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("*[S]tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'"); *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("[T]he respect accorded prior decisions [should] increase[], rather than decrease[], with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised on their validity.").

Second, respect for precedent ameliorates the uncertainty of judge-made law and enables legislatures and regulators -- as well as legal organizations like the ABA -- to rely on accepted, generally applicable legal rules. *See John R. Sand & Gravel Co. v. United States*, No. 06-1164 slip op. at 8-9 (Jan. 8, 2008) ("reexamination of well-settled precedent could nevertheless prove harmful . . . . 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'") (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (J. Brandeis, dissenting)).

And third, respect for precedent restrains courts from encroaching on areas long reserved to democratically elected legislators, at least absent reason to believe the challenged legislation reflects a breakdown in the democratic system, *e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), has bred confusion, *e.g.*, *California v. Acevedo*, 500 U.S. 565, 579 (1991), or has produced ill-founded results, *e.g.*, *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). As

Justice Breyer recently summarized this Court's approach, "[T]he rule of law demands that adhering to . . . prior case law be the norm [and] [d]eparture from precedent is exceptional and requires 'special justifications' . . . . especially [where] the principle has become settled through iteration and reiteration over a long period of time." *Randall*, 126 S. Ct. at 2489 (2006) (declining to overrule *Buckley v. Valeo*, 424 U.S. 1 (1976)).

The decision below undermines many decades of settled expectations and threatens the legal structure built upon them. Absent special justifications -- and none were articulated by the court below -- such a departure from precedent offends basic tenets of the rule of law.

A. The Decision Below Conflicts with a Vast Body of Precedent.

The court of appeals' decision represents the first time since ratification of the Bill of Rights in 1791 that a federal appellate court has invalidated a regulation of firearms as offending the Second Amendment. Courts have consistently upheld regulation of firearms based on the understanding that the Second Amendment ties the right to bear arms to maintenance of a well-regulated militia, and few, if any, limitations on firearms in the modern age would defeat that purpose. For many decades, the ABA has relied on this interpretation in formulating its policies, and Congress and state and local legislatures have relied on it in adopting legislation.

Well before 1939, the year *Miller* was decided, courts routinely refused to recognize that the Second Amendment conferred an individual right to own, keep, and use weapons for self-defense. Virtually every court to consider the issue prior to *Miller* upheld legislation on firearms challenged under the Second Amendment or state analogues. *See, e.g.*, *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 157-58 (1840) ("bear arms" does not mean an individual right to carry weapons for personal use, but rather implies a right to bear arms only as related to military use); *see also Fife v. State*, 31 Ark. 455 (1876); *State v. Workman*, 14 S.E. 9 (W. Va. 1891); *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905).

In *Miller*, the Court upheld the National Firearms Act of 1934 on this basis. The Court read the "declaration and guarantee of the Second Amendment" in conjunction with the Militia Clauses of Article I. 307 U.S. at 178 Thus, in the Court's words:

> The Constitution as originally adopted granted to the Congress power-'To provide for calling forth the Militia *to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia*, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.' *With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and*

> *guarantee* of the Second Amendment were made. *It must be interpreted and applied with that end in view.*

Id. (citation omitted) (emphases added). The fundamental holding of *Miller*, based on the conjunction of these provisions, is inescapable: the Second Amendment protects "possession or use" of a firearm only insofar as related to the "preservation or efficiency of a well regulated militia." *Id.* at 178.

Since *Miller*, each of the eleven regional federal circuits has considered the purpose and scope of the Second Amendment. Prior to the decision below, all save one interpreted *Miller* to mean that the Second Amendment protects the right to bear arms only insofar as it relates to the functioning of a well-regulated militia.[3] Even the one circuit that separated the right to bear arms from the maintenance of a militia, the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001), upheld the challenged restrictions on firearms. The overwhelming majority of state court cases have agreed with the established view in the federal courts.[4]

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[3] *See, e.g.*, *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984); *United States v. Rybar*, 103 F.3d 273, 285-86 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *Cody v. United States*, 460 F.2d 34, 37 (8th Cir. 1972); *Hickman v. Block*, 81 F.3d 98, 101-02 (9th Cir. 1996); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997).

Nevertheless, in 2007, 216 years into the life of the Second Amendment, a divided panel of the court below concluded differently, refusing effect to laws duly enacted by the democratically elected representatives of the District of Columbia to restrict possession of handguns. This new course could affect a vast array of measures intended to secure public safety and prevent crime.

B. The Decision Below Jeopardizes an Extensive Regulatory Framework That Was Predicated on Longstanding Judicial Precedent.

Relying on the consistent interpretation of the Second Amendment long "embedded" in our national culture, legislators and regulators -- at the recommendation of the ABA and others -- have built an elaborate system to regulate firearms. The ABA is concerned that the decision below would destabilize that system by prompting decades of litigation and uncertainty regarding the status of critical firearms legislation.

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[4] The decision below cited eight state court cases as suggesting that "the Second Amendment protects an individual right." Pet. App. 48. Seven of these cases involve statements that were not essential to the holding or construe state constitutional provisions rather than the Second Amendment. The lone exception is *Rohrbaugh v. State*, 607 S.E.2d 404, 412 (W. Va. 2004). But like *Emerson*, that decision did not declare gun control legislation unconstitutional. In upholding the West Virginia statute at issue, the court concluded: "[T]he legislature may enact laws limiting one's firearm rights in conjunction with its inherent police power." *Id.* at 413.

1. Federal Legislation on Firearms

Since 1934, Congress has repeatedly enacted firearms legislation to respond to the exponential growth in crime, attacks on national figures, and burgeoning violence. In so doing, Congress was advised, and repeatedly concluded, that the Second Amendment did not impinge on these legislative enactments.

The National Firearms Act of 1934, 26 U.S.C. §§ 5801 *et seq.*, was the first major federal gun control legislation. The Act allows the Government to regulate certain "firearms" including machine guns, short-barreled shotguns and rifles, hand grenades and bazookas, silencers, and deceptive weapons. *See* 26 U.S.C. §§ 5861. Congress soon expanded these prohibitions and restrictions in the Federal Firearms Act of 1938, 18 U.S.C. § 921. That Act bans the sale of firearms to known criminals and imposed licensing requirements for manufacturers, dealers, and importers of firearms and handgun ammunition. As *Miller* shows, by this time the link between the Second Amendment right to bear arms and the maintenance of a well-regulated militia was established in the law.

The next major legislative initiative came thirty years later. The Federal Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq.*, authorizes federal regulations related to interstate commerce in firearms, and prohibits certain persons, such as convicted felons, from buying or owning a gun. In considering this legislation, which the ABA supported, Congress specifically assessed Second Amendment law and found unwavering support in the courts for the proposition that it is only "a prohibition upon Federal action which would interfere with the organization of militia by the states of the Union." S. Rep. No. 90-1097 (1968) *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2169; *see also* Mem. from William H. Rehnquist, Asst. Atty. Gen., Office of Legal Counsel, Re: Proposed Federal Gun Registration and Licensing Act of 1969 at 4 (Feb. 13, 1969) ("constitutional objections based on the Second Amendment's guarantee of 'the right of the people to keep and bear arms' [do not] present any serious legal obstacle to this legislation").[5]

Congress again passed gun control legislation in the 1990s. The Brady Act of 1993, 18 U.S.C. §§ 921-930, required federally licensed firearm dealers to check the National Instant Criminal Background Check System, or NICS, before selling a handgun to a prospective purchaser. During congressional hearings, the ABA again cited the uniform precedent upholding gun control legislation. Letter from Robert D. Evans, Dir., ABA, to Hon. Charles E. Schumer, Chairman, Subcommittee on Crime and Criminal Justice, U.S. House of Representatives (Apr. 4, 1991). In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act, Pub. L. 103-322, which implemented a temporary ban on semi-automatic assault weapons and increased the requirements for firearms dealer licenses under the 1938 Act. During debate on the legislation, the ABA advised that the Second Amendment as long interpreted by the courts did not limit legislative authority to enact this law.[6] These views were cited during Senate debate. *See, e.g.*, 139 Cong. Rec. S15,411-01 at S15,440 (Nov. 2, 1993) (stating "existing case law clearly rejects the argument that the second amendment confers an absolute and unrestricted personal right to bear arms") (statement of Sen. Danforth, quoting ABA President L. Stanley Chauvin).

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[5] The ABA adopted policy in support of this legislation. The report presented to the ABA House of Delegates in connection with this policy concluded that "the right to bear arms protected by the Second Amendment relates only to the maintenance of the militia." ABA, *Gun Control Resolution (And Report) Adopted By House of Delegates: Report of the Section of the Criminal Law* 574 (1965).

In the ensuing years, Congress adopted additional restrictions on firearms. *See, e.g.*, Domestic Violence Offender Gun Ban, 18 U.S.C. § 922(g)(9); 18 U.S.C. § 924(c)(1) (sentence enhancements for crimes involving guns). The ABA continued on several occasions to advise Congress about the judicial precedent holding that the "Second Amendment □permits the exercise of broad power to limit private access to firearms." *Assault Weapons Legislation: Before the Sen. Comm. on the Judiciary*,

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[6] In 1994, the ABA called upon leaders of the legal profession to:

> Educate the public and lawmakers regarding the meaning of the Second Amendment to the United States Constitution, to make widely known the fact that the United States Supreme Court and lower federal courts have consistently, uniformly held that the Second Amendment to the United States Constitution right to bear arms is related to "a well-regulated militia" and that there are no federal constitutional decisions which preclude regulation of firearms in private hands . . . .

ABA, *Gun Violence Resolution Adopted By House of Delegates* (1994), *available at* http://www.abanet.org/gunviol/docs/1994policy.pdf (last visited Jan. 10, 2008).

103rd Cong. (1993) (statement of J. Michael Williams). *See also, e.g., On Gun Violence: Before the Subcomm. on the Constitution, Federalism and Property Rights of the Sen. Comm. on the Judiciary* (1998) (statement of David Clark) ("[t]hroughout our nation's history, no legislation regulating the private ownership of firearms has been struck down on Second Amendment grounds").

Not only has this body of legislation directed social policy, influenced law enforcement, and grounded criminal convictions, it has also spawned extensive federal administrative rulemaking to guide enforcement, including 110 separate regulations under the amended Gun Control Act of 1968, 87 regulations under the National Firearms Act, and 27 regulations under the Arms Export Control Act. *See* A.T.F. P. 5300.4, *Federal Firearms Regulation Refernce Guide* at 32, 79, 101 & 111 (2000) (citing 27 C.F.R. §§ 447, 478-79 and 28 C.F.R. § 25). The Bureau of Alcohol, Tobacco, Firearms and Explosives ("A.T.F.") administers these regulations and employs nearly 5,000 people to do so.

By questioning the basic constitutional premise upon which this regulatory framework rests, the decision below casts doubt on an incalculable number of laws, regulations, and administrative orders relating to firearms. How many would survive the court of appeals' ruling is unclear, but it is more than plausible that such a significant change in Second Amendment law would dictate repeal or revision of many. At the very least, this shift in the law will prompt years of litigation regarding the constitutionality of statutory, regulatory, and administrative provisions, and will disrupt law enforcement in an area critical to public safety.

2. *State and Local Firearm Regulations*

Notwithstanding the numerous federal laws, most regulation of firearms is by state and local governments. Jon S. Vernick & Lisa M. Hepurn, *Twenty Thousand Gun-Control Laws?*, (Brookings Institution 2002). The state and local laws include bans on certain types of guns (*e.g.*, seven states ban assault weapons), mandatory registration (seven states), licensing and permitting laws for the purchase of certain firearms (twelve states), mandatory waiting periods (twelve states), licensing of firearm dealers (twenty-six states), permitting to carry a concealed weapon (forty-six states), and mandatory background checks (forty-nine states). Legal Comm. Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* (2006). The latest A.T.F. compendium of state and local laws is 458 pages long, listing hundreds of measures. A.T.F. P. 5300.5, *State Laws and Published Ordinances* xvi (2005).

Revisiting the basic premise of the Second Amendment and striking down gun legislation for the first time in 216 years would have ripple effects through this entire network of state and local regulation. Although the Court ruled in *Presser v. Illinois*, 116 U.S. 252 (1886), that the Second Amendment limits the power only of the federal government, the decision relied on the importance of militias as a check on federal power. Separating the right to bear arms from the maintenance of a well-regulated militia would cast doubt on the authority of state and local governments to regulate firearms. Such a ruling would thus invite challenges to hundreds of state and local restrictions, thrusting upon the courts difficult policy judgments about the reasonableness of individual regulations.

II. THE DETERMINATIONS REQUIRED BY THE DECISION BELOW WOULD COMPOUND THE DISRUPTION OF THE REGULATORY SYSTEM DEVELOPED IN RELIANCE ON JUDICIAL PRECEDENT.

The impracticality and unpredictability of the approach to the Second Amendment taken in the decision below further places at risk the regulatory system for firearms. As this Court has noted, unclear and impractical standards impede effective law enforcement. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 231 (1983) (probable cause involves "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act") (citation omitted). Uncertain standards invite litigation, which burdens courts and regulators, and engenders further uncertainty.

A. The Decision Below Does Not Create an Objective, Reliable, and Intelligible Definition of "Arms."

The court below stated that "[o]nce it is determined -- as we have done -- that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." Pet. App. 53. The court, however, provided no meaningful guidance as to how judges are to determine what weapons qualify as "Arms." Instead, the court fashioned a test that turns in large part on the physical characteristics of the weapon and whether it is a "lineal descendant" of those used by Founding-era militiamen. Pet. App. 51. In making this issue a key part of its test, the court departs from the standard articulated in *Miller*, which is whether use or possession of the firearm has a "reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178.

The "lineal descendant" standard is inherently subjective and is likely to engender massive confusion regarding the permissible scope of gun control. Moreover, the standard will prove highly impractical. By tying the Second Amendment to historical and technological issues, requiring judges to assess the physical effects and relative lethality of eighteenth century weapons and to extrapolate those conclusions to the vast array of modern firearms, the decision below supplants legislative expertise and saddles courts with issues they are ill-suited to resolve. *See, e.g., United States v. Rybar*, 103 F.3d 273, 294 n.6 (3d Cir. 1996) (Alito, J., dissenting) (as a rule, appellate judges "are not experts on firearms, machine guns, . . . or crime in general").[7] With many thousands of variations in arms -- plus many new ones every year -- intersecting with many hundreds of variations in state and federal regulations, the court of appeals' departure from the *Miller* standard can only yield confusion and dislocation.

Even a brief survey of weaponry subject to regulation demonstrates that the court of appeals' approach, focusing on the weaponry rather than the relation of the regulation at issue to a well-regulated militia, provides neither clarity nor stability. The Justice Department's taxonomy divides firearms into three basic types -- *shotguns*, *rifles*, and *handguns* (including *revolvers*, which store ammunition in a revolving chamber, and *pistols*, which refer to all other handguns). But each type may be further distinguished by whether they feature automatic firing action (*fully automatic* weapons, which automatically load and fire bullets as long as the trigger is depressed, and *semiautomatic* weapons, which automatically load and fire one bullet per trigger function), *caliber* (bore diameter), *gauge* (for shotguns), and *muzzle velocity* (how fast a bullet leaves the gun). *See generally* Marianne W. Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearms, Crime, and Criminal Justice: Guns Used in Crime* 2 (1995).

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[7] These concerns are heightened by the suggestion in the decision below that a court should determine that a particular "lineal descendent" of a firearm was in "common use" and had "potential military application." Pet. App. 51. These questions do not lend themselves to judicial expertise.

Thus, under the "lineal descendant" standard employed below, courts will have to decide whether an automatic or semiautomatic pistol, or only a revolver, is protected by the Second Amendment. They will have to assess whether it is reasonable to ban certain handguns, say those over .38 caliber. They will have to decide whether to draw lines based on the number of shots a gun can fire, the type and power of bullets it uses, the accuracy of the gun at particular distances, or the general lethality of the weapon. No doubt, the distinctions courts devise on these questions will differ, both between courts and over time. As new weapons technologies develop, courts will have to revisit these questions repeatedly. Such inevitably subjective decision-making is detrimental to the rule of law, which requires clear legal rules, of general applicability, on which courts, legislators, and the legal profession may rely.

B. The Decision Below Will Entangle Courts in Factual and Policy Determinations More Appropriately Left to State and Local Legislatures.

From the ABA's perspective as an advocate for the rule of law, the problems with the court of appeals' approach stem not only from the disruptive consequences of changing the rules on which an entire regulatory scheme rests, but also from the adverse effects of entangling courts in essentially legislative policy decisions. Even if courts could settle on a workable definition of "arms," the assessment "whether any particular restriction on the possession of weapons is 'reasonable' -- for example, banning handguns or limiting firearms to law enforcement officers -- would be as subjective and arbitrary as decisions as to whether modern weapons are 'comparable' to 18th century weapons." Richard Allen, *A Gun May Be a Gun May Be a Gun*, Legal Times, Nov. 26, 2007, at 42.

Insofar as courts, when deciding the reasonableness of a regulation, weigh the states' interests, the varying strength of those interests will produce disparate results in different jurisdictions. A "Saturday night special," for example, may pose a greater threat in urban areas than in rural jurisdictions, based on the level of violent crime, population density, and trafficking in unregistered guns. Thus, a court in one jurisdiction could find banning this weapon to be constitutionally "unreasonable," but courts in another jurisdiction could uphold such a ban. The prospect of such disparities militates against revision of Second Amendment standards in a manner requiring greater judicial intervention. *See* Lawrence G.

Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217 (1978).

Even if courts *could* steer through this jurisprudential thicket, that does not mean that they *should*. Within the boundaries set by the Constitution, the legislature has traditionally been the branch that balances the interests of the state in public safety against the interests of individuals in owning weapons.[8] Constricting the constitutional boundaries for legislative action on firearms lodges the reconciliation of these competing policies in courts, which are neither intended nor equipped to displace the legislative process.

Further, the decision below imperils legislative and executive determinations absent any of the accepted factors necessitating judicial intervention. Voters who oppose gun control have not had difficulty participating in the political process. They are not a discrete and insular minority. And there is no legal crisis that the other branches of government cannot resolve. Judicial entanglement in the gun control debate thus will amount to an unwarranted encroachment on the policy prerogatives of the legislative and executive branches. Such a breach of constitutional boundaries, removing an issue from the democratic process, will produce greater public controversy as it frustrates the policy choices of voters. As Judge Henry Friendly stated, "In the long run the people can hardly be expected to be more tolerant of judicial condemnation of reasonable efforts to protect the security of their lives and property than they were of nullification of efforts to advance their economic and social welfare." Henry J. Friendly, BENCHMARKS 265 (1967).

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[8] For example, the most notable risk factor for mortality among abused women is the presence of a gun. Jane Koziol-McLain, *et al.*, *Risk Factors for Femicide-Suicide in Abusive Relationships: Results From a Multisite Case Control Study*, in *Assessing Dangerousness; Violence by Batterers and Child Abusers*, 143 (J.C. Campbell, Ed., 2d ed. (2007). *See* Violence Policy Center, *When Men Murder Women: An Analysis of 2005 Homicide Data* 13 (Sept. 2007). How to weigh these risks against the desire to own a gun for self defense is a policy judgment, not a constitutional one.

This risk is particularly acute because constitutional rulings, unlike legislative enactments, are not easily adaptable to changing conditions. Regulatory agencies can clarify the law, fill the interstices of legislative enactments, and soften inequities through enforcement decisions. Legislatures can amend or repeal unworkable statutes. By comparison, constitutional decisions are enduring and inflexible. Judge Friendly, quoting Learned Hand, found this rigidity a compelling reason for judicial modesty. He observed that "'[c]onstitutions are deliberately made difficult of amendment; mistaken readings of them cannot be readily corrected'. . . . The Bill of [R]ights ought not to be read as prohibiting the development of 'workable rules.'" *Id.* at 267.

CONCLUSION

The American Bar Association respectfully requests that the Court reverse the decision below.

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

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Eugene Volokh, "Necessary to the Security of a Free State," 83 Notre Dame L. Rev. 1 (Nov. 2007)...24, 25

INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice (ACLJ), is a public interest legal and educational organization committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues, with a particular emphasis on the First Amendment.[2] The proper resolution of this case is a matter of substantial concern to the ACLJ because it concerns proper application of the Bill of Rights, including the First Amendment, to conduct of the federal government and its delegatees.

Petitioner's argument, that legislative acts of the District of Columbia Council, which are purely local in nature, are not subject to constitutional scrutiny under the Bill of Rights, ignores the reality that the Council is a creation of the federal Congress acting only pursuant to authority delegated by Congress. More importantly, if Petitioner's assertion were accepted, both Congress and the Council would be free to trample the constitutional rights of United States citizens who reside in the District. Indeed, under the District's rationale, there would be no impediment to the Council's establishing of an official church within the District. Nor would such body be prohibited from passing a law banning demonstrations from the streets and sidewalks of the District, or from arresting demonstrators whose message is distasteful to the government. Since the adoption of the federal Constitution, such actions have been understood by all to be prohibited to the federal government, as they would undoubtedly interfere with fundamental rights of the people, yet if Petitioner is successful here, citizens of the District – the seat of the federal government tasked with ensuring the continued enjoyment of these fundamental rights – would be the one group of United States citizens denied such rights. The Council, when legislating for the District, may not disregard the guarantees secured in the Bill of Rights.

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[1] The parties in this case have consented to the filing of this brief upon receipt of the required seven (7) days' notice of ACLJ's intent to file. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

[2] *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

SUMMARY OF ARGUMENT

When members of the founding generation ratified the United States Constitution, ceding specific enumerated powers to the federal government, they included the Bill of Rights. The amendments contained therein serve to ensure that the federal government, in the exercise of its enumerated powers, does not act in a manner that would infringe the fundamental rights of the people. Thus, although Article I of the Constitution vests Congress with plenary power to legislate for the District of Columbia, the subsequent adoption of the Bill of Rights, including the Second Amendment, prohibits Congress from exercising this authority in contravention of the right of United States citizens to keep and bear arms.

Just as Congress may not pass laws for the District that infringe the constitutional rights of United States citizens residing therein, neither may the District of Columbia Council do so. Such authority is limited by the guarantees of the Bill of Rights, including the Second Amendment right of the people to keep and bear arms.

The Second Amendment itself expressly preserves the individual right of the American people to keep and bear arms for private purposes. An understanding of the underlying purpose for the Bill of Rights, the Constitution, and even the institution of American government itself reveals this fact. The Founding Fathers believed that every human being is endowed with certain "inalienable rights" and that the establishment of good government was necessary to the preservation of such pre-existing rights. Based on this premise, American government, with its attendant Constitution and Bill of Rights, was established. Thus, by virtue of the Second

Amendment's placement within the Bill of Rights, one must necessarily conclude that the Second Amendment was drafted with the purpose of preserving an individual right, namely, the right to keep and bear arms.

A textual analysis of the Second Amendment also reveals this specific purpose of preserving individual rights. When understood in light of their actual meanings and connotations at the time of the Founding, the words and phrases appearing in the text of the Second Amendment clearly demonstrate that the drafters intended for it to codify and thus expressly secure the right of individual citizens to keep and bear arms for private uses. The Second Amendment was drafted to achieve a specific purpose related to establishing good government: to ensure the security of a "free States" — a phrase with a distinct meaning at the time of the Founding. The drafters believed that the most effective way to guarantee this security was to ensure the presence of a well-regulated Militia. As used in the Second Amendment, the term "Militia" referred to a body comprised of self-armed citizens, as opposed to soldiers. As such, to ensure the presence of a well-regulated Militia — as the best means of achieving the ultimate end of ensuring the security of a "free State" — the drafters expressly protected the right of individual citizens — "the people" — to arm themselves.

ARGUMENT

I. THE BILL OF RIGHTS, INCLUDING THE SECOND AMENDMENT RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS, BINDS BOTH CONGRESS AND THE DISTRICT COUNCIL.

Article I, § 8, cl. 17 of the Constitution provides that "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States . . ." The "Seat of Government Clause," vests Congress with legislative power to act for what is now the District of Columbia. Although congressional power over the District pursuant to this clause is "plenary," *Palmore v. United States*, 411 U.S. 389, 397 (1973), a complete understanding of this provision, in context of the entirety of the Constitution, yields the conclusion that the guarantees within the Bill of Rights protect all citizens residing within the United States and likewise restrain the legislative power of Congress at all times.

A. Whether legislating nationally or merely locally for the District of Columbia, Congress is at all times subject to the constitutional restraints imposed upon it by the Bill of Rights.

The scope of Congress's "exclusive" legislative power over the District of Columbia was a question of considerable discussion among the Founders. Concerns were raised that this power might allow Congress to "set at defiance the laws of the surrounding states" such that the District might "become the sanctuary of the blackest crimes." Debate in Virginia Ratifying Convention, June 16, 1788, Elliot 3:89, 430-36 (remarks of Mr. George Mason). More specifically, and consistent with the founding generation's distrust of governmental institutions, the fear was expressed that "if an attempt should be made to establish tyranny over the people, here are ten miles square where the greatest offender may meet protection." *Id.*

Responses to these and related concerns indicate that the people were of two minds regarding the breadth of Congress's legislative power over the District. Some held the belief that such a grant of "exclusive" authority vested Congress "with supreme power of legislation, paramount to the constitution and laws of the states . . . " *Id.* (remarks of Mr. Henry); *see also* Debate in North Carolina Ratifying Convention, July 30, 1788, Elliott 4:209, 219-20 (remarks of Mr. Lenoir). Others, however, expressed the understanding that "this clause does not give Congress power to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the Union at large." Debate in Virginia Ratifying Convention, June 16, 1788, Elliot 3:89, 430-36 (remarks of Mr. Pendleton); *see also* Debate in North Carolina Ratifying Convention, July 30, 1788, Elliott 4:209, 219-20 (remarks of Messrs. Spaight and Iredell). The language of Article I, § 8, cl. 17, it was explained, was merely intended to subject the District to the sole legislative authority of *Congress*, "as opposed to the legislative power of that state where [the District] shall be." *Id.* (remarks of Mr. Pendleton).

Although this question may have been unsettled at the time of the nation's Founding, the overwhelming weight of subsequent case law indicates acceptance of the latter view. This Court has expressly adopted the understanding that rather than granting some form of extra-constitutional congressional power, "the word 'exclusive' was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states." *District of Columbia v. Thompson*, 346 U.S. 100, 109 (1953) (citing The Federalist, No. 43; 3 Elliot's Debates (2d ed. 1876), pp. 432-33; 2 Story, Commentaries on the Constitution of the United States (4th ed. 1873),

§ 1218). Congressional authority over the District of Columbia, pursuant to Article I, § 8, cl. 17, is therefore undoubtedly plenary, and "includes all of the legislative powers which a state may exercise over its affairs." *Berman v. Parker*, 348 U.S. 26, 31 (1954).

Congress, however, is merely "*akin* to a state legislature," *McClough v. United States*, 520 A.2d 285, 288 (D.C. App. 1987) (emphasis added) – but does not actually *become* one – when legislating for the District. Whether acting in this capacity, or enacting national legislation, therefore, Congress is at all times constitutionally accountable for its conduct through application of the Bill of Rights. *See, e.g.*, 3 Story, Commentaries on the Constitution of the United States (1833), § 1221 ("The power of congress to exercise exclusive jurisdiction over [the District] is conferred on that body, as the legislature of the Union; and cannot be exercised in any other character").

Under Petitioner's reasoning, that "[l]aws limited to the District . . . whether passed by Congress or the Council . . . do not implicate the Second Amendment" because they "raise no federalism type concerns," Pet. Br., at 35, both Congress and the Council would be free to legislate in violation of any of the Bill of Rights, so long as such laws infringe only the rights of those United States citizens residing within the District. This Court has expressly recognized, however, that while "the power of Congress under [Article I, § 8,] Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers . . . in the context of national legislation enacted under other powers delegated to it under Art. I, § 8," *Palmore*, 411 U.S. at 397-98 (1973), "[t]here is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may lawfully be deprived of the benefit of any of the constitutional guarantees of life, liberty, and property . . ." *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933) (quoting *Callan v. Wilson*, 127 U.S. 540, 550 (1888)).

Specifically regarding the Second Amendment, this Court has expressly acknowledged that it "is a limitation . . . upon the power of Congress and the National government . . ." *Presser v. Illinois*, 116 U.S. 252, 265 (1886). No exception was made for congressional enactments pursuant to the Seat of Government power, or any other enumerated power of Congress. Writing for the Court in *Downes v. Bidwell*, Justice Brown stated it this way:

> This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can

> never be taken backward. . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. . . . If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution.

182 U.S. 244, 260-61 (1901).

That Congress remains at all times constrained by constitutional limitations, including the Second Amendment, even when legislating solely for the District, could not be more plain given this Court's longstanding and consistent history of scrutinizing such legislative acts for compliance with the provisions of the Bill of Rights – without question or comment as to the propriety of doing so. For example, in *Bauman v. Ross*, the Court scrutinized under the Fifth Amendment a congressional act applicable only to the District. 167 U.S. 548 (1897).

In an effort to create uniformity in the streets of the District, Congress authorized the Commissioners of the District, by way of a legislative act, to create a plan for such uniformity, to designate and take lands necessary to execute the plan, and thereafter to construct roads in accordance with the plan. *Id.* at 551-60.

The actual controversy arose because the act allowed the determination of just compensation to take into account any direct benefits accruing to portions of the landowner's property not taken, thereby decreasing in some cases the amount of compensation paid to the landowner. In analyzing (and upholding) the provisions of the enactment under the Fifth Amendment, the Court never once questioned the underlying proposition that such an act, though applicable only to the District, should be required to conform to constitutional restrictions on congressional authority. *See also Berman v. Parker*, 348 U.S. 26 (1954) (scrutinizing act of Congress effective only in the District under eminent domain provision of the Fifth Amendment without comment regarding the rationale for application of the Bill of Rights to purely local legislation); *Block v. Hirsh*, 256 U.S. 135 (1921) (applying Fifth Amendment to District of Columbia Rents statute).

Several years after this Court's decision in *Bauman*, the same issue surfaced again, this time as a result of the intervening case of *Norwood v. Baker*, 172 U.S. 269 (1898). In *Wight v. Davidson*, 181 U.S. 371 (1901), the appellant landowner successfully argued in the lower courts that the *Norwood* decision effectively overruled *Bauman*. The Court disagreed, however, explaining that in addition to the lower courts' misunderstanding of the actual holding of *Norwood*, that case was inapposite because it presented a question under the Fourteenth, rather than the Fifth, Amendment.

As the *Wight* Court clarified, "[i]n the present case is involved the constitutionality of an act of Congress regulating assessments on property in the District of Columbia, and in respect to which the jurisdiction of Congress, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the Fourteenth Amendment." 181 U.S. at 384. Rather, the Court made explicit, "in the exercise of such legislative powers, Congress is subject to the provisions of the Fifth Amendment to the Constitution of the United States," *id.*, such that a decision "maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is [not] to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation." *Id.*; *accord Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (expressly stating that "[t]he Fifth Amendment . . . is applicable in the District of Columbia," while "the Fourteenth Amendment . . .

applies only to the states"); *Shelley v. Kraemer*, 334 U.S. 1, 8 (1948) (recognizing that a suit "involv[ing] the enforcement of covenants on land located in the District of Columbia, could present no issues under the Fourteenth Amendment; for that Amendment by its terms applies only to the States").

More recently, in *Boos v. Barry*, the Court addressed a facial challenge, brought pursuant to the First Amendment, to a provision of the D.C. Code enacted by Congress. 485 U.S. 312 (1988). In an attempt to fulfill its obligation under international law to protect the dignity of foreign officials in the United States, Congress enacted D.C. Code § 22-1115 prohibiting "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" *Id.* at 315. Without addressing any threshold question of whether or why provisions of the Bill of Rights might apply to congressional action effective only within the District, the Court concluded the statute in question failed First Amendment scrutiny as it was not narrowly tailored to serve a compelling government interest. *Id.* at 324; *see also Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding a contract between the District of Columbia Commissioners and a private hospital run by members of a religious society, entered pursuant to an act of Congress, on the grounds that neither the agreement nor the congressional act set "a precedent for the appropriation of the funds of the United States for the use and support of religious societies" in violation of the Establishment Clause of the First Amendment).

The foregoing decisions make unmistakably clear that even when acting solely pursuant to its authority under the Seat of Government Clause and enacting purely local legislation for the District, Congress operates in only one capacity and therefore remains at all times subject to the provisions of the Bill of Rights restricting the conduct of the federal government, including the Second Amendment.

B. The District of Columbia Council, exercising legislative authority pursuant to a delegation of power by Congress, is likewise bound by the guarantees of the Bill of Rights.

Although the Constitution expressly provides that Congress may legislate for the District, it does not prohibit Congress from delegating such authority to another body. In the District of Columbia Home Rule Act, P.L. 93-198, approved December 24, 1973 ("Home Rule Act"), Congress expressed its intent to, *inter alia*, "delegate certain legislative powers to the government of the District of Columbia." § 102(a). In recognition of the necessity of acting in a manner "consistent with the constitutional mandate" provided in the Seat of Government Clause, however, Congress asserted that its delegation of legislative authority was "[s]ubject to the retention by Congress of the ultimate legislative authority over the nation's capital," *id.*, and expressly "reserve[d] the right, at any time, to exercise its constitutional authority as legislature for the District . . . ." § 601.

This Court recognized and upheld the right of Congress to make such a delegation of power in *District of Columbia v. Thompson*, explaining that

> there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, *subject of course to constitutional limitations to which all lawmaking is subservient* and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted.

346 U.S. 100, 109 (1953) (emphasis added). By virtue of Congress's exclusive legislative authority over the District, and its decision to delegate that authority to the District Council in the Home Rule Act, any legislative power possessed by the Council derives directly from Congress.

It is axiomatic that one may delegate only what authority he possesses and no more. *See, e.g., United States v. Bazzano*, 570 F.2d 1120, 1125 (3d. Cir. 1977) (citing Restatement (2d) Agency § 20 (1958)); *accord* Restatement (3d) Agency § 3.04 (2006). Through the Home Rule Act, Congress could delegate to the Council no greater legislative authority than Congress itself has with regard to the District. Because Congress lacks the power to legislate in such a manner as to violate the constitutional rights of United States citizens residing within the District of Columbia, neither may the Council do so. Otherwise, contrary to the authority of this Court, Congress *could* "do indirectly . . . what it could not do directly." *Downes*, 182 U.S. at 261.

When this Court upheld the authority of Congress to delegate its legislative power, it made clear that the recipient of delegated authority is subject to the same restrictions as the delegating body. Analogizing congressional delegation of power to delegation of authority from a state government to a municipality, this Court explained that "the delegated power of municipalities is as broad as the police power of the state, *except as that power may be restricted by terms of the grant or by the state constitution.*" *District of Columbia v. Thompson*, 346 U.S. at 109 (emphasis added). Just as a municipality legislating under delegated authority is subject to restrictions imposed upon the state by the state constitution, so the Council, legislating under delegated authority, is subject to restrictions imposed upon Congress by the federal Constitution, including the Bill of Rights. Consequently, the Council may not pass laws on any topic in violation of the constitutional rights of citizens residing within the District, including the Second Amendment right to keep and bear arms.

II. THE SECOND AMENDMENT SECURES THE INHERENT, INDIVIDUAL AND PRIVATE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS.

The Second Amendment to the United States Constitution states that "[a] well regulated Militia, being necessary to the security of a free State, *the right of the people* to keep and bear Arms, shall not be infringed." U.S. Const. amend. II (emphasis added). Stated as such, it is clear that the substantive effect of the Second Amendment is to secure and codify a pre-existing right of the American people to keep and bear arms. *See Presser v. Illinois*, 116 U.S. 252 (1886) (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). Both the text and the context of the Second Amendment reveal that its drafters expressly intended to preserve the extant right of the American citizenry to keep and bear arms for private uses.

A. The Bill of Rights Secures Pre-Existing Individual Rights of the American People.

It is the cornerstone of American political philosophy that, as a human being, every individual possesses certain inalienable rights. Even a cursory glance at the text of the Founding documents reveals a recurrent intention to preserve these "endowed" human rights. *See* Decl. of Independence paras. 1-3 (U.S. 1776); U.S. Const. pmbl. As demonstrated by the Founding documents, the Founding Fathers rejected the notion that retention of these endowed rights was conditioned on arbitrary qualifications such as age, social status or government authorization. *See* Decl. of Independence; U.S. Const. pmbl. The Framers recognized, however, that the enjoyment of these rights depended on the establishment of good government. Decl. of Independence paras. 2-3. Indeed, in the face of human nature, the pre-existing rights of the citizenry could not fully be enjoyed except in the presence of a governing institution dedicated to ensuring their security. Accordingly, the Founders established this rights-*securing* form of government, enunciating their purpose for doing so as follows:

> We hold these truths to be self-evident, that all men are created equal, that *they are endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness.
>
> That *to secure these rights, Governments are instituted among Men*, deriving their just powers from the consent of the governed, That *whenever*

> *any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it,* and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Decl. of Independence paras. 2-3. The Founders' intent to establish government for the purpose of codifying and securing the rights of the people is further evidenced in the Preamble to the United States Constitution:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and *secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America.

U.S. Const. pmbl.

Just as the United States Constitution was a substantive outgrowth of the Declaration of Independence, so the Bill of Rights was a substantive outgrowth of the Constitution; and, just as the Constitution sought to achieve the purpose for establishing government as articulated in the

Declaration of Independence, so the Bill of Rights sought to achieve that self-same purpose as articulated in both the Declaration of Independence and the Constitution. The Bill of Rights was added to the Constitution to more effectively achieve its underlying purpose of securing the endowed rights of the people. Opponents of the Constitution objected to its ratification on the bases that it did not effectively and completely secure the rights of the people, that it did not prohibit the establishment of tyrannical government, and that, as such, a bill of rights, enumerating and codifying the individual rights of private citizens, was essential to achieving the greater goal of securing those rights.[3] Elucidating this point, the Preamble to the Bill of Rights explains that the

> Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses [the Bill of Rights] should be added: And as extending the ground of public confidence in the Government, will *best*

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[3] *The National Archives and Records Administration,* The Bill of Rights, at http://www.archives.gov/national-archives experience/charters/bill_of_rights.html (last visited Jan. 31, 2008).

> *ensure the beneficent ends of its institution.*

U.S. Const. amends. I-X pmbl. As expressly stated in both the Declaration of Independence and the Constitution, the "beneficent ends" of the institution of government is the preservation of endowed human rights. *See* Declaration of Independence para. 3; U.S. Const. pmbl. It is therefore apparent that the Bill of Rights was added to the Constitution in order to secure the individual rights inherently possessed by every human being.

A survey of the subsequent examination and analysis of the Bill of Rights similarly reveals that the amendments comprising it were designed to secure individual liberties against interference from the federal government. As Justice Harlan explained it, the "Bill of Rights, *designed to protect personal liberties*, was directed at rights against governmental authority." *United States v. Guest*, 383 U.S. 745, 771 (1966) (Harlan, J., concurring in part and dissenting in part) (emphasis added). In *McIntyre v. Ohio Elections Commission*, this Court declared that "the purpose behind the Bill of Rights, and of the First Amendment in particular[is] to protect unpopular *individuals* from retaliation – and their ideas from suppression – at the hand of an intolerant society." 514 U.S. 334, 357 (1995) (emphasis added). This Court has also maintained that "one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed *to protect the fragile values of a vulnerable citizenry . . .*" *Arnett*, 416 U.S. at 223 (citing *Fuentes v. Shevin*, 407 U.S. 67, 92 n.22 (1972)). In *Arnett*, this Court recognized two significant aspects of the Bill of Rights, which clearly attest to that document's direct correlation to the purpose for which American government was founded. First, the Bill of Rights was designed to *secure* rights, and as such, was intended to bulwark rights that pre-dated the Founding. Second, the rights secured by the Bill of Rights were both personal and individual to the American people. It is only logical that the guarantee provided by the Second Amendment, as part of the Bill of Rights, would possess these same characteristics.

A textual analysis of the Bill of Rights further supports the conclusion that its underlying purpose is to secure pre-existing individual liberties. The First Amendment, for example, protects the individual's freedoms of religion, speech, press, and assembly, and the right to petition the government. The Third Amendment follows suit by protecting the individual from being forced to house U.S. soldiers. The Fourth Amendment protects the individual against unreasonable searches and seizures. The Fifth, Sixth and Eighth Amendments protect the rights of individuals accused of crimes or other acts of wrongdoing. The Seventh Amendment ensures an individual's right to a civil trial by jury. Importantly, the Ninth Amendment protects those rights which are "retained by the people" but *not* enumerated by the Constitution. The significance of the Ninth Amendment lies in the fact that it expressly reveals the drafters' belief that the rights protected by the Constitution, including the Bill of Rights, were pre-existing rights retained by the people. Finally, the Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." *See* U.S. Const. amends. I-X.

Each of the first nine amendments appearing in the Bill of Rights specifically secures rights retained by the individual. It would thus be illogical to construe one of these provisions, namely, the Second Amendment, as not similarly securing and codifying an individual right. In addition to recognizing the Second Amendment as securing individual rights based on its inclusion in the Bill of Rights as a whole, it is important to note that such interpretation is bolstered by the fact that it specifically appears "within a subset of the Bill of Rights amendments, the First through the Fourth, that relates most directly to personal freedoms (as opposed to judicial procedure regulating deprivation by the government of one's life, liberty, or property) . . ." U.S. Dep't of Justice: Office of Legal Counsel, "Whether the Second Amendment Secures an Individual Right" (2004)[4] (hereinafter, "DOJ Memo").

The Bill of Rights was designed to protect individual liberties. A uniform interpretation of the Bill of Rights thus requires the Second Amendment to be properly construed as similarly protecting an individual right of the people: the right to keep and bear arms for private uses.

B. The Text of the Second Amendment Protects and Secures the Individual Right to Keep and Bear Arms for Private Uses.

The chief end of the Second Amendment is to ensure the security of a "free State." To understand the scope of what the drafters contemplated in formulating the Second Amendment, one must first understand what the drafters meant by the phrase "free State." "'[A] free State' was not understood as having to do with states' rights as such. Rather, it referred to preserving the liberty of the new country that the Constitution was establishing." Eugene Volokh, "Necessary to the Security of a Free State," 83 Notre Dame L. Rev. 1, 6 (Nov. 2007). Upon considering the writings of Blackstone, Montesquieu, James Madison and John Adams, one can conclude that, at the time of the Founding,

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[4] Available at http://www.usdoj.gov/olc/secondamendment2.pdf.

> "State" simply meant country; and "free" almost always meant free from despotism, rather than from some other country, and never from some larger entity in a federal structure. That is how the phrase was used in the sources that the Framers read. And there is no reason to think that the Framers departed from this well-established meaning, and used the phrase to mean something different from what it meant to Blackstone, Montesquieu, the Continental Congress, Madison, Adams, or others.

Id. In light of the Framers' understanding of a "free State," it is evident that they specifically intended for the Second Amendment to "preserv[e] the liberty of the new country that the Constitution was establishing." As such, the purpose of the Second Amendment is a direct outgrowth of the very purpose for which the United States government itself was established: to preserve the rights and liberties of the people.

Based on the practices of the day, the Framers understood that the most effective way to preserve the liberty of this newly established nation—a nation established by a Constitution expressly elevating individual rights—was to ensure the presence of a "well-regulated Militia." In this particular context, "Militia" does not refer to standing armies, such as the United States military or the National Guard, as one might understand them today; at the time of the founding, "Militia" were "composed of the body of the people,"[5] and, as such, were entirely distinct from the regular armed forces of the United States. In *Miller v. United States*, the last instance in which this Court expressly considered the rights protected by the Second Amendment, the Court distinguished between the "Militia" and the military by explaining that

> The Militia which the States were expected to maintain and train is set *in contrast with Troops* which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—*civilians primarily*, soldiers on occasion.

310 U.S. 174, 178-79 (1939) (emphasis added). Indeed, "every citizen [was] required by Law to be a soldier" in the Militia "for the defence of our

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[5] *Amendments to the Constitution*, Annals of Congress, House of Representatives, 1st Congress, 1st Session, p. 778 (Aug. 17, 1789), *available at* http://memory.loc.gov/cgibin/ampage?collId=llac&fileName=001/llac001.db&recNum=390.

country." 1 *The Debate on the Constitution* 712 (Bernard Bailyn ed., 1993). And not only was every citizen required to enroll in the Militia, but every citizen was also required to arm himself. The *Miller* Court stated that, at the time of the Founding,

> [T]he Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further, that ordinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time.

Miller, 310 U.S. at 179 (emphasis added). A South Carolina state legislator once testified to the solidity of the citizen militia as one of the nation's defense mechanisms: "What European power will dare to attack us, when it is known that the *yeomanry of the country uniformly armed and disciplined*, may on any emergency be called out to our defence . . . ?" 1 *The Debate on the Constitution* at 507.

The texts of the various preliminary versions of the Second Amendment further support that a "well-regulated Militia" referred to a militia composed of the citizenry. James Madison introduced the first draft of the Second Amendment, recommending that the clause be included as part of Article I, Section 9,[6] to the U.S. House of Representatives on June 8, 1789:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.[7]

The House of Representatives, however, altered Madison's version of the amendment by placing the reference to "Militia" at the beginning of the clause:

> A well regulated militia, *composed of the body of the people*, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.[8]

Thereafter, the Senate modified the language to read, "A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed."[9] Just days later, the Senate again changed the clause to read, "A well regulated militia being the security of a free state, the right of the people to keep and bear arms shall not be infringed."[10] The House ultimately passed the Senate version, with a minor addition of "necessary to" to the clause: "A well regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed."[11]

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[6] *See* William J. Michael, *Questioning the Necessity of Concealed Carry Laws*, 38 AKRON L. REV. 53, 62 (2005).

[7] James Madison, Annals of Congress, House of Representatives, 1st Congress, 1st Session, p. 451 (June 8, 1789), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=227.

[8] *Amendments to the Constitution*, Annals of Congress, House of Representatives, 1st Congress, 1st Session, p. 778 (Aug. 17, 1789), *available at* http://memory.loc.gov/cgi-in/ampage?collId=llac&fileName=001/llac001.db&recNum=390.

Just as the Framers understood that the best way to preserve the liberty of the country was to ensure the presence of a well-regulated militia, the Framers also understood that the most effective way to ensure the presence of a well-regulated militia was to *protect* the people's right to keep and bear arms in order to *secure* it against the federal government. This notion was undoubtedly based on the practice of states, as showcased in *Miller*, which required private citizens to enroll in the militia and to provide their own arms. Understandably, if the government were permitted to infringe the ability of the people to arm themselves, this would clearly undermine the presence of the well-regulated citizen militia, which would, in turn, undermine the desired end of the Second Amendment: preserving the liberty of the newly established nation.

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[9] Journal of the Senate of the United States of America, vol. 1, p. 71 (Sept. 1789), *available at* http://rs6.loc.gov/cgi-bin/ampage?collId=llsj&fileName=001/llsj001.db&recNum=68&itemLink=r%3Fammem%2Fhlaw%3A%40field%28DOCID%2B%40lit%28sj001133%29%29%230010075&linkText=1.

[10] Journal of the Senate of the United State of America, vol. 1, p. 77 (Sept. 1789), *available at* http://rs6.loc.gov/cgibin/ampage?collId=llsj&fileName=001/llsj001.db&recNum=74&itemLink=r?ammem/hlaw:@field(DOCID+@lit(sj001133))%230010075&linkText=1.

[11] Journal of the House of Representatives of the United States, vol. 1, p. 305 (1790), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=001/llhj001.db&recNum=302

As highlighted by the text of the Second Amendment, the people's ability to arm themselves depends entirely on the protection of their inherent right to do so. Importantly, the Second Amendment expressly provides that the people's right to keep and bear arms shall not be *infringed*. In light of the American philosophy that all individuals are born with certain inalienable rights and that government is necessary to preserve those rights, it is clear from the text of the Second Amendment and its inclusion in the Bill of Rights that the Framers believed that one of these inalienable rights was the right to arm oneself.

The Framers' use of the Second Amendment to enumerate a "right of the people" clearly intimates that the right to keep and bear arms is both private and individual. Indeed, the Constitution never uses the word "right" to enumerate a liberty interest belonging to entities, whether public or private, and a careful examination of the Constitution reveals that individuals possess "rights," whereas governmental entities possess "powers" or "authorities." DOJ Memo, at 11 (citing U.S. Const. art. I, § 1; art. I, § 8; art. II, § 1; art. III, § 1; amend. X).

Furthermore, "the people," as used in the Second Amendment, functions as a term of art in light of its use throughout the Founding documents. For instance, the Declaration of Independence states that "whenever any Form of Government becomes destructive of these ends [securing the people's inalienable rights] it is the Right of the People to alter or abolish it, and to institute new Government" to achieve such ends. Decl. of Independence para. 3. Among its many purposes, the Declaration of Independence specifically served as an indictment against King George III for "his invasions on the rights *of the people*." Decl. of Independence para. 9. The Preamble to the Constitution states that "We *the People* of the United States . . . do ordain and establish this Constitution . . . " U.S. Const. amends. I-X pmbl. As such, the Second Amendment's use of "the people" signifies that the right to keep and bear arms belongs to those who instituted and established the new government and its accompanying Constitution for the United States of America. Simply stated, the right to keep and bear arms belongs to the people of the United States. Additionally, because government was established *by* "the people" (and for "the people"), it is illogical to interpret "the people" to mean "the government" or "the State." In light of its preservation of a right belonging to "the people," it is clear that the Second Amendment secures an individual's private and inherent right to keep and bear arms.

During the Founding era, it was understood that individuals possessed the inherent right to arm themselves for purposes of self-defense, defense of country, hunting and fowling. In *United States v. Emerson*, the Fifth Circuit Court of Appeals noted that some delegates to the Pennsylvania Convention to ratify the Constitution proposed an amendment expressly stating the full scope of the people's right to keep and bear arms:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . .

270 F.3d 203, 231 (5th Cir. 2001). Joseph Story explained that the right to keep and bear arms is essential to the people's right to overthrow an abusive government. 3 Story, Commentaries of the

Constitution of the United States, (1833) § 1890. Interestingly, it was the exercise of this latter right which specifically precipitated the drafting of the Declaration of Independence:

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Id.

The Second Amendment, like the rest of its Bill of Rights counterparts, preserves individual rights. The Second Amendment would be flaccid indeed if its only purpose were to allow soldiers in the U.S. Military or the National Guard to keep their weapons at home. That narrow purpose does not comport with the whole of the Bill of Rights, as it would imply that the soldier's "right" to keep weapons at home would be based on his or her status as a soldier, rather than on his or her status as a human being. A true understanding of the political ideologies upon which this nation was built eliminates the possibility that the drafters haphazardly included in the Bill of Rights a clause intended to do anything but protect and secure individual human rights. The Second Amendment expressly secures the right of individual citizens of the United States to keep and bear arms for private purposes.

CONCLUSION

This Court should affirm the decision below that the D.C. Code provisions at issue infringe the Second Amendment right of individuals to keep and bear arms.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA
AND MAYOR ADRIAN FENTY,

Petitioners,

v.

DICK ANTHONY HELLER

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit**

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the clearly stated right of the people to keep and bear arms under the Second Amendment..

All parties consented to the filing of this brief under blanket consents filed with the Court, and were timely notified.

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

We urge the Court to decide this one case presently before it, with its own particular set of facts, and to reject the invitation of the Solicitor General to write a philosophical treatise attempting to resolve all future Second Amendment cases as well. If the Second Amendment means anything at all, then the challenged prohibitions on gun ownership and use in the District of Columbia are plainly unconstitutional, as they prohibit the use of handguns for self defense within the home, and effectively prohibit such use of other firearms as well. In reaching that result, this Court would establish that the Second Amendment does, indeed, protect an individual right to keep and bear arms. That decision can, just as the decision below did, leave plenty of flexibility and scope to deal with the potential problems raised by the Solicitor General that may arise in future cases. We respectfully submit that this Court should let the standard that would apply to those cases arise out of those cases, and the particular facts they present.

Of course, we also urge the Court to reject the invitation of Petitioners to read a fundamental Constitutional right stated in plain English in the text out of the Constitution altogether. The American people can read, and they can see that unlike some of the other rights found by the Court on the basis of complex reasoning, the Constitutional text forthrightly promises that "the right of the people to keep and bear arms shall not be infringed." No amount of artful linguistic acrobatics or fanciful historical tales can rub those plain words out of the text. We respectfully submit that the rights clearly stated in The Bill of Rights should be read broadly and vigorously enforced, rather than minimized to suit a particular ideology.

STATEMENT OF THE CASE

Dick Anthony Heller is a special police officer working in the District of Columbia assigned to protect the federal judiciary as a guard at the Federal Judicial Center. PA4a. He carries a handgun while serving in that capacity during his work day. Id. He wants to keep a handgun in his home in the District of Columbia for self defense at night. Id. He applied for a registration certificate for such a handgun, but his application was denied by the District, which explicitly cited D.C. Code Sect. 7-2502.02 in its denial. Id.

That Section entitled "Registration of Certain Firearms Prohibited" states that "A registration certificate shall not be issued for a...Pistol" not validly registered before September 24, 1976. Without such a registration certificate, it is illegal to possess a handgun anywhere, including within the home.

D.C. Code Section 22-4504(a) provides that no person may carry a handgun within the District of Columbia, even within their own home, from room to room, without a license. Such licenses will not be issued either. Bsharah v. United States, 646 A.2d 993 (D.C. 1994)("It is common knowledge...that with very rare exceptions licenses to carry pistols have not been issued within the District of Columbia for many years and are virtually unobtainable." 646 A.2d at 996 n.12).

These two D.C. Code Sections ban the possession or use of handguns within the District outright, for self-defense within the home, or for any other purpose.

In addition, D.C. Code Section 7-2507.2 states,

> E]ach registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is

> kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

So even those firearms that can be registered, such as rifles and shotguns, may not be kept in a functional state where they could be used within the home for self-defense. Note that the Section says that these rifles and shotguns could be unlocked, assembled, and loaded for protection of businesses and for recreational purposes, but it says nothing about self-defense within the home. On the face of the statute, therefore, maintaining the functionality of these firearms within the home for self-defense is illegal.

These provisions amount to the strictest gun control laws in the country. Only one other major city, Chicago, bans handguns outright. No state does. Nor does any other state or city prohibit other firearms from being kept in a functional state, for self-defense within the home, or for other lawful purposes.

Heller and 5 other original plaintiffs sued the District claiming that these statutes violated their rights under the Second Amendment to the U.S. Constitution. They argued that under that Amendment they have an individual right to own, possess and use functional firearms readily available for self-defense within the home. The District Court found that all 6 plaintiffs had standing, but that they had no individual right to keep and bear arms under the Second Amendment.

The D.C. Circuit Court of Appeals reversed. It held that only Heller had standing among the original plaintiffs because only he filed for a registration certificate and was denied. But it held that Heller did have an individual right to keep and bear arms under the Second Amendment that was violated by the D.C. Code Sections cited above. Therefore, the Circuit Court struck down these Sections as unconstitutional.

This Court granted certiorari.

SUMMARY OF ARGUMENT

As a matter of plain English, the text of the Second Amendment protects an individual right to keep and bear arms. The language in the prefatory clause by its own terms does not nullify or place a limit upon the clearly stated individual right in the second clause.

There is no logical alternative interpretation of the Amendment. The collective rights interpretation holds that it does not provide for any individual right, but only a collective right of each state to arm and maintain its own militia. But that interpretation contradicts not only the language of the Second Amendment, but the language of the Militia Clauses in Article I, Section 8, Article 1, Section 10, and Article II, Section 2 of the Constitution.

Alternatively, Petitioners argue that the Second Amendment provides only for an individual right of those serving in the militia to keep and bear arms for service in the militia. But if that was what the Amendment is supposed to mean, it would have been written as

> A well-regulated militia being necessary to the security of a free state, the right of *those who serve in the militia* to keep and bear arms *for use in the militia* shall not be infringed.

But the actual Amendment does not contain any such language limiting the right to the militia. Petitioners are asking the Court to read such language into the Amendment.

Petitioners weave a fanciful tale regarding the history behind the Second Amendment, concluding that the Amendment was a great victory for the states in granting them the right to prevent the Federal government from disarming their militias. But the history shows that the Anti-Federalists completely failed to win any constitutional protection specifically directed to the state militias and their armament, as reflected in the Militia Clauses and other provisions of the Constitution.

All that the Anti-Federalists could get was explicit Constitutional protection for the old English right to keep and bear arms. That was what was put into the Second Amendment. This would at least assure them an armed citizenry on which the states could draw in establishing a militia. But they still had to cede to ultimate Federal control over the militias, as well as to a Federal standing army.

In this historical context, it is easy to see why the framers would add the prefatory clause to the Second Amendment pointing out how the individual right to bear arms would at least protect a foundation for the militias. That was the one concession granted to the Anti-Federalists by the Federalists. But the Constitution, considering the militia clauses and the Second Amendment together, expressly and intentionally did not provide the states anything more than that. And that is why there is no language in the prefatory clause of the Second Amendment limiting in any way the right to keep and bear arms provided in the second clause. It was not intended to provide any such limit. It was just intended to point out that this was the resolution of the debate between the Federalists and the Anti-Federalists over the state militias.

The District's severe gun restrictions violate the plain terms of the Second Amendment. With a complete handgun ban, citizens cannot keep and bear handguns for self-defense within the home, or anywhere else for any purpose. Moreover, with the ban on carrying handguns, citizens are prohibited from bearing handguns for self-defense within the home, or anywhere else for any purpose.

Requiring that any firearm kept in the home, including rifles and shotguns, must be kept unloaded and disassembled or disabled by a trigger lock or similar device also violates the plain terms of the Second Amendment, as citizens also cannot effectively keep and bear arms for self-defense within the home under this provision.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

A. The Text of the Amendment Protects an Individual Right to Keep and Bear Arms.

The Second Amendment states in part, "[T]he right of the people to keep and bear arms shall not be infringed." As a matter of plain English, this language provides for an individual right to own, possess, and use firearms.

It plainly says that this is a right of the people, not the states. That same term, the people, is used to refer to individual rights in the First, Fourth, Ninth, and Tenth Amendments. The Constitution never confuses, but always distinguishes between, the terms "state" and "people". E.g. U.S. Const., Amendment Ten, ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the *States*, are reserved to the *States* respectively, or to the *people*.")(emphasis added); Lund, A Primer on the Constitutional Right to Keep and Bear Arms (Virginia Institute for Public Policy, 2002), at 5 ("The Constitution nowhere uses the term 'the people' to refer to state government.").

Moreover, the terms "keep" and "bear" are actions that individuals do. States do not bear firearms. Rather, as Black's Law Dictionary states, "bear" refers to carrying "upon the person or in the clothing or in a pocket, for the purpose...of being armed and ready for offensive or defensive action in a case of conflict with another person." Emerson v. United States, 270 F.3d 232 (5th Cir. 2001), cert. denied, 536 U.S, 907 (2002). The term "keep" is also commonly used to refer to personal ownership. Emerson, 270 F.3d at 232.

In addition, the Bill of Rights is almost entirely focused on protecting individual rights, with the states mentioned only in the Tenth Amendment, which refers to their powers, not their rights. If the Second Amendment relates not to an individual right but a right of states regarding the militia, why would the framers have stuck it in as the second item in a long list of otherwise individual rights?

The focus on individual rights, of course, reflects the whole history of the Bill of Rights. Those rights were added to the Constitution precisely to protect individual rights from the power of the new Federal government, which the people demanded as a condition of ratifying the Constitution. How can that Amendment possibly now be read as allowing the District of Columbia, under the authority of the Federal government, to completely ban the right to keep and bear arms under general circumstances? That would simply read the Second Amendment out of the Constitution.

The argument of Petitioners is that the language in the first half of the Second Amendment, "A well regulated militia being necessary to the security of a free state", somehow eliminates the individual right plainly stated in the second half of the Amendment. But as a matter of plain English, nothing in that prefatory statement limits the substantive, clearly individual right granted in the rest of the Amendment.

A well-regulated militia may well be necessary to the security of a free state. Where does that say in any way that a state, let alone the Federal government as in this case, can entirely ban handguns, and render other firearms dysfunctional for self-defense, in contravention to the right to keep and bear arms promised in the rest of the Amendment? It does not. As Professor Nelson Lund has stated,

> If you parse the Amendment, it quickly becomes obvious that the first half of the sentence is an absolute phrase (or ablative absolute) that does not modify or limit any word in the main clause. The usual function of absolute phrases is to convey information about the circumstances surrounding the statement in the main clause, such as its cause. For example: "The teacher being ill, class was cancelled."

Lund, *supra,* at 6. See as well Lund, at 6-7.

Petitioners and their *amici* want to read that prefatory language as not only limiting, but nullifying the individual right stated in the rest of the Amendment, leaving the government with the power to prohibit gun use for self-defense in the home, as in this case. That interpretation would leave the amendment textually incoherent, flatly stating an individual right in the second half of the sentence that is supposedly nullified in the first half of the sentence. As a matter of plain English, the Amendment cannot be read that way.

Moreover, the language of the Constitution is to be interpreted as internally consistent whenever possible. A preamble in particular is not to be interpreted as contradicting the substantive right that follows if at all possible. Emerson, 270 F.3d at 233, n.32 ("... at least where the preamble and the operative portion of the statute may reasonably be read consistently with each other, the preamble may not properly support a reading of the operative portion which would plainly be at odds with what would otherwise be its plain meaning."). This is especially true when interpreting a substantive right of the Bill of Rights, which is to be interpreted broadly to protect the rights and liberties of the people.

Rather than reading the prefatory language to nullify the following statement of an individual right, it would be more reasonable and consistent with canons of constitutional interpretation, as well as our history, to read it as strengthening the statement of the following right. The prefatory language does this by bringing up the importance of the militia, which the public so strongly favored at the time for defense of the country, rather than standing Federal armies. What that prefatory language is adding is that the individual right to keep and bear arms that follows must be **especially protected**, because it is essential to maintaining the state militias (non-standing armies of armed citizens), which were to be the first line of defense for the new nation.

The Courts cannot treat the Second Amendment as a politically incorrect, disfavored stepchild of the Bill of Rights. Fidelity to the Constitution requires that courts give it the same zealous protection as every other right stated in our founding document. The Amendment is not being read broadly to protect the rights and liberties of the people if it is somehow interpreted to allow the government to adopt a complete ban on handguns and the use of other firearms within the home for self-defense, as in this case.

B. There Is No Logical Alternative Interpretation For The Second Amendment Other Than As An Individual Right to Keep and Bear Arms.

The individual rights interpretation of the Second Amendment discussed above is reinforced by the recognition that there is no logical alternative interpretation of the Amendment.

One alternative is a collective rights interpretation of the Amendment, which holds that it does not provide for any individual right, but only a collective right of each state to arm and maintain its own militia. But that interpretation contradicts not only the language of the Second Amendment, but the language of other provisions of the Constitution as well.

First, the Second Amendment says that the right belongs to the people, not to the states. As discussed above, the term the people refers to individual rights, not states rights. The terms "keep" and "bear" also refer to individual actions. Moreover, the Second Amendment is placed second in a long list of individual rights, indicating not only that it is an individual right, but a very important one.

Secondly, Article 1, Section 10 of the Constitution prohibits the states from maintaining troops in times of peace without the consent of Congress. Reading the Second Amendment to provide for the right of the states to arm and maintain their own militias would flatly contradict this section. Are we to conclude that Article I, Section 10 has been repealed by the Second Amendment? No one has ever suggested that is so. Consequently, the Second Amendment cannot be said to provide for such a state right.

Thirdly, Article I, Section 8 provides that Congress has the authority to provide for arming the militias. That section preempts any right of the states to arm their militias. It grants the states only the authority to train the militia and appoint its officers. The states are granted no other authority over the militia anywhere else in the Constitution. Reading the Second Amendment as providing for the right of the states to arm their militias would again flatly contradict this provision, which everyone must concede remains effective today.

Fourthly, Article II, Section 2 states that "[T]he President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states...." If the President orders a state militia to stand down, abandon any arms provided by the state, and go home with any individually owned arms, are we to believe that the Second Amendment grants the states a constitutional right to disobey and refuse?

Would we really want a Second Amendment that says an openly rebellious state has a constitutional right to arm and maintain a militia and the Federal government cannot order it to disband and leave all but personal weapons behind? If so, wouldn't the actions of the Federal government in the Civil War have been unconstitutional? Isn't such an interpretation far more dangerous than to interpret the Amendment to provide for a right of individuals sorely in need of self-defense to keep and bear arms? The Court below rightly characterized this view in saying, "So understood, the right amounts to an expression of militant federalism, prohibiting the federal government from denuding the states of their armed forces." PA14a.

As Professor Lund concludes,

> Turning back to the Second Amendment with these facts in mind, it becomes apparent why the Second Amendment cannot possibly have been meant to constitutionalize a right of the states to keep up

> military organizations like the National Guards. That theory implies that the Second Amendment silently repealed or amended two separate provisions of the Constitution: the clause giving the federal government virtually complete authority over the militia, and the clause forbidding the states to keep troops without the consent of the Congress.
>
> When the Bill of Rights was adopted, nobody so much as suggested that it would alter these provisions, and nobody claims such a thing today. Indeed, these two provisions of the original Constitution have allowed the federal government essentially to eliminate the state militias as independent military forces by turning them into adjuncts of the federal army through the National Guard system. Under the states' rights theory of the Second Amendment, the National Guard system must be unconstitutional, which everyone (including the Supreme Court) agrees is not the case.

Lund, *supra,* at 9.

Petitioners and their *amici* offer another alternative interpretation. They argue that the Second Amendment does provide for an individual right, but only a right of those serving in the militia to keep and bear arms for service in the militia.

But as the Court below noted, if that was what the framers meant, then why didn't they say that? The Court below said,

> At first blush, it seems passing strange that the able lawyers and statesmen in the First Congress (including James Madison) would have expressed a sole concern for state militias with the language of the Second Amendment. Surely there was a more direct locution, such as "Congress shall make no law disarming the state

militias" or "States have a right to a well regulated militia. PA14a.

Indeed, if the framers meant to say what Petitioners so ardently insist they said, the Amendment would read,

> A well-regulated militia being necessary to the security of a free state, the right of *those who serve in the militia* to keep and bear arms *for use in the militia* shall not be infringed.

But the actual language used was not limited to the militia. It says "The right of the people to keep and bear arms shall not be infringed." There is no limitation to those who serve in the militia or to arms for use in service to the militia. Petitioners are desperately trying to read such limitations into the Amendment.

Petitioners respond to the above quote from the decision of the Court below by saying, "Far 'strange[r],' however, was the majority's supposition that the Framer's would have written the Amendment this way to protect private uses of weapons." Pet. Br. at 20. But the language that was used, "The right of the people to keep and bear arms shall not be infringed" states precisely such an individual right in plain English, as argued above, without any limitation to service in the militia. The prefatory phrase merely pointed out that one benefit of this right was to assure that citizens would have available arms that could be used for service in the militia, as the Court below noted. PA34a-35a. But by its own terms that prefatory phrase placed no limitation on the substantive right of the people to keep and bear arms stated so directly in the second clause, as also argued above.

Petitioners complain that this individual rights interpretation reads "the opening clause out of the amendment." Pet. Br. at 17. But courts cannot ascribe to the words of the text a meaning they do not have. If the words by their own terms do not place a limitation on the declaration of the substantive right in the clause that follows, then courts may not read such a limitation into the text, as Petitioners urge. It is Petitioners who would read the second clause out of the Amendment, the one that actually states the substantive right.

This individual rights interpretation of the Amendment without limitation to the militia is all the more clear because of the pre-existing right to keep and bear arms noted by the Court below. The Court said, "The wording of the operative clause also indicates that the right to keep and bear arms was not created by government, but rather preserved by it." PA 20a. The Court explained the ancient origins of the right, saying,

> The ancient origin of the right in England was affirmed almost a century later, in the aftermath of the anti-Catholic Gordon riots of 1780, when the Recorder of London, who was the foremost legal advisor to the city as well as chief judge of the Old Bailey, gave the following opinion on the legality of private organizations armed for defense against rioters: The right of His majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of the Kingdom, not only as a *right,* but as a *duty;* for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right which every Protestant most unquestionably possesses, individually, may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of

> judicial decisions and ancient acts of parliament, as well as by reason and common sense.

PA20a n.8. The language quoted here from 225 years ago seems to say precisely what both clauses of the Second Amendment, taken together, say much more succinctly.

The Court below went on to say,

> To determine what interests this pre-existing right protected, we look to the lawful, private purposes for which people of the time owned and used arms. The correspondence and political dialogue of the founding era indicate that arms were kept for lawful use in self-defence and hunting....
>
> The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they would be obligated to perform for the state. The premise that private arms would be used for self-defense accords with Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation.

PA21a. This language again seems to capture precisely what both clauses of the Second Amendment, taken together, mean to say. This is what "*the* right to keep and bear arms" means in the Second Amendment, an individual right to arms for self-defense and other private, lawful purposes, in addition to the purpose of joining together in collective self-defense.

C. The Framers Intended to Provide in the Second Amendment for an Individual Right to Keep and Bear Arms.

Petitioners weave a fanciful tale regarding the history behind the Second Amendment. They conclude that the Amendment was a great victory for the states in granting them the right to prevent the Federal government from disarming their militias, and that the framers had no other concern behind the Amendment, such as protecting any private use of firearms. But, despite the best efforts of the Petitioners to the contrary, their historical discussion does help to make clear the real history behind the Amendment, which was not what they say it was.

The history shows that the Anti-Federalists completely failed to win any constitutional protection specifically directed to the state militias and their armament. First, the Anti-Federalists wanted the new nation to rely on state run militias with no Federal standing army. But they lost that, as the new Constitution expressly provided for a Federal standing army.

Then the Anti-Federalists wanted the Constitution to provide at least that the states would run and operate their militias. But they lost that too. The Militia Clauses provide that the Congress and the President hold the ultimate authority over the state militias and can take command of them at any time. The Clauses also provide that it is the Federal government that has the power to arm the militias, and grants the states no power to arm them.

Petitioners cite George Mason and Patrick Henry as recognizing the problem here from their Anti-Federalist perspective. Pet. Br. at 24-25. Mason said quite correctly,

> The militia may be here destroyed ...by disarming them. Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive

> right to arm them....Should the national government wish to render the militia useless, they may neglect them and let them perish......

Pet. Br. at 24.

Indeed, if Congress or the President orders a state militia to disarm, then under the Constitution it must do so. Even worse for the Anti-Federalists, why would the Federal government ever order a state militia to disarm when it can, in fact, take command of it.

Mason and the Anti-Federalists sought Amendments to grant the states power to arm and organize the militias. Pet. Br. at 25-26. But those Amendments failed. Id. So the law remained as described by Mason above. The Second Amendment did not serve the purpose described by Petitioners. It did not provide protection for any right of the states to arm their militias. Under the Constitution, the Militia Clauses provide for ultimate Federal control over the militias and provide for the Federal government, not the states, to arm the militias.

All that the Anti-Federalists could get was explicit Constitutional protection for the old English right to keep and bear arms. That was what was put into the Second Amendment. This would at least assure them an armed citizenry on which the states could draw in establishing a militia. But they still had to cede to ultimate Federal control over the militias, as well as to a Federal standing army.

In this historical context, it is easy to see why the framers would add the prefatory clause to the Second Amendment pointing out how the individual right to bear arms would at least protect a foundation for the militias. That was the one concession granted to the Anti-Federalists by the Federalists. But the Constitution, considering the militia clauses and the Second Amendment together, expressly and intentionally did not provide the states anything more than that. And that is why there is no language in the prefatory clause limiting in any way the right to keep and bear arms provided in the second clause. It was not intended to provide any such limit. It was just intended to point out that this was the resolution of the debate between the Federalists and the Anti-Federalists over the state militias.

The historical record makes clear that the framers did intend to provide protection for this individual right to keep and bear arms, which would provide at least some solace to the Anti-Federalists. In Federalist 29, Hamilton writes,

> [I]f circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.

The Federalist No. 29, at 145 (Alexander Hamilton)(G. Carey, J.McClellan eds. 1990). This "large body of *citizens*", not militiamen, obviously refers to individuals exercising their right to keep and bear arms, not to an organized state militia, which would not be referred to as a large body of citizens.

Madison offered this same response, raising "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to Europe, where "the governments are afraid to trust the people with arms." The Federalist No. 46 at 244 (James Madison)(G. Carey, J. McClellan eds. 1990). Madison continued saying that any threat of oppression from a Federal standing army would be opposed by "a militia amounting to near half a million of citizens with arms in their hands…." Id.

These passages naturally refer again to individual citizens exercising their right to keep and bear arms, the people trusted with arms, the advantage the Americans possess over the people of almost every nation. That half a million armed citizens obviously arises from an armed citizenry that enjoys a protected individual right to keep and bear arms, not a well-regulated militia encompassing a then unheard of half a million man army armed by the state.

The amendments proposed from the state ratifying conventions calling for a Bill of Rights uniformly called for an individual right to keep and bear arms. New Hampshire proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." 1 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 326 (2d ed. 1836).

Madison's home state of Virginia proposed, "That the people have a right to keep and bear arms; that a well-regulated Militia composed of the body of the people trained to arms is the proper, natural, and safe defense of a free state." 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 658 (2d. ed. 1836).

These proposals from the Anti-Federalists should be taken as legislative history indicating what the framers were trying to say in the Second Amendment. There is no history showing any challenge or rejection regarding these proposals. Quite to the contrary, the historical evidence shows a desire to mollify the Anti-Federalists by accepting these proposals

Madison's notes from the speech introducing the amendments that became the Bill of Rights show that Madison understood his Second Amendment to provide for an individual right to keep and bear arms, not a collective right of the states. His notes said that the proposed amendments "relate first to private rights." Id. This is shown as well by his placing the Amendment second among a long list of individual rights in the Bill of Rights. 12 Papers of James Madison 193-194 (C. Hobson et al. eds. 1979)

While Petitioners and their *amici* repeatedly cite the recently published articles of their colleagues in the gun control movement, they never mention the more contemporaneous top constitutional scholars and authorities from the 19th century who recognized the Second Amendment as providing precisely for an individual right to keep and bear arms. Supreme Court Chief Justice Joseph Story stated in an 1842 treatise that the Second Amendment protects "a right of the citizen" and emphasized that the Amendment protected Americans from "one of the ordinary modes, by which tyrants accomplish their purposes without resistance, [which] is, by disarming the people, and making it an offence to keep arms…." Story, A Familiar Exposition of the Constitution of the United States, 264-265 (1842). Story also wrote in an 1833 treatise, "[T]he right of the people to keep and bear arms has justly been considered as the palladium of the liberties of the republic." Story, Commentaries on the Constitution, Vol. 3, at 746 (1833).

In 1803, St. George Tucker indicated that the Second Amendment was equivalent to Blackstone's "right of the subject," and protected, "The right of self-defense [which] is the first law of nature. 1 St. George Tucker, Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia, 143, 300 (1803). In his authoritative 1829 treatise, William Rawle wrote,

> No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both."

Rawle, A View of the Constitution of the United States of America 125-26 (Da Capo Press 1970)(2d. ed. 1989).

In the face of such evidence, Professor Tribe writes in the new edition of his treatise, changing his previous view,

> Perhaps the most accurate conclusion one can reach with any confidence is that the core meaning of the Second Amendment is a populist/republican/federalism one: Its central object is to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit.
>
> Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in defense of themselves and their homes...a right that directly limits action by Congress or by the Executive Branch...."

1 Tribe, American Constitutional Law, n.221 at 902 (3d. ed. 2000).

The evidence has also now convinced the Executive Branch of the correctness of the individual rights view, also changing its previous position.[2]

No doubt the framers did not intend for the right to keep and bear arms to be absolute, allowing for no restriction or regulation, a position not taken by Respondents or their *amici* in this case either.[3] Any statement of the framers that may be found reflecting this non-absolute position would not mean that they intended no protection for the individual right to keep and bear arms. Similarly, any regulation of the possession or use of firearms in the colonies or early states would also not mean that the framers intended no protection for this individual right, particularly in regard to the power of the power Federal government to disarm citizens completely.

Despite any such regulations, some of which may have been reasonable and some of which may have been out of bounds on analysis, gun ownership and use in the colonies and early states was widespread. Dederer, War In America to 1775 (1990)("[B]y the eighteenth century Americans were the most heavily armed people in the world; not only did colonial law mandate owning and maintaining a firearm, but through the Revolution *most* colonials still shot for the table." Id. at 251); Black, War for America: The Fight for Independence 1775-1783 (1991), at 48; Staples v. United States. 511 U.S. 600, 610 (1994)("[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country."). Jefferson, in fact, attributed Revolutionary War victories to "our superiority in taking aim when we fire; every soldier in our army having been intimate with his gun since infancy."[4]

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[2] Brief of United States of America as Amicus Curiae, in District of Columbia v. Heller, No. 07-290; Opposition to Petition for Certiorari in United States v. Emerson, No. 01-8780, at 19 n. 3, Appendix A; Memorandum From The Attorney General To All United States Attorneys, Re: United States v. Emerson, Nov. 9, 2001, www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf; Silveira v. Lockyer, 312 F.3d 1052, 1064-65(9th Cir.2002), *cert. denied* 124 S.Ct. 803(2003).

[3] Under the non-absolute right undoubtedly intended by the framers, and advanced by Respondents and their *amici*, Federal and state governments, for example, would have all necessary powers to disarm those involved in domestic insurrections or rebellions. Indeed, it is the interpretation advanced by Petitioners and their *amici* that would eviscerate the power to counter rebellious states. For they read into the Amendment a right of the states to arm and maintain a militia, constitutionally protected from the authority of the Federal government.

Given this context, and the enormous struggle between the Federalists and the Anti-Federalists, it is completely unbelievable to suggest that the Anti-Federalists and others would have quietly accepted a Federal government with the power to disarm the public. Indeed, Petitioners would read out of the Second Amendment the one concession that the Anti-Federalists won, constitutional recognition of the old English right to keep and bear arms.

D. The Supreme Court's Precedents Do Not Preclude an Individual Right to Keep and Bear Arms in the Second Amendment, But, In Fact, Support It.

Contrary to the claims of Petitioners, the U.S. Supreme Court precedent of United States v. Miller, 307 U.S. 174 (1939) does not preclude an individual right to keep and bear arms. Rather, that case, and other Supreme Court precedents, support such a right.

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[4] Jefferson, Letter to an Italian Friend (Fabbroni), June 8, 1776, in Julian P. Boyd (ed.), 2 The Papers of Thomas Jefferson (1750-97) 195, 198n.

In Miller, the Defendant was indicted under the National Firearms Act for carrying an untaxed, sawed off shotgun in interstate commerce. The Defendant argued that such possession was constitutionally protected under the Second Amendment.

The Supreme Court never said anything about the Second Amendment solely protecting a right of the states to arm and maintain a militia. Nor did it deny that the Amendment protected an individual right to keep and bear arms.

Rather, the Court simply decided the case by analyzing whether the Second Amendment would protect possession of the weapon in question under the circumstances of the case, and concluded that it did not. Effectively, the Court concluded that the regulation of possession of the sawed off shotgun at issue, a weapon that indiscriminately inflicts great damage, was a reasonable and permissible regulation of the right to keep and bear arms, just as a prohibition on machine guns and grenade launchers would be.

But in analyzing whether the Amendment applied to the weapon at issue, the Court implicitly indicated that the Amendment applied to the individual Defendant in question. For if the Second Amendment does not protect an individual right to keep and bear arms, why analyze whether it covered the Defendant's weapon? The Court could simply have dismissed the Second Amendment claim on the grounds that the Defendant was not a state and, therefore, was not covered by the Amendment.

Moreover, in Prinz v. United States, 521 U.S. 898 (1997), the Supreme Court itself stated that it had not decided the scope of the Second Amendment in Miller, but left that question open. The Court said in Prinz,

> In Miller, we determined that the Second Amendment did not guarantee a citizen's right to a sawed off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense." The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.

Id. at 938, n.1. So this Court itself has said that Miller does not preclude ultimately finding that the Second Amendment does indeed provide for an individual right to arms.

Other Supreme Court precedents expressly refer to the Second Amendment as encompassing an individual right the same as all other individual rights in the Bill of Rights. For example, in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Court said,

> [T]he people" seems to have been a term of art employed in select parts of the Constitution.... The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1 ("Congress shall make no law ...abridging ...the right of the people peaceably to assemble")(emphasis added)...While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendment, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. at 265.

Similarly, in Planned Parenthood v. Casey, 505 U.S. 833 (1992), the Court said, "[L]iberty encompasses [] more than those rights already guaranteed *to the individual* against federal interference by the express provisions of the *first eight Amendments.*" Id. at 847 (emphasis added). The Court went on to say,

> The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech press and religion; *the right to keep and bear arms;* the freedom from unreasonable searches and seizures; and so on.

Id. at 848 (quoting Poe v. Ullman, 367 U.S. 497 (1961)(Harlan, J. dissenting)(emphasis added).

The Second Amendment again was referred to as an individual right the same as the rest of the Bill of Rights in Duncan v. Louisiana, 391 U.S. 145 (1968):

> [T]he *personal rights* guaranteed and secured by *the first eight amendments* of the Constitution; such as the freedom of speech and of the press, the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people, *the right to keep and to bear arms....*

Id. at 168 (Black, J. concurring)(emphasis added)). Similar language can be found in Moore v. City of East Cleveland, 431 U.S. 494 (1977).

Emerson summarized these Supreme Court cases by saying,

> Several other Supreme Court opinions speak of the Second Amendment in a manner plainly indicating that the right which it secures to 'the people' is an individual or personal, not a collective or quasi-collective, right in the same sense that the rights secured to 'the people' in the First and Fourth Amendments, and the rights secured by the other provisions of the first eight amendments, are individual or personal, and not collective or quasi-collective, rights.

270 F.3d at 228-229 (citations omitted). Emerson also said, "It appears clear that 'the people' as used in the Constitution , including the Second Amendment, refers to individual Americans." 270 F.3d at 229.

Congress has taken the same view. "The same two-thirds of Congress that proposed the Fourteenth Amendment...also enacted the Freedmen's Bureau Act, which declared protection for the 'full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and...estate..., *including the constitutional right to keep and bear arms....*'"_ Halbrook, The Freedmen's Bureau Act and the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment, 29 N. Kentucky L.R., No. 4, 683-703 (2002)(quoting Act of July 16, 1866, 14 Stat. 173, 176; 15 Stat. 83 (1886)(emphasis added). Congress consequently again recognized the right to keep and bear arms as an individual right in enacting this legislation to ensure the legal right to arms for the freed former slaves and for discharged Union soldiers so that they could defend themselves against Klan violence.

II. THE DISTRICT'S SEVERE GUN RESTRICTIONS VIOLATE THE SECOND AMENDMENT.

We again urge the Court to decide this one case presently before it, and not try to adopt a standard that will decide all future cases as well, as the Solicitor General suggests. Let the standard that will ultimately govern Second Amendment cases arise out of future adjudication on a case by case basis, based on the particular facts presented by each case.

For all of the reasons stated above, we submit that this Court should rule definitively that the Second Amendment does protect an individual right to keep and bear arms, apart from any service in the militia. If anything violates this right, the severe gun restrictions embodied in D.C. Code Sections 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 plainly do.

D.C. Code Section 7-2502.02 bans handguns in the District, with certain minor exceptions. Obviously, then, such guns cannot be used for self-defense in the home.

D.C. Code Section 22-4504(a) provides that no person may carry a handgun within the District of Columbia, even within their own home, from room to room, without a license. Such licenses will not be issued either. Bsharah v. United States, 646 A.2d 993 (D.C. 1994). This Section effectively bans the use of handguns even within the home for self-defense, as a handgun has to be picked up, and, therefore, carried, to be used. By the terms of the Section, this ban on handgun use for self-defense would apply to handguns registered before September, 1976 as well as after.

These provisions violate the plain terms of the Second Amendment. With a complete handgun ban, citizens cannot keep and bear handguns for self-defense within the home, or anywhere else for any purpose. Moreover, with the ban on carrying handguns in D.C. Code Section 22-4504(a), citizens are prohibited from bearing handguns for self-defense within the home, or anywhere else for any purpose. As the Court below noted, "the pistol is the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." PA53a-54a. That is because the pistol, or handgun, is the easiest weapon to wield and use for self-defense.

This direct violation of the plain terms of the Second Amendment is the main reason why these provisions are unconstitutional. The handgun ban and the ban on carrying handguns prohibit citizens from keeping and bearing handguns at all. It is not a matter of a *per se* rule or a rule of reason. It is a matter of violating the plain terms of the Amendment as written.

As the Court below said, "Once it is determined—as we have done—that handguns are "Arms" referred to in the Second Amendment[5], it is not open to the District to ban them." PA52a. That is because a complete ban on arms covered by the Second Amendment does not allow citizens to keep and bear such arms at all, and so violates the plain terms of the Amendment.

D.C. Code Section 7-2507.2 requires that any firearm kept in the home, including rifles and shotguns, must be kept unloaded and disassembled or disabled by a trigger lock or similar device. Exceptions are specified for firearms at a place of business, or firearms in use for recreational purposes. But no exception is made for firearms in use for self-defense.

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[5] The standard for determining what arms are covered by the protections of the Second Amendment should be the same as the arms covered by the old, pre-existing, English right to arms, which the Second Amendment just explicitly recognizes. That is arms currently in common use among the general public for self-defense, hunting, and other lawful purposes. PA20 n.8; PA21. That would exclude major military weapons such as machine guns, bazookas, missile launchers, artillery, etc. That would also eliminate the concerns raised by the Solicitor General in his brief..

So these firearms effectively cannot be used within the home for self-defense either. This provision is consequently unconstitutional for the same reason as the other two. It effectively prevents citizens from keeping and bearing these firearms for self-defense within the home as well, and so, again, directly violates the plain terms of the Second Amendment.

Petitioners argue that the District would never prosecute anyone for violating this section by using a loaded, assembled, and unlocked firearm for self-defense. But courts must look to what statutes say on their face, not to an informal, unenforceable promise that a jurisdiction will read a statute differently from what it plainly says.

Petitioners have also tried to argue that the District can ban handguns for self defense within the home because it has not banned rifles and shotguns used for such purpose within the home. But we have just seen above that D.C. Code Section 7-2507.2 does effectively ban functional rifles and shotguns within the home usable for self-defense.

Moreover, constitutional rights cannot be violated in one context by arguing that they have not been violated in another. The government could not shut down opposition newspapers in violation of freedom of speech on the justification that opponents remain perfectly free to exercise their freedom of speech through books, radio, TV and the Internet. PA53a.

If firearms can't be kept and used for self-defense within the home, then when and where can they be kept and used? This implicates interests in privacy within the home, property ownership, personal self-defense, and the survival of life and limb, as well as the right to use guns. Self-defense within the home has to be the most vital and urgent use of firearms. Using firearms outside the home surely would not enjoy greater protection than using them inside the home. And using firearms for other purposes surely would not enjoy greater protection than using them for self-defense. The violations of the Second Amendment in this case, therefore, could not be more clear.

Other gun regulations that would not completely ban keeping or bearing particular arms may be constitutional under the Second Amendment. Requiring registration or licenses for handgun ownership and use may be permissible under the Second Amendment if the registration certificates and/or licenses are available without onerous requirements that prevent most or all from getting them. Other restrictions that still allow citizens to keep and bear arms but merely limit their use may also be constitutional, depending on how severe the limit.

The Court below suggested that also permissible as Constitutional under the Second Amendment may be regulations, "to prohibit the carrying of weapons under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror…." PA52a. The Court indicated as well that prohibiting the carrying of concealed weapons or requiring firearm proficiency testing may also be Constitutional.

These cases may require the development of some sort of standard to weigh various factors in deciding them. But these cases are not the present case before this Court. This case can be decided as discussed above by recognizing that the statutes at issue violate the plain language of the Second Amendment, and that the statutes are so extreme that if any gun restrictions violate the Second Amendment these must. That is why this Court can and should leave the development of a standard for deciding future Second Amendment cases that do not fall into this clear category to arise out of the particular facts and issues presented by those future cases. The Court for now should decide this present case before it and not try to develop now a standard that would decide all future cases.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be affirmed.

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In the Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF SUPPORTING PETITIONERS OF *AMICI CURIAE* AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, BAPTIST PEACE FELLOWSHIP OF NORTH AMERICA, CEASEFIRE NJ, CENTRAL CONFERENCE OF AMERICAN RABBIS, CITIZENS FOR A SAFER MINNESOTA, METHODIST FEDERATION FOR SOCIAL ACTION, CLIFTON KIRKPATRICK IN HIS CAPACITY AS THE STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.), EDUCATIONAL FUND TO STOP GUN VIOLENCE, FREEDOM STATES ALLIANCE, AMERICAN JEWISH CONGRESS, FRIENDS COMMITTEE ON NATIONAL LEGISLATION, GRAY PANTHERS, GUNFREEKIDS.ORG, ILLINOIS COUNCIL AGAINST

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HANDGUN VIOLENCE, ILLINOISVICTIMS.ORG, IOWANS FOR THE PREVENTION OF GUN VIOLENCE, JENNA FOUNDATION FOR NONVIOLENCE, INC., KARLA ZIMMERMAN MEMORIAL FOUNDATION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL COUNCIL OF JEWISH WOMEN, NEW ENGLAND COALITION TO PREVENT GUN VIOLENCE, NEW YORKERS AGAINST GUN VIOLENCE, DC STATEHOOD GREEN PARTY, NORTH CAROLINIANS AGAINST GUN VIOLENCE EDUCATION FUND, OHIO COALITION AGAINST GUN VIOLENCE, RENÉE OLUMBUNI RONDEAU PEACE FOUNDATION, ROOT (REACHING OUT TO OTHERS TOGETHER) INC., UNION FOR REFORM JUDAISM, VIRGINIA CENTER FOR PUBLIC SAFETY, WISCONSIN ANTI-VIOLENCE EFFORT, AND CERTAIN INDIVIDUAL VICTIMS AND FAMILIES OF VICTIMS OF GUN VIOLENCE

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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IN THE

Supreme Court of the United States

No. 07-290

DISTRICT OF COLUMBIA AND ADRIAN FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit

BRIEF SUPPORTING PETITIONERS OF *AMICI CURIAE* AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, BAPTIST PEACE FELLOWSHIP OF NORTH AMERICA, CEASEFIRE NJ, CENTRAL CONFERENCE OF AMERICAN RABBIS, CITIZENS FOR A SAFER MINNESOTA, METHODIST FEDERATION FOR SOCIAL ACTION, CLIFTON KIRKPATRICK IN HIS CAPACITY AS THE STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.), EDUCATIONAL FUND TO STOP GUN VIOLENCE, FREEDOM STATES ALLIANCE, AMERICAN JEWISH CONGRESS, FRIENDS COMMITTEE ON NATIONAL LEGISLATION, GRAY PANTHERS, GUNFREEKIDS.ORG, ILLINOIS COUNCIL AGAINST HANDGUN VIOLENCE, ILLINOISVICTIMS.ORG, IOWANS FOR THE PREVENTION OF GUN VIOLENCE, JENNA FOUNDATION FOR NONVIOLENCE, INC., KARLA ZIMMERMAN MEMORIAL FOUNDATION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL COUNCIL OF JEWISH WOMEN, NEW ENGLAND COALITION TO PREVENT GUN

VIOLENCE, NEW YORKERS AGAINST GUN VIOLENCE, DC STATEHOOD GREEN PARTY, NORTH CAROLINIANS AGAINST GUN VIOLENCE EDUCATION FUND, OHIO COALITION AGAINST GUN VIOLENCE, RENÉE OLUMBUNI RONDEAU PEACE FOUNDATION, ROOT (REACHING OUT TO OTHERS TOGETHER) INC., UNION FOR REFORM JUDAISM, VIRGINIA CENTER FOR PUBLIC SAFETY, WISCONSIN ANTI-VIOLENCE EFFORT, AND CERTAIN INDIVIDUAL VICTIMS AND FAMILIES OF VICTIMS OF GUN VIOLENCE

INTEREST OF *AMICI CURIAE*

Amici curiae are religious, civic, community, and civil-rights groups and group representatives—as well as individual victims and families of victims of gun violence—with a strong interest in stemming the tide of gun violence that threatens individual lives and our communities. A description of each of the 63 *amici* on this brief is set forth in Appendix A, App., *infra*, 1a-9a.[1] For decades, many *amici* have supported meaningful handgun regulations that *amici* believe are critical to protecting life, liberty, and property. *Amici* thus have a particular interest in the manner in which the decision below struck down the District of Columbia's handgun law, because it threatens their ability to seek and obtain effective protection through firearm regulation at the state and local level. *Amici* believe that the text and historical context of the Second Amendment show that it is a federalism provision that reinforces, rather than diminishes, state and local authority.

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[1] This brief is filed with the consent of the parties, and letters of consent have been filed with the Court. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and *amici*'s counsel made such a monetary contribution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici believe the decision below is premised on a fundamental misconception about the relationship between state and local authority and the preservation of individual liberty under our Constitution. Viewing state and local authority as inconsistent with individual liberty, the decision below distorted the Second Amendment—disregarding half of it entirely—to fit that misconception. But the Framers of the Constitution embraced federalism because they understood that state and local authority are critical to protecting life, liberty, and property. By dividing authority between the federal government and the States, the Framers established a federal government capable of pursuing the new Nation's interests on the global stage while, at the same time, preserving the integrity of state and local governments best situated to respond to local needs. Throughout this Nation's history, the States have fulfilled that role by enacting and enforcing laws necessary to ordered liberty.

I. The Second Amendment, both in its text and origins, reflects and implements that dual system of government. Far from limiting the ability of States and localities to redress threats to the safety of their citizens, the Second Amendment enhances state and local authority to protect life and liberty through the maintenance of militias composed of the local populace. It thus embodies the uniquely American principle of federalism that arose out of a uniquely American historical debate about the respective roles of state militias and a national standing army. Properly read, the Second Amendment prevents unreasonable federal intrusions into gun possession that would impair *state* authority by defeating the *States'* ability to raise "well regulated militia[s]" to protect public welfare and order. Because the Second Amendment is a structural protection for federalism aimed at preserving the integrity of state militias, the District's handgun law does not implicate it at all. See Pet. Br. 35-40. The court below, however, ignored the Second Amendment's origins in federalism and distorted the constitutional bargain between the States and the federal government. Because the Second Amendment was designed to protect state authority, reading it to limit the ability of States to preserve the lives, liberty, and property of their citizens through firearm regulation turns that amendment on its head. Indeed, the role of the States and their militias—not the putative benefits of unregulated private firearm usage—pervaded the state debates over the Constitution's ratification.

II. Throughout this Nation's history—both before and after the Second Amendment's adoption—the States embraced a variety of approaches to militia participation, gun possession, and firearm regulation. Those early practices reflect the long-held view that the Second Amendment is a limit on *federal* authority to interfere with gun possession by individuals when that would intrude on *state* militia authority—not a limit on state and local authority to regulate in the first instance.

III. Those proposing to interpret the Second Amendment divorced from that context seek to anchor the provision in their interpretation of English law and traditions the Framers inherited from England. But that theory is belied by the historical sources it purports to invoke and is refuted by the course of history. If the Second Amendment had its origins in Blackstone or the well-established rights of Englishmen, one would expect firearm possession to be largely beyond governmental regulation in the other countries that, like ours, inherited their traditions from England. But those countries all extensively regulate firearm possession.

The Second Amendment is unique to this Nation because it stems from, and must be read in light of, the Framers' unique contribution of federalism. It constitutes a bulwark against federal diminution of state authority over militias, not an intrusion on the ability of States and localities to protect their populations in light of local needs and preferences.

ARGUMENT

I. THE SECOND AMENDMENT IS ROOTED IN THE PROTECTION OF INDIVIDUAL LIBERTY PROVIDED BY FEDERALISM

"Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *Saenz* v. *Roe*, 526 U.S. 489, 504 n.17 (1999) (similar). Federalism, a "structural element[] in the Constitution," represents the Framers' "unique contribution." *United States* v. *Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring); see *Alden* v. *Maine*, 527 U.S. 706, 713 (1999); *Printz* v. *United States*, 521 U.S. 898, 918 (1997); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.15 (1996).

The Framers adopted that "constitutionally mandated division of authority" between the States and the federal government "'to ensure protection of our fundamental liberties.'" *Lopez*, 514 U.S. at 552 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)). "[S]eparation of the two spheres is one of the Constitution's *structural* protections of *liberty*." *Printz*, 521 U.S. at 921 (emphasis added); *New York* v. *United States*, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments *for the protection of individuals.*") (emphasis added). As Madison explained:

> In the compound republic of America, the power surrendered by the people, is first divided between two distinctive governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.

The Federalist No. 51, at 400 (James Madison) (John C. Hamilton ed., 1864).

Federalism thus "protects liberty" in multiple ways. It "restrict[s] the burdens that" the national "government can impose from a distance," and "facilitat[es] citizen participation in government that is closer to home." *United States* v. *Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., dissenting). It also protects *state authority* to enact and enforce legislation to safeguard life, liberty, and property in light of local conditions and preferences to which the States are often uniquely suited to respond. *Gregory*, 501 U.S. at 458.

The Second Amendment reinforces state authority by protecting the States' ability to raise the militias once thought critical to the maintenance of ordered liberty. See pp. 14-17, *infra*. For that reason, federal courts have routinely and overwhelmingly focused on the connection between the Second Amendment and state militias. See Pet. App. 59a (citing myriad cases). This Court's decisions have as well. See, *e.g.*, *United States* v. *Miller*, 307 U.S. 174, 178 (1939); *Presser* v. *Illinois*, 116 U.S. 252, 264-66 (1886); see also *Lewis* v. *United States*, 445 U.S. 55, 65-66 n.8 (1980).

The majority's contrary position below stems in large part from the view that preserving state authority is somehow inconsistent with individual liberty. See Pet. App. 47a-48a. But the Framers embraced federalism because they saw state and local authority as critical to the protection of life and liberty. As Federalist Number 45 explains:

> The powers delegated by the proposed constitution to the Federal Government, are few and defined. * * * The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 363 (James Madison) (John C. Hamilton ed., 1864). Consequently, "[s]tate sovereignty is not just an end in itself" but a means of "secur[ing] to citizens the liberties that derive from the diffusion of state power." *New York*, 505 U.S. at 181 (citation omitted). And there can be "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618 (citations omitted). Properly interpreted, the Second Amendment does not restrict the ability of States and localities to regulate dangerous weapons to prevent threats to the lives, liberty, and property of their citizens, or to otherwise regulate their militias. To the contrary, as explained below, text and history show that the Second Amendment is a structural reinforcement of federalism that protects state authority and ensures that the States can call forth and deploy their "well regulated militia[s]" for the security of their people.

A. Text And History Confirm That The Second Amendment Protects State Autonomy By Creating Militia-Related Rights

Read in light of the Constitution as a whole, the text and history of the Second Amendment show that it reflects the principles of federalism that pervade our republican form of government. Under those principles, the local District of Columbia legislation at issue here does not implicate the Second Amendment. Even if it were applicable to the District, that Amendment does not limit state and local authority to protect life, liberty, and property by addressing the proliferation of firearms for non-militia uses.

1. *Text And Structure Make Clear That the Second Amendment Is A Militia- and Federalism-Based Protection*

a. While interpretation of the Constitution begins with text, we will not repeat petitioners' and other *amici*'s exhaustive textual analysis. See Pet. Br. 12-21; Profs. of Linguistics and English Br. 5-30. For now, it is sufficient that the very first clause—"a well regulated militia being necessary to the security of a free State"—declares the Amendment's militia-related purpose. That "absolute" clause sets forth the purpose or reason for the remainder of the Second Amendment's text—a purpose that is critical when interpreting the Amendment's scope. See Profs. of Linguistics and English Br. 5-14. The phrase "to keep and bear Arms" likewise reflects a militia-related purpose. See Pet. Br. 16-17. And the references to "the people" are not to the contrary. As detailed at pp. 17-18, *infra*, the Framers often used "the people" to mean the people acting through the militia (which was composed of the people).

Indeed, the Second Amendment's first clause mirrors many of the preconstitutional statutes that established state militias. Those statutes—like the Second Amendment—began with a statement of purpose. North Carolina's declared that "a well regulated militia is absolutely necessary for the defending and securing [of] the liberties of a free State." Act of Apr. 8, 1777, ch. XV, 1777 N.C. Laws 58. Georgia's likewise stated that "a well ordered and disciplined Militia, is essentially necessary, to the Safety, peace and prosperity, of this State, and a Militia Law, upon just principles hath ever been regarded, as the best Security of Liberty and the most effectual Means, of drawing forth and exerting the Natural Strength of a State." Act of Nov. 15, 1778, reprinted in 19 *Colonial Records of the State of Georgia* 103-04 (Allen Candler ed., 1911). See also App., *infra*, 10a-36a (reproducing other contemporaneous state militia statutes). That the Framers borrowed text for the Second Amendment from *state militia laws*—laws explicitly enacted to create state-controlled forces to defend *the State* and "exert[ ] *the Natural Strength of a State*"—speaks volumes about the purpose and scope of the Second Amendment.

b. The Second Amendment, moreover, must be read in light of related constitutional provisions, such as Article I, § 8, which governs state and federal control over the militias and military forces. Article I, § 8 represented a shift from the Articles of Confederation, which had made militias the nearly exclusive means of national defense and had left them in state control.[2] By contrast, Article I, § 8, clauses 12 and 13 of the new Constitution gave Congress authority to raise and support an army and navy, while clause 16 gave Congress substantial authority over state militias. That authority included the ability to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," and to "provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States," Art. I, § 8, cl. 16. And under Article II, the President is Commander in Chief "of the Militia of the several States, when called into the actual Service of the United States." Art. II, § 2, cl. 1.

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[2] The Articles mandated that the States "always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered." Art. Confed. VI. States were also required to "provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage." *Ibid.* The Articles did not address the private possession of arms, but did proclaim that "[e]ach state retains its sovereignty, freedom, and independence, and every power, juris-

At the same time, the States retained vital control and authority over their militias. They retained the power to appoint officers, and to train "the Militia according to the discipline prescribed by Congress." U.S. Const., art. I, § 8, cl. 16. A State, moreover, could engage in war if "actually invaded" or if "in such imminent danger as will not admit of delay." Art. I, § 10, cl. 3. The States were expected to, and did, call on their state militias to maintain order, quell insurrection, and repel invasion. See pp. 12-13, *infra*. The Second Amendment cannot be construed apart from the States' use and control of militias contemplated in Article I, § 8. Indeed, the Second Amendment circumscribes the relevant "militia" further, by protecting the right to bear arms in a "well regulated militia" to ensure the "security" of a "free State." See Profs. of Linguistics and English Br. 15-18. As explained below, the ratification debates make it clearer still that the Amendment was designed to preserve the ability of the sovereign States to raise militias from their populace despite the authority granted to the national govern-

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diction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." Art. Confed. II.

ment—not to protect unregulated and non-militia firearm possession.

c. The effort to unmoor the Second Amendment from its federalism origins and its purpose of preserving the States' control over their militias sets the Constitution at war with itself. For example, although the majority below posited that the Second Amendment sought to protect private possession of firearms so that individuals could "resist and throw off a tyrannical government," Pet. App. 21a, the *Constitution* specifies that any effort to overthrow the government is "treason" punishable by death, Art. III, § 3. Just as courts should not read one provision of a statute to conflict with another, see *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 872 (2000), they ought not read the Second Amendment as arming the populace to commit what the Constitution itself deems a capital offense. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821) (describing "the duty of the Court" to "construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other").

The Second Amendment, Article I, § 8 of the Constitution, and contemporaneous militia statutes all provide for the militias to be called forth to preserve *the security of the State* and to *quell insurrections*. See pp. 8-10, *supra*. To read the Second Amendment as providing arms so that militias can quell insurrection, while at the same time facilitating insurrection, makes no sense. Nor is it plausible that the Second Amendment *sub silentio* protects a right to keep and bear arms to overthrow the government when some unspecified number of individuals, in their unguided discretion, decide that the government is "tyrannical." Blackstone rejected—as a license for "anarchy" and as "fatal to civil liberty as tyranny itself"—any "right" that would allow individuals to determine when armed force against government is necessary. William Blackstone, 1 *Commentaries on the Laws of England* *244 (1765).[3]

The Framers understood the dangers of such a theory from their own experience, just as we do today. In 1786, Daniel Shays and fellow Massachusetts citizens began an armed revolt, known as Shays' Rebellion, to resist debt collection. They described their mission as "[s]uppressing a tyrannical government in the Massachusetts State." C.O. Parmenter, *History of Pelham* 373 (1898); Daniel Shays interview, Massachusetts Centinel, Jan. 17, 20,

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[3] Blackstone rejected as "extreme" any view that would "allow[] to every individual the right of determining th[e] expedience" of "proclaim[ing] * * * resistance [to the prince] necessary" "and of employing private force to resist even private oppression * * * ." *Ibid.* Nor does Blackstone offer support for the proposition that English common law provided an unqualified personal right to bear arms. His *Commentaries* separated the civic and auxiliary right to bear arms from the personal right of self-defense. 4 Blackstone, *supra*, at *184-85. Blackstone's fifth auxiliary right "is that of having arms for their defence, suitable to their condition and degree, and such *as are allowed by law.*" 1 Blackstone, *supra*, at *139 (emphasis added). Likewise, Article VII of the English Bill of Rights states "[t]hat the Subjects which are Protestants may have Armes for their defence Suitable to their Conditions *and as allowed by law.*" Bill of Rights, 1689, 1 W. & M., st. 2, c. 2 (Eng.) (emphasis added). "As allowed by law" qualifies that right. Before the English Bill of Rights' passage, a wide variety of laws limited the possession of arms—including, for example, laws based on socioeconomic class that limited possession of certain hunting weapons to the wealthy. Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 35, 47-49 (2000). Nor do the works of St. George Tucker and Joseph Story undermine the militia-based view of the Second Amendment. See, *e.g.*, Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 Wm. & Mary L. Rev. 1123 (2006); Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 73-76, 150-52 (2006).

1787 (quoting Shays as seeking to "overthrow the present constitution" of Massachusetts) (cited in Leonard L. Richards, *Shays's Rebellion: The American Revolution's Final Battle* 30 (2002)). When the insurrectionists sought to seize the weapons in the arsenal at Springfield, Massachusetts, the *militia* was called out to put down the rebellion. Richards, *supra*, at 27. The Whiskey Rebellion of July 1794, swiftly suppressed when George Washington and Alexander Hamilton called forth the militia, was likewise widely denounced. Mark Bonsteel Tachau, *A New Look at the Whiskey Rebellion*, in *The Whiskey Rebellion: Past and Present Perspectives* 97 (Steven R. Boyd ed., 1985).

For the Framers, the lesson of such uprisings was that "the rebellion of a people against a government established by themselves is *not* justifiable, *even in an extreme case*, and can only result in dishonor to the state, and calamity and disgrace to those who participate in it." 1 Josiah Holland, *History of Western Massachusetts* 299-300 (Springfield, Bowles & Co. 1855) (emphasis added). Thus, in the Framers' experience, it was not the possession of arms for personal uses apart from militia service (or against the government) that preserved ordered liberty. It was the *States*' access to militias and similar state-controlled forces to protect their citizens that was essential. Modern experience confirms that view.[4]

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[4] Deeming the States and the federal government "tyrannical," members of groups like the Tax Protest Movement, the White Supremacist Movement, the Sovereign Citizen Movement, and the so-called "militia" movement have all been prosecuted for plotting to blow up federal buildings or otherwise engage in violent anti-government activities. See http://www.adl.org/learn/ext_us/default.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=1&item=0; http://www.splcenter.org/intel/intelreport/article.jsp?aid=197. Timothy McVeigh's decision to bomb the Murrah Federal Building in Oklahoma City was in part motivated by

2. *The Contemporaneous Debates Confirm the Second Amendment's Purpose*

Read as a whole, the ratification debates confirm what text makes plain: The Second Amendment was designed to protect the sovereignty of the States and their ability to have and control militias—not to protect individuals wishing to possess firearms irrespective of state law. For the Court's convenience, extensive materials relating to the debates are reproduced as an Appendix hereto. App., *infra*, 37a-191a. That Appendix includes the key Virginia Convention debates held on June 14, 16, and 27, 1788. *Id.* at 91a-191a. According to the Justice Department's Office of Legal Counsel, the Virginia Convention "had particular importance, not only because of the possibility that Virginia would be the ninth State to ratify but also because of the State's significance, the prominence of its leaders, and the strength of the Anti-Federalists, led by Patrick Henry." *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel 65 (2004). That may be true, but the debates—particularly when read in their entirety—show that the Second Amendment is a federalism provision that protects individual liberty by preserving, not undermining, state authority. Far from protecting a non-militia right to possess arms outside of state authority, the Second

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a desire to avenge perceived government tyranny at Ruby Ridge, Idaho and Waco, Texas. Lou Michel & Dan Herbeck, *American Terrorist: Timothy McVeigh and the Oklahoma City Bombing* 136-37, 285-86 (2001). Relatedly, far from enhancing personal security, the widespread availability of handguns often results in its diminution. Cf. *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968) (authorizing "stop-and-frisk" of citizens on "reasonable suspicion" in view of danger presented by handguns); see also *Adams* v. *Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting) ("The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol.").

Amendment protects arms possession for state-regulated militia and internal-security purposes, thereby protecting state authority and the state-federal balance the Framers viewed as central to ordered liberty.

a. The militia clauses of the Constitution and the Second Amendment are both products of extensive Framing-era discussions concerning the proper balance between state and federal authority. In the Constitution, Congress was given authority to establish standing armies under Article I, § 8. That raised concern among Anti-Federalists that a standing army could become an instrument of oppression by the national government. As a counterbalance, the Constitution provided the States a critical role with respect to another military force—the militias—reserving for the States "the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Art. I, § 8, cl. 16. As the Legal Community Against Violence's brief explains at length (at 9-12), the debates surrounding that compromise make it clear that preserving the *States'* sovereign authority over their militias was seen as critical both to counterbalancing the standing army and to establishing an effective federal-state balance that would protect individual liberty.

The state debates (and Virginia's in particular) make it clear that the Second Amendment likewise was designed to achieve a proper state-federal balance by protecting state authority over militias. Because the new Constitution provided the national government with authority to "arm" the militias, there was grave concern that the national government could disable the militias by refusing to arm them. Thus, while Madison and others responded that the federal government's power over the militias was concurrent rather than exclusive,[5] Anti-Federalists were not convinced. They feared that Article I, § 8 gave the "national government * * * an exclusive right to provide for arming, organizing, and disciplining the militia * * * ." George Mason, Remarks at the Virginia Convention Debates (June 14, 1788), reprinted in 3 Elliot, *supra*, at 379; see Patrick Henry, Remarks at the Virginia Convention Debates (June 14, 1788), reprinted in 3 Elliot, *supra*, at 385-86 (similar).

Such an exclusive authority, the Anti-Federalists warned, could be used not merely to organize the militia, but also to leave the militia disorganized and unarmed:

> [I]n *this* system, we give the general government every provision it could wish for, and even *invite* it to *subvert* the *liberties* of the *States* and *their citizens*; since we give them the right to [i]ncrease and keep up a standing army as numerous as *it* would wish, and by placing the militia under *its* power, enable it to leave the militia *totally unorganized, undisciplined*, and *even to disarm them.*

Luther Martin, *Genuine Information IV*, Maryland Gazette, Jan. 18, 1788, excerpted in *The Origin of the Second Amendment: A Documentary History of the Bill of Rights* 219, 221 (David E. Young ed., 2d ed. 1995) (some emphasis added). Similarly, George Mason argued that the federal government might "attempt to harass and abuse the militia" so as to effectively "abolish them, and raise a standing army in their stead. * * * The militia may be here destroyed * * * by rendering them useless—*by disarming them.* Under various pretences, *Congress may neglect to provide for arming* and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them." George Mason, Remarks at the Virginia Convention Debates (June 14, 1788) (emphasis added), reprinted in 3 Elliot, *supra,* at 379; see also Luther Martin, *To the Citizens of Maryland,* Maryland Journal, Mar. 18, 1788, excerpted in Young, *supra,* at 301, 301-02 (similar).

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[5] James Madison, Remarks at the Virginia Convention Debates (June 14, 1788), reprinted in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 382 (Jonathan Elliot ed., 2d ed., 1836); George Nicholas, Remarks at the Virginia Convention Debates (June 14, 1788), reprinted in 3 Elliot, *supra*, at 391.

The concomitant concerns about a standing army and the potential for federal neglect of the state militias, which were viewed as composed of and thus responsive to the people, pervaded the debate. Exemplifying typical concerns, Federal Farmer urged that it would be impossible to maintain local responsiveness and control over militias if "the only actual influence the respective states will have * * * will be in appointing the officers." Federal Farmer, Letter No. III, *Observations Leading to a Fair Examination of the System of Proposed Government by the Late Convention; and to Several Essential and Necessary Alterations To It,* Nov. 8, 1787, excerpted in Young, *supra,* at 89, 91. Stressing the need to counterbalance the national standing army, A Farmer urged, "[y]ou, my friends, in general, know nothing of the evils that attend [a standing army]; guard and secure it well in your Bill of Rights, that it may not be in the power of any set of men to trample your liberties under their feet with it. *Organize your militia, arm them well, and under Providence they will be a sufficient security.*" A Farmer, *Letter to My Friends and Fellow Farmers,* New Hampshire Freeman's Oracle, Jan. 11, 1788, excerpted in Young, *supra,* at 204, 206 (emphasis added).

b. The Second Amendment's reference to "the people" cannot be taken as a contrary indication—particularly given the Framers' use of those words in connection with militias throughout the debates. As an initial matter, it is entirely reasonable to urge that "the people" of this Nation have a right, for example, to serve on juries. But it is well understood that such a civic duty is exercised only together with other individuals in an organized judicial proceeding under the auspices (and control) of the State. That is how the Framers saw the Second Amendment. Because they viewed the militia as composed of the people, *i.e.*, those entitled to citizenship's rights and duties, they often referred to the militia as "the people."

Thus, in the debate over the Second Amendment, Anti-Federalists contrasted a militia composed of "the people" with "select" militias, which they feared as unrepresentative and thus a potential source of tyranny. George Mason, Remarks at the Virginia Convention Debates (June 16, 1788), reprinted in 3 Elliot, *supra*, at 425-26. "Who are the militia?" asked George Mason. "They consist now of the whole people, except a few public officers." *Ibid.*

Madison likewise connected "the people" with the "militia" of Article I, § 8, clause 16, contrasting "the people" with "the army": "If resistance should be made to the execution of the laws * * * it ought to be overcome. This could be done only in two ways—*either by regular forces or by the people.* * * * *If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed*, to suppress and repel them, *rather than a standing army.* The best way to do these things was *to put the militia on a good and sure footing* * * * ." Remarks at the Virginia Convention Debates (June 14, 1788), reprinted in 3 Elliot, *supra*, at 378 (emphasis added).

Similarly, Federal Farmer equated the militia with the people. The "militia," he insisted, "are the people, *immediately under the management of the state governments* * * * ." Federal Farmer, Letter No. XVIII, *An Additional Number of Letters from the Federal Farmer to the Republican* (May 1788), excerpted in Young, *supra*, at 342, 355 (emphasis added). It was thus the people composed as a "well regulated militia" "under the management of the state governments"—not arms in private hands for private use—the Framers established as an appropriate counterbalance to federal authority. Far from undermining the Second Amendment's connection to militia service, the Framers' use of the words "the people" reinforces it.

c. Those urging that the Second Amendment protects firearm possession wholly apart from militia purposes sometimes invoke partial quotations from state ratification debates. But the full quotations underscore the link between the Second Amendment and state militias. For example, Patrick Henry did assert that it was a "great object" "that every man be armed," but he was referring to arming them for *militia service*—and addressing whether the States or the federal government should discipline, arm, and control the militias:

> May we [the States] not discipline and arm [the militia], as well as Congress, if the power be concurrent? so that *our militia* shall have two sets of arms, double sets of regimentals, &c.; and thus, at a very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms, &c.? Every one who is able may have a gun. But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored *to have the militia completely armed*, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will *your militia* be armed? * * * If gentlemen are serious when they suppose a concurrent power,

> where can be the impolicy to amend it? Or, in other words, to say that Congress shall not arm or discipline them, till the states shall have refused or neglected to do it?

Patrick Henry, Remarks at the Virginia Convention Debates (June 14, 1788), reprinted in 3 Elliot, *supra*, at 386 (emphasis added).

Other efforts to divorce the Second Amendment from its state-militia purposes are self-defeating. For example, although there are infrequent instances in state debates where the right to bear arms was given a non-traditional, non-militia meaning, in each case the proposal *specifically included* language making that broader meaning clear. See 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971) (dissenting Pennsylvania delegates' post-Convention proposal); *id.* at 681 (failed proposal at Massachusetts Convention); *id.* at 761 (New Hampshire Convention recommendation). The Second Amendment contains no such language. Nor do the ratification debates reflect any suggestion that "bear arms" had a meaning unconnected to a "well regulated militia."

Although the ratification debates were filled with statements about cementing state authority over militias (to counterbalance national authority), "there is not a single statement in the congressional debate about the proposed amendment that indicates that any congressman contemplated that it would establish an individual right to possess a weapon" apart from militia service. *Silveira* v. *Lockyer*, 312 F.3d 1052, 1085 (9th Cir. 2002) (citation and emphasis omitted); 2 *The Records of the Federal Convention of 1787*, 329-33, 384-88 (Max Farrand ed., 1911). Purposes such as state militias made it into the text of the Second Amendment. Purposes such as insurrection, self-defense, and hunting are not mentioned. Indeed, the various proposals at state ratification debates were almost universally in the context of, and connected to, militias. See, *e.g.*, Op. Off. Legal Counsel, *supra*, at 61-77 (cataloguing proposals); see also 1 Elliot, *supra*, at 88; 2 Elliot, *supra*, at 97-98, 406, 520-22, 531, 536-37; 4 Elliot, *supra*, at 95-100, 214-15, 260-61.

The debates thus demonstrate that the Second Amendment is concerned with preserving the authority of the States to arm their citizens for state militia service—not with protecting any non-militia right to possess firearms for private purposes. Read as the federalism provision that it is, the Second Amendment ensures that the power to arm the militia does not reside only in the federal government. It makes certain that the federal government cannot disarm state militias by decree or neglect. And it guarantees the ability of the States to continue having militias, composed of the people, in which militia members "bear arms" to preserve the security of a free State.

II. PRE- AND POST-RATIFICATION EVENTS CONFIRM THAT THE SECOND AMENDMENT EMBODIES FEDERALISM PRINCIPLES

Early historical practice is a persuasive indicator of constitutionality. See, *e.g.*, *Eldred* v. *Ashcroft*, 537 U.S. 186, 213 (2003); *Knowlton* v. *Moore*, 178 U.S. 41, 56 (1900); *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884); *Stuart* v. *Laird*, 5 U.S. (1 Cranch) 299, 309 (1803). Here, that practice confirms what text and structure make plain: The Second Amendment, arising out of federalism concerns, protects state authority over the state militias for public protection. It was never intended to limit state and local police power to protect the public by regulating firearms more generally.

A. State Laws Enacted Before And After The Second Amendment's Adoption Confirm That It Reinforces Federalism

From the Articles of Confederation, to the Constitution, and throughout the Nation's early years, one thing remained constant: States broadly regulated the possession and use of firearms and other weapons. Ratification did not change that long-established practice. As shown below, some States proscribed firearm possession under a variety of circumstances—not only in the militia-related context, but also more generally. That plenary exercise of the police power cannot be reconciled with the notion that the Second Amendment limits the authority of the States to regulate firearms.

1. At our Nation's founding, the States heavily regulated individual possession of firearms, in some instances proscribing it altogether. Massachusetts and Pennsylvania, for example, mandated confiscation of weapons belonging to individuals required to serve in the militia but who refused to swear a loyalty oath or affirmation. See, *e.g.*, Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31 (disarming persons who were "Disaffected to the Cause of America"); Act of Apr. 1, 1778, ch. 796, §§ 2, 4, 9 Pa. Stat. 238-39 (requiring loyalty oath). Massachusetts provided that, where an individual refused to swear or affirm loyalty, the State should proceed "without Delay, to disarm the said Delinquent, and take from him *all his Arms*, Ammunition and warlike Implements"—"mak[ing] strict and diligent Search" of his home if necessary, and "immediately carry[ing] and deliver[ing] [the weapons] to the Justice who made the said Warrant * * * ." Act of Mar. 14, 1776, ch. VII, 1775-76 Mass. Acts 33 (emphasis

added).[6] Massachusetts likewise disarmed its citizens for violating gunpowder-storage statutes. Act of Mar. 1, 1783, ch. XIII, Mass. Acts 218-19.

Similarly, a decade before the federal Constitution was adopted, Pennsylvania enacted a statute requiring anyone who "refused" or "neglected" to affirm loyalty "to deliver up his arms to the lieutenant * * * of the city or county where he inhabits" or face prosecution "before two or more justices of the peace for the said county * * * without appeal to the supreme or any other court whatsoever." Act of Apr. 1, 1778, ch. 796, 9 Pa. Stat. 238-39, 242. That law coexisted with a provision of the Pennsylvania Constitution declaring "[t]hat the people have a right to bear arms for the defence of themselves and the state * * * ." Pa. Const. of 1776 Art. XIII.[7] That Pennsylvania would disarm its citizens for failure to take a loyalty oath undermines the claim that the Pennsylvania Constitution protected a non-militia right to possess guns for self-defense. Moreover, the existence of those Pennsylvania and Massachusetts statutes at the Nation's founding underscores the importance the States placed on the role of militia service in matters of firearm possession. It also undermines the theory that, at that time, there was a widely accepted right to possess firearms for personal purposes apart from militia service.

The States continued to regulate after the Second Amendment's adoption. In the early 1800s, Kentucky and Louisiana banned the carrying of concealed weapons. Act of Feb. 3, 1813, ch. LXXXIX, 1813 Ky. Acts 100-111; Act of Mar. 25, 1813, 1813 La. Acts 172-75. Tennessee,

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[6] Virginia and Maryland also disarmed citizens for failure to take a loyalty oath or affirmation. See Act of May 5, 1777, ch. III, 1777 Va. Acts 8; Act of Mar. 17, 1778, ch. VII, § V, 1778 Md. Laws 445, 446.

[7] Pennsylvania repealed its loyalty oath in 1789. Act of Mar. 3, 1789, ch. 1396, 13 Pa. Stat. 222.

Virginia, and Ohio enacted similar laws. See, *e.g.*, Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts 15; Act of Feb. 2, 1838, ch. 101, 1838 Va. Acts 76; Act of Mar. 18, 1859, reprinted in 4 *Public Statutes at Large of the State of Ohio* 56 (Maskell Curwen ed., 1861).[8] The enactment of those state regulations in the period following the Second Amendment's adoption further suggests that the Second Amendment does not restrict in any way the States' police power to regulate firearm possession.

2. The continuity of militia regulation before and after adoption of the Second Amendment likewise supports the conclusion that, at bottom, it is a structural protection for federalism. Years after passage of the Second Amendment and the federal Uniform Militia Act of 1792, see Act of May 8, 1792, ch. 33, 1 Stat. 271, state militia statutes continued to declare that the overriding purpose of the militia was to defend the safety and security of the State. See, *e.g.*, Act of Feb. 18, 1799, 1799 Ga. Laws 76 ("the defense and safety of republican States must greatly depend on their militia * * * ."); Act of Dec. 26, 1795, ch. XII, §§ I-III, 1795 Va. Acts 17 ("a well trained militia is the only natural and safe defense of a free State, and in order to carry this principle into effect, it is essentially expedient that the militia of this commonwealth should be armed in such manner as to answer the end of its institution"). Indeed, Delaware enacted a

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[8] States also regulated the discharge of guns, see, *e.g.*, Act of Feb. 17, 1831, § 6, reprinted in 3 *Statutes of Ohio and the Northwestern Territory* 1740 (Salmon P. Chase ed., 1835); Act of Dec. 3, 1825, ch. CCXCII, § 3, 1825 Tenn. Priv. Acts 306; Act of Nov. 16, 1821, ch. LXLIII, §§ 1-2, 1821 Tenn. Pub. Acts 78-79; Act of Jan. 30, 1847, ch. 79, 1846-47 Va. Acts 67; Act of Feb. 4, 1806, ch. XCIV, 1805-06 Va. Acts 51, and the storage of gunpowder, see, *e.g.*, Act of June 26, 1792, ch. X, 1792 Mass. Acts 208; Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627; Act of Dec. 6, 1783, ch. 1059, 11 Pa. Stat. 209.

statute in 1793 stating that "a well regulated militia is the proper and natural defence of every free state." Act of June 18, 1793, ch. XXXVI, 1793 Del. Laws 1134. Thus, the Second Amendment succeeded in permitting the States to retain control over their militias while enabling a more effective federal government to be put in place.

3. The theory that the Second Amendment protects a non-militia right to possess firearms—and that the Amendment's militia clause simply expresses one purpose for that protection—is further undermined by state militia statutes. Before and after the Second Amendment's adoption, each State provided for its militia to be armed according to local preferences—with the States themselves often choosing to provide the arms and regulate where they were kept.

For example, Pennsylvania's 1777 militia statutes required that the Commonwealth provide arms for a portion of the militia without regard to need. Act of Mar. 17, 1777, ch. 750, § XIV, 9 Pa. Stat. 84. The arms provided by the Commonwealth were not kept in individual hands; they were kept "in the care and under the direction" of lieutenants. *Ibid.* By 1778, North Carolina followed a similar course, requiring that the Brigadier Generals of each district "take into their Possession, and distribute to the Troops to be raised, such Guns as belong to the Public, and are good and sufficient; and in case there should not be Arms for every Man, then, and in that case, the Colonel or commanding Officer of each County shall purchase Guns for the Men marching from [such County] * * * ." Act of 1778, 1778 N.C. Sess. Laws 4, § VI.

Likewise, by 1794, New York undertook to purchase weapons for its militia. Act of Mar. 22, 1794, ch. 27, 1794 N.Y. Laws 503. By 1798, New York provided for state-owned weapons to "be distributed or deposited in such place or places" as the State deemed appropriate. Act of

Aug. 27, 1798, ch. 5, 1798 N.Y. Laws 299-300. Connecticut and Delaware enacted laws to provide weapons for militia members unable to buy their own, again placing those weapons under state and local control. See Act of Dec. 18, 1776, 1776 Conn. Pub. Acts 441, 443, 445; Act of Feb. 5, 1782, 1782 Del. Laws 3, 6.[9]

For those reasons, it is a mistake to read the Uniform Militia Act of 1792 as implicitly recognizing a non-militia right to possess firearms (even apart from the fact that the Act was ignored in practice, see *Perpich* v. *Dept. of Defense*, 496 U.S. 334, 341 (1990)). Under the Act, Congress purported to discharge its constitutional duty to "arm" the militia by requiring that all militia members possess certain weapons and equipment. But both before and after the Act, the *States* determined how their militia members were to be armed when called forth by the States, with some States providing arms to their militia members and requiring that those weapons, when not being used for militia purposes, be kept by state officers under state control. That reflects the understanding that the Second Amendment was a federalism provision that enhances state authority—not a restriction on state authority to regulate firearms.

B. The Role Of State Militias In Modern Times Cannot Alter The Constitution's Meaning

That the Second Amendment is about state militias may seem incongruous in the modern era. While state militias formed a central part of the Framing-era debate, they have a different role today—although almost all of the States, and the District of Columbia, still have militia statutes allowing the militia to be called forth for a variety of purposes, including to quell rebellions.

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[9] Further, Delaware established a state-run commissary to "collect together all public [(i.e., state-owned)] Arms, Stores or Provisions and Military Stores" and to keep them "securely and safely * * * in some convenient and proper place." *Id.* at 13.

The Second Amendment today, as it did in the late eighteenth century, protects a State's ability—if it so chooses—to have a well regulated militia made up of its citizens. By doing so, the Second Amendment protects States from unreasonable federal regulations intruding on this permissible state function.[10]

III. THE PRACTICES OF NATIONS SHARING OUR COMMON-LAW HERITAGE CONFIRM THE SECOND AMENDMENT'S UNIQUE ROOTS IN AMERICAN FEDERALISM

Notwithstanding overwhelming evidence that the Second Amendment reflects our Nation's unique experiment in federalism—and seeks to strengthen rather than handicap the States' authority to protect their citizenry—the majority below cited the English Bill of Rights and Blackstone as evidence that there was a non-militia right of gun ownership in England before ratification of the Constitution. Pet. App. 20a-22a. As noted elsewhere, that misreads English history and Blackstone, see n.3, *supra*; see Historians Br. 2-3, 5-9. More fundamentally, if private gun ownership were a natural-law right inherited from our colonial mother country, the laws of other Nations sharing our heritage should treat individual gun ownership as a protected activity. But those well-governed, democratic Nations extensively regulate and limit firearm ownership in the service of public safety. And while they do not have a Second Amendment or similar provision, that is merely further evidence that the Second Amendment has its origins in the uniquely American tradition of federalism—and the unique role of state militias in this Nation's early history—not in some prior common law tradition.

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[10] Indeed, in many States the militia have not been supplanted by the National Guard. Those States thus retain authority to call forth their militias in times of natural disasters, for example. See Reserve Forces Policy Board, Office of the Secretary of Defense, *Annual Report 2004* 46 (2005) ("These forces exist in 23 states and have varying organizations, structures, and responsibilities.").

A. England And Canada Have Handgun Bans That Closely Parallel D.C.'s

Confronted with the destructive and unlawful use of pistols, England has banned handguns altogether. After long regulating firearms, see *e.g.*, Firearms Act, 1920, 10 & 11 Geo. 5, c. 43 (Eng.), England has only increased that regulation in response to a growing need to protect the lives of its citizens. Parliament has banned semi-automatic rifles, pump-action rifles, and regulated shotguns for decades. See Firearms (Amendment) Act, 1988, c. 45 (Eng.). And in 1996, after a licensed gun owner massacred 16 school children, see G. Bowditch & K. Alderson, *16 Classmates Die with Their Teacher*, Times (U.K.), Mar. 14, 1996, at 1, Parliament passed a near total ban on handguns. See Firearms (Amendment) Act, 1997, c. 5 (Eng.); Firearms (Amendment) (No. 2) Act, 1997, c. 64 (Eng.). Thus, the Nation that brought us both Blackstone and the English Bill of Rights bans handguns. Indeed, although the English Bill of Rights remains in effect today, it has not prevented Parliament from enacting regulations that parallel the ones at issue here.

Like England, Canada has increased firearm regulation in response to growing threats of gun violence. Since the 1930s, Canada has required permits and registration for handgun ownership. See Canada Firearms Centre, *History of Firearms Control in Canada: Up to and Including the Firearms Act*, available at http://www.cfc-cafc.gc.ca/polleg/hist/pdfs/histoe.pdf. Under Canadian law, handguns have long been classified as "restricted" firearms. Criminal Law Amendment Act of 1977, 1976-77

Acts of the Parliament of Canada, ch. 53, pp. 1283, 1310-1; Canadian Crim. Code, R.S.C., ch. C 46 § 84(1) (1985). The current Canadian regime—enacted in 1995—also requires licensing and registration of firearms. Canadian Crim. Code, R.S.C., ch. C 46 § 91(1) (1985).

B. Australia, New Zealand, And South Africa All Strictly Regulate Firearms

Other Nations with English colonial roots likewise strictly regulate firearm possession. Australia, like England and Canada, has steadily increased regulation of firearm ownership. In 1996, after 35 people were killed and 19 wounded by an assailant using a semi-automatic rifle, Editorial, *Port Arthur Revisited*, Australian, Apr. 28, 2006, at 15, the Australian states harmonized their firearm laws through a Nationwide Agreement on Firearms. That agreement effectively banned self-loading rifles and self-loading and pump-action shotguns; introduced nationwide registration for all firearms; and required that all license applicants establish a satisfactory reason for firearm ownership. Austl. Inst. of Criminology, *Firearm-related Violence: The Impact of the Nationwide Agreement on Firearms*, 1-2 (1999).

New Zealand's governing Arms Act generally requires an individual to obtain a license from the police. See Arms Act 1983, 1983 S.N.Z. No. 44, § 20. To obtain a standard firearm license, the applicant must prove that he or she is "a fit and proper person to be in possession of a firearm." *Id.* § 24(1)(b); see also Arms Regulations 1992, 1992 S.R. No. 346, §§ 14-16 (application regulations). Licensing requirements are stricter for pistols. Arms Act 1983, 1983 S.N.Z. No. 44, § 2. Among other things, licenses will issue only to those acting in one of the specified capacities in the Act—*e.g.*, as "[a] member of an incorporated pistol shooting club," "[a] person to whom the pistol or restricted weapon has special significance as an heirloom or memento," or "[t]he Director or Curator of a bona fide museum." Arms Act 1983 §§ 29-30. Each endorsement is revocable, *id.* § 33, and subject to conditions that include strict storage requirements, a duty to maintain restricted weapons in inoperable condition, and, in some cases, any other conditions that a "member of the Police thinks fit." *Id.* § 32; see also Arms Regulations 1992 §§ 22, 28.

South Africa too imposes strict requirements on firearm owners. Responding to a rapid escalation of gun-related crimes, the South African Parliament promulgated the Firearms Control Amendment Act ("FCA") of 2000. See Firearms Control Act 60 of 2000; see also Firearms Control Act 43 of 2003 (amending original legislation). To secure a firearm license, individuals must obtain a competency certificate that requires an extensive background check, training, and testing. See Firearms Control Act 60 of 2000 §§ 6-9. The FCA defines the legitimate purposes for owning firearms, and prescribes licensing requirements accordingly. See, *e.g.*, *id.* §§ 13-20. Additionally, it imposes strict storage requirements, *id.* §§ 83, 120(8), controls ammunition and firearm parts, *id.* §§ 90-94, declares certain persons to be unfit to possess firearms, *id.* §§ 102-05, and requires firearms to be made available for inspections, *id.* §§ 106-09. Finally, to encourage compliance, the FCA creates criminal offenses and imposes penalties (ranging from fines to imprisonment) for violations. *Id.* §§ 120-22.

* * * * *

Wholly apart from any debate about the general relevance of foreign law, the experience of England and other Nations with English colonial roots discredits the claim that there is an inalienable personal right to own guns traceable to our respective Nations' common legal tradition or heritage. Each of the Nations sharing our heritage—including the country that gave us Blackstone and the English Bill of Rights—extensively regulates private firearm possession to protect its citizens' lives, often more extensively than the District does here.[11] Thus, far from reflecting a shared pre-constitutional value, the Second Amendment reflects something uniquely American—the critical role of the states in our federal system—and the correspondingly unique role of state militias in this Nation's early history. Properly read, the Second Amendment prevents unreasonable federal encroachment on the ability of the States to maintain, arm, and call forth their militias. It does not handicap the States' exercise of their police powers to regulate dangerous instrumentalities, including firearms, to fulfill their equally central role of protecting the lives, liberty, and property of their citizens.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[11] Regulations in these successful democracies also put the lie to the myth that gun control laws make it easier for government to tyrannically oppress its citizens. While many have suggested that gun control eased Hitler's rise to power, "[t]he history of gun control in Germany from the post-World War I period to the inception of World War II seems to be a history of declining, rather than increasing, gun control." Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws*, 73 Fordham L. Rev. 653, 671 (2004). It was the inability of the German *government* to remain sufficiently strong and organized that allowed Hitler's "street gangs" to "seize[] control of the resources of a great modern State," causing "the gutter" to come "to power." Alan Bullock, *Hitler, A Study in Tyranny* 149 (abridged ed. 1991). While Germany had discriminatory laws that barred Jews from having firearms, that proves only the evils of discrimination. It surely does not support the myth that arming everyone might allow an oppressed minority, no matter how courageous, to restore democracy and liberty when confronted with Hitler's (or another demagogue's) larger armed mob.

Respectfully submitted.

JANIS M. MEYER
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APPENDIX

APPENDIX A
DESCRIPTIONS OF *AMICI CURIAE*

The American Jewish Committee ("AJC"), a national organization of over 175,000 members and supporters and 31 local chapters nationwide, including Washington, D.C., was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans. Recognizing that the unrestricted private possession of guns constitutes a very real danger to the Nation, AJC has a long history of supporting gun control laws. Among its activities, AJC supported the federal Gun Control Act of 1968, the federal Assault Weapon Control Act of 1989, and the Brady Handgun Prevention Act of 1993.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic, and religious rights of American Jews. It has supported hand gun control for over 40 years, filing numerous briefs in support of such regulations.

The Anti-Defamation League ("ADL") fights anti-Semitism and all forms of bigotry, defends democratic ideals, protects civil rights for all, and is an organization well known for its long history of monitoring, exposing, and combating extremists. ADL has called for the adoption of federal and state initiatives designed to make it more difficult for children and extremists to acquire and use guns and other dangerous weapons.

The Baptist Peace Fellowship of North America gathers, equips, and mobilizes Baptists to build a culture of peace rooted in justice. Its members work for peace and justice throughout North America and around the world. It provides training in conflict transformation and nonviolence in various countries, including Sudan and the Philippines.

Ceasefire NJ ("CFNJ") is dedicated to reducing gun violence by influencing public policy at the state, regional, and national level, educating the public, and mobilizing communities in support of reducing gun violence. CFNJ believes that framing gun violence prevention as both a public health and public policy issue will lead to enactment of sensible state and national laws and safer and healthier schools and communities.

Citizens for a Safer Minnesota is a nonprofit member-based advocacy organization dedicated to ending gun violence.

The DC Statehood Green Party (formed in 1997 by a merger between the DC Statehood Party and the DC Green Party) emphasizes the "Ten Key Values" of the national Green Party, with a focus on achieving autonomy for the District of Columbia (currently a "federal district") through full statehood. The DC Statehood Green Party focuses on, among other things, the need for the District of Columbia to have autonomy over local government operations. In connection with that, it supports the exercise of the District's police power at issue in this case.

The Educational Fund to Stop Gun Violence ("EFSGV") seeks to secure freedom from gun violence through research, strategic engagement, and effective policy advocacy. EFSGV has always supported the District of Columbia's right to determine its own gun laws.

The Freedom States Alliance is a national non-profit organization working to free Americans from gun violence. Its focus is to reduce gun-related deaths and injuries through public awareness campaigns and by providing technical assistance and support to grassroots organizations.

The Friends Committee on National Legislation ("FCNL") is the largest peace lobby in Washington, D.C.

Founded in 1943 by members of the Religious Society of Friends (Quakers), FCNL staff and volunteers work with a nationwide network of tens of thousands of people from many different races, religions, and cultures to advocate social and economic justice, peace, and good government.

The Gray Panthers seeks to create a humane society that puts the needs of people over profits, responsibility over power, and democracy over institutions.

GunFreeKids.org is a new political organization dedicated to strengthening the gun violence prevention network and to raising awareness for existing organizations.

The Illinois Council Against Handgun Violence ("ICHV") seeks to reduce death and injury caused by gun violence. ICHV does that by informing the public, the media, and policymakers about the epidemic of gun violence. ICHV also serves as a clearinghouse for information on gun violence issues.

IllinoisVictims.org is a victims' rights watchdog organization that advocates for victims' rights and violence prevention issues. The website-based organization provides resource referrals, legislative information, prisoner watch, victim support, media relations, and evaluates and promotes programs that help victims cope with or prevent violent victimization.

Iowans for the Prevention of Gun Violence ("IPGV") is a nonprofit, educational organization that seeks to reduce firearm-related deaths and injuries in Iowa, and to make Iowa a role model for other States in the area of gun violence prevention. IPGV is concerned with all forms of gun violence—gun homicides, gun suicides, and unintentional shootings.

The Jenna Foundation for Nonviolence, Inc., works diligently to end violence in our society. It teaches children and adults the tools of violence prevention. It makes support, advocacy, education, and mentoring the building blocks for society by maintaining a low-cost mentoring program through schools towards ending violence; establishing a free community outreach center to reach victims and provide a known, trusted place for victims; and developing a community-wide gateway for delivering victim services.

The Karla Zimmerman Memorial Foundation, Gun Violence and Teens ("GAT") program provides educational programs to secondary schools in the California Bay Area regarding violence prevention. Led by victims and utilizing victim speakers, GAT teaches young people how to resolve conflicts peacefully, about the dangers and lures of guns, and about the consequences of violence and how to avoid it.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with 40 years of policies adopted by the General Assembly calling for federal and state regulation of gun ownership. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

The Methodist Federation for Social Action, founded in 1907, is a national network of United Methodists working for justice and peace within and beyond the United Methodist Church. Organized into chapters across the United States, the work of the Federation is focused in the areas of peace, poverty, people's rights, and progressive initiatives. The Federation has long advocated for public policies that promote nonviolent means of resolving conflict.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the Nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared before courts throughout the Nation in numerous civil rights cases. The NAACP has challenged the physical, social, and economic impact of handgun violence on African-Americans and other minorities, and has sought injunctive relief to end the negligent sale, marketing, and distribution of handguns in the United States. In addition, the NAACP has called for the enactment of safe, sane, and sensible gun control measures.

The National Council of Jewish Women ("NCJW") is a volunteer organization, inspired by Jewish values, that works through its network of 90,000 members and supporters nationwide to improve the quality of life for women, children, and families, and to ensure individual rights and freedoms for all. NCJW's Resolutions state that the organization endorses and resolves to work for "laws and policies to restrict and regulate guns."

New England Coalition to Prevent Gun Violence ("NECPGV") is a region-wide, non-profit organization working to prevent gun violence, deaths, and injuries. Providing education, advocacy, and public awareness campaigns, NECPGV brings together organizations and individuals from all six New England States to help raise awareness about this urgent public health and public safety issue. Founded in 2001, NECPGV is the region's only coalition dedicated exclusively to providing New Englanders with the expertise and resources needed to combat the devastating toll of guns in our society.

Since 1993, New Yorkers Against Gun Violence and its Education Fund have worked to reduce gun violence through advocacy and education designed to encourage action, influence public opinion, and lead to policy change. With a primary focus on New York State, the organizations also advocate at the local and national levels for laws, policies, and practices that protect New York State residents and particularly youth from gun violence.

North Carolinians Against Gun Violence Education Fund seeks to make North Carolina safe from gun violence. To that end, it educates the public about preventing gun violence, encourages the enforcement of current gun laws, and promotes the enactment of needed new laws.

The Ohio Coalition Against Gun Violence ("OCAGV") began as a volunteer committee in 1995 based on the concern about gun violence felt by the Interracial Religious Coalition, an organization promoting racial, ethnic, and religious harmony. OCAGV began its work under the auspices of Toledo Metropolitan Mission, which works ecumenically to improve the quality of life for all citizens of the area, especially the poor and powerless. OCAGV's goal is to increase safety in Ohio in regards to firearms. OCAGV educates about gun homicides, suicides, and unintentional deaths and injuries. OCAGV supports and encourages local, state, and federal legislation to reduce the accessibility of firearms in our communities and families.

The Renée Olumbuni Rondeau Peace Foundation ("RORPF") works to promote the American public's awareness of the magnitude of the crime problem and our individual and collective responsibility for the solution. RORPF seeks to accomplish its mission by involvement in three areas: Direct Service to crime victims through the National Coalition of Victims in Action; Educational Support through the Renée Olubunmi Rondeau Memorial Scholarship Fund; and Advocacy through Action Americans.

ROOT (Reaching Out to Others Together) Inc. is committed to advocacy and intervention on behalf of homicide victims and their families. ROOT's mission is to motivate and mobilize communities to take a proactive approach to reducing homicides and the senseless violence occurring in our cities.

The Union for Reform Judaism ("URJ") encompasses 1.5 million Reform Jews in more than 900 North American congregations. The membership of the Central Conference of American Rabbis ("CCAR") includes 1,800 Reform rabbis. The Talmud teaches us that "one who takes a life it is as though they have destroyed the universe and one who saves one life is as though they have saved the universe." (Sanhedrin 4:5) The too-often reflexive resort to violence, and the easy use of deadly violence in particular, stand in direct violation of our traditions. URJ and CCAR have long recognized the importance of education and legislation at the national, state, and local levels that would limit and control the sale and use of firearms and thus heed the biblical injunction that we must not "stand idly by the blood of our neighbor." (Leviticus 19:16)

The Virginia Center for Public Safety ("VACPS") is a non-profit, non-partisan grass roots organization dedicated to the reduction of gun violence in Virginia. VACPS strives to accomplish this mission through awareness, education, and advocacy. VACPS members represent a cross-section of racial, religious, professional, and political groups.

Wisconsin Anti-Violence Effort ("WAVE") Educational Fund is Wisconsin's only statewide organization dedicated solely to preventing gun violence, injuries, and deaths. Through research, education, and advocacy, WAVE raises awareness about firearm violence, provides current information to the public and to policymakers, and promotes commonsense measures that will bring us to the forefront of gun violence prevention.

The individual victims and families of victims of gun violence joining this brief include the following: Lynnette Alameddine, mother of Ross Alameddine, who was killed along with 31 others by a gunman at Virginia Polytechnic Institute and State University ("Virginia Tech") on April 16, 2007; Jeri and Michael Bishop, parents of Jamie Bishop, also killed in the Virginia Tech shooting; Dennis and Beverly Bluhm, parents of Brian Bluhm, killed in the Virginia Tech shooting; Susan Carney, mother of Katelyn Carney, injured at the Virginia Tech shooting; Letitie Clark, mother of Ryan Clark, and Pat Craig, Aunt of Ryan Clark, who was killed at Virginia Tech; Garrett Evans, injured at Virginia Tech; Donna and David Finkelstein, parents of Mindy Finkelstein, and Mindy Finkelstein, who was injured with four others by a gunman at the North Valley Jewish Community Center in California on August 10, 1999; Anne and Andrew Goddard, parents of Colin Goddard, injured at Virginia Tech; Suzanne Grimes, mother of Kevin Sterne, also injured at

Virginia Tech; Greg Gwaltney, father of Matt Gwaltney, killed at Virginia Tech; Lori Haas, mother of Emily Haas, and Emily Haas, who was injured at Virginia Tech; Elilta Habtu, also injured at Virginia Tech; Marian and Chris Hammaren, parents of Caitlin Hammaren, killed at Virginia Tech; Stefanie Hofer, widow of Jamie Bishop, killed at Virginia Tech; Harry and Karen Pryde, parents of Julia Pryde, killed at Virginia Tech; William and Jeanne O'Neil, parents of Daniel O'Neil, killed at Virginia Tech; Peter and Cathy Read, parents of Mary Read, killed at Virginia Tech; Loren Lieb and Alan Stepakoff, parents of Joshua Stepakoff, injured at the North Valley Jewish Community Center; Dr. Diane Strollo, mother of Hilary Strollo, and Dr. Patrick J. Strollo, brother of Hilary Strollo, who was injured at Virginia Tech.

APPENDIX B

STATE MILITIA STATUTES

Connecticut:

1. Act of Dec. 18, 1776, 1776 Conn. Pub. Acts 441, 443, 445, provides in relevant part:

It is therefore further Enacted by the Authority aforesaid, That all male Persons from Sixteen Years of Age to Sixty, not included in that part of the Militia called the Train-band, or exempted from common and ordinary Training, shall continue an Alarm List in this State, (excepting Members of the Council, of the House of Representatives, and *American Congress*, for the Time being, the Treasurer and Secretary of the State, Ministers of the Gospel, the President, Tutors and Students of *Yale*-College, for the Time being, and Negroes, Indians, and Molattoes); and is of sufficient Ability in the Judgment of the Select-men of the Town where they have their usual Place of Abode, shall respectively provide for and equip themselves with such Arms and Accoutrements as by Law is directed for those of the Train-band in the Militia aforesaid; and shall, in Case of an Alarm, or Orders given, be under the Command of such Officers as by this Act is directed; any Law, Usage, or Custom to the contrary notwithstanding.

* * * * *

Be it further enacted, That when the Select men shall adjudge any Person unable to equip and arm himself as in this Act is required, they shall certify the same under their Hands to the Captain or commanding Officer of the Company to which such Person shall belong; and the said Select-men shall, at the Expence of the Town, arm and equip such deficient Person, and the Arms so provided shall be the Property of such Town, and the Fines and Penalties in this Act provided for such as shall neglect or refuse to join and march when called for, shall be appropriated for or towards reimbursing the Expences of providing such Arms.

Delaware:

2. Act of Feb. 5, 1782, 1782 Del. Laws 3, 6-7, 13, provides in relevant part:

An ACT for establishing a Militia within this State:

* * * * *

6. *And be it Enacted*, That every Person between the Ages of eighteen and fifty, or who may hereafter attain to the Age of eighteen Years (Clergymen and Preachers of the Gospel of every Denomination, Judges of the Supreme Court, Sheriffs, Keepers of the public Gaols, School-Masters teaching a Latin School, or having at least twenty English Scholars, and indented Servants *bona Fide* purchased, excepted) who is rated at Six Pounds, or upwards, towards the Payment of public Taxes, shall, at his own Expence, provide himself; and every Apprentice, or other Person, of the Age of eighteen and under twenty-one Years who hath an Estate of the Value of Eighty Pounds, or whose Parent is rated at Eighteen Pounds towards the public Taxes, shall, by his Parent or Guardian, respectively, be provided with a Musket or Fire-lock with a Bayonet, a Cartouch-Box to contain twenty-three Cartridges, a Priming-Wire, a Brush and six Flints, all in good Order, on or before the first Day of *June* next, and shall keep the same by him at all Times, ready and fit for Service, under the Penalty of Twenty Shillings for every two Months Neglect or Default, to be paid by such Person, if of full Age, or by the Parent or Guardian of such as are under twenty-one Years, the same Arms and Accoutrements to be charged by the Guardian to his Ward, and allowed at settling the Accounts of his Guardianship.

* * * * *

15. *And be it Enacted,* That all Fines and Forfeitures that shall be paid into the Hands of any Treasurer of a Battalion, in Pursuance of this Act, shall be applied for the Purpose of purchasing Arms, Accoutrements and Ammunition for the Use of the Battalion, as the President or Commander in Chief from Time to Time shall order and direct, and for purchasing such Drums, Colours and Fifes for the several Companies, and also for paying Adjutants, Drummers and Fifers, and in such Manner as the Field-Officers thereof, shall, from Time to Time, order and direct.

16. *Provided always, and be it Enacted,* That no Ammunition shall be delivered for the Use of any Battalion until the same be made up into Cartridges, which the President or Commander in Chief is hereby required to have done at the Expence of the State.

17. *And be it Enacted,* That whenever any Arms, Accoutrements, or Ammunition shall, by Order of the President or Commander in Chief, be delivered by the Treasurer of the Battalion, or any other Person in whose Hands the same may be, for the Use of such Battalion, the Commanding Officer thereof shall give a Receipt for the same, accurately specifying the Articles received, and the Number of Arms, Accoutrements and Cartridges respectively, who upon delivering them to the Commanding Officers of Companies, shall take Receipts in like Manner, and the said Commanding Officers of Companies, upon delivering them to the Privates, shall make Entries in a Book, fairly kept, specifying the Articles and the Numbers as aforesaid, and the Names of the Persons respectively, into whose Hands they were by him delivered, which Persons respectively shall be accountable to him for the full Value of every of the said Articles received by them, in Case of Abuse, Waste or Imbezzlement, to be sued for and recovered by him, in the Manner herein after directed, and the said Commanding Officers

of Companies shall be accountable to the Treasurer for the full Value of every of the said Articles respectively received by them, in Case of Abuse, Waste or Imbezzlement, to be sued for and recovered by the said Treasurer in like Manner.

* * * * *

33. *And be it Enacted,* That a proper Person may be appointed by the President or Commander in Chief, to be Commissary of military Stores and Provisions, in each of the Counties of this State, whose Business and Duty shall be to collect together all public Arms and Military Stores, and the same securely and safely to keep in some convenient and proper Place, in good Order and fit for Service, and not to deliver out any of the said Arms, Stores or Provisions, but by Virtue of an Order in Writing from the President or Commander in Chief, or, in his Absence, and in Case of Emergency, by an Order from the Officer commanding the Militia in the respective Counties, and to take proper Receipts for all Arms, Stores and Provisions delivered out, and make Report of the Condition of the Arms, Stores and Provisions in his Care and Custody, once in every three Months, to the President or Commander in Chief; and the said Commissary is hereby directed to keep a just and fair Account of all Arms, Stores and Provisions which may come to his Hands as aforesaid, and of the Delivery thereof.

3. Act of June 18, 1793, ch. XXXVI, 1793 Del. Laws 1134, provides in relevant part:

An ACT *for* establishing *the militia in this state*:

WHEREAS a well regulated militia is the proper and natural defence of every free state; And as the several laws enacted by the Legislature of this state for the regulation of the militia thereof have been found to require material alterations; in order to which it has been thought more adviseable to revise the whole system, than to amend it by supplementary statutes; therefore * * *.

Georgia:

4. Act of Nov. 15, 1778, reprinted in 19 Colonial Records of the State of Georgia 103-04 (Allen Candler ed., 1911), provides in relevant part:

AN ACT, *for the better ordering and regulating the Militia of this State.*

WHEREAS a well ordered and disciplined Militia, is essentially necessary, to the Safety, peace and prosperity, of this State, and a Militia Law, upon just principles hath ever been regarded, as the best Security of Liberty and the most effectual Means, of drawing forth and exerting the Natural Strength of a State, BE IT ENACTED and it is hereby enacted by the Representatives of the People of the State of Georgia in general Assembly met, and by the authority of the same, That the Governor or Commander in Chief for the time being, with the advice and consent of the Executive Council, shall have power to assemble and call together all Male Persons, except as hereafter excepted, in this State, from the age of Fifteen to Sixty Years, within the Towns, divisions, Counties, Parishes or places within this State, at such times, and Arm and Array them, in such manner as is hereafter expressed and declared, and to form them into Companies, Troops and Regiments, and in case of Insurrection, Rebellion or Invasion them to lead, conduct, or employ, or cause to be led, conducted, and employed, as well within the said Towns, divisions, Counties, parishes or places, where such Persons reside, as into any other division, parish, County or place within this State, for suppressing all such insurrections, as may happen to be * * *.

5. Act of Feb. 18, 1799, 1799 Ga. Laws 76, provides in relevant part:

An act to alter and amend the Militia Law of this State, and to *provide for arming the militia thereof*:

WHEREAS the defence and safety of republican states must greatly depend on their militia, which cannot be well organized and disciplined without arms and experienced officers; and no adequate provision has been made by this state for the attainments of those desirable objects * * *.

Massachusetts:

6. Act of Mar. 14, 1776, ch. VII, 1775-76 Mass. Acts 31-33, provides in relevant part:

AN ACT for the executing in the Colony of the *Massachusetts-Bay*, in *New-England*, one Resolve of the *American Congress*, dated March 14, 1776, recommending the disarming such persons as are notoriously disaffected to the cause of America, or who refuse to associate to defend by arms the *United American Colonies*, against the hostile attempts of the *British* Fleets and Armies, and for the restraining and punishing persons who are inimical to the Rights and Liberties of the said *United Colonies*, and for directing the proceedings therein:

WHEREAS on the fourteenth of March *One Thousand seven Hundred and Seventy-six, a certain Resolve was made and passed by the* American *Congress, of the following Tenor*, viz. "*Resolved*, That it be recommended to the several Assemblies, Conventions and Councils, or Committees of Safety of the United Colonies, immediately to cause all Persons to be disarmed within their respective Colonies, who are notoriously disaffected to the Cause of *America*, or who have not associated and refuse to associate to defend by

Arms these United Colonies, against the hostile Attempts of the *British* Fleets and Armies; and to apply the arms taken from such Persons in each respective Colony, in the first Place, to the arming of the Continental Troops raised in said Colony; in the next, to the arming such Troops as are raised by the Colony for it's own Defense, and the Residue to be applied to the arming the Associators; that their Arms when taken, be appraised by indifferent Persons, and such as are applied to the arming Continental Troops, be paid for by Congress; and the Residue by the respective Assemblies, Conventions or Councils, or Committees of Safety:"

Be it therefore enacted by the Council, and House of Representatives in General Court assembled, and by the Authority of the same, That every Male Person above sixteen Years of Age, resident in any Town or Place in this Colony, who shall neglect or refuse to subscribe a printed or written Declaration of the Form and Tenor herein after prescribed, upon being required thereto by the Committee of Correspondence, Inspection and Safety for the Town or Place in which he dwells, or any one of them, shall be disarmed, and have taken from him in Manner hereafter directed, all such Arms, Ammunition and Warlike Implements, as by the strictest Search can be found in his Possession or belonging to him; which Declaration shall be in the Form and Words following, *viz.*

* * * * *

And be it further enacted by the Authority aforesaid, That the Committee of Correspondence, Inspection and Safety in each and every Town and Place in this Colony, or some one Member of such committee, shall without Delay tender the said Declaration to every Male Person in their respective Town and Places above the Age of sixteen Years, requiring them severally to subscribe the same with his Name or Sign in his or their Presence; and if any one shall refuse or neglect so to do for the Space of twenty-four Hours after such Tender is made, the said Committee, or some one of them, shall forthwith give Information of such Refusal or Neglect, to some Justice of the Peace for the County in which such delinquent dwells: And the Justice to whom such Information is given, shall forthwith make his Warrant, directed to the Sheriff of the same County, or his Deputy, or one of the Constables of the Town in which such supposed Delinquent hath his usual Place of Abode, or any indifferent Person, by Name requiring him forthwith to make the Body of such Delinquent, and him bring before the said Justice to answer to such Information, and to shew cause, if any he hath, why he should not be disarmed, and have taken from him all his Arms, Ammunition and Warlike Implements; and in Case it shall be made to appear to the said Justice, that the said Information is true, and he should not shew any sufficient Cause why he should not forthwith be disarmed, &c: then the said Justice shall make his Warrant, directed to some proper Person, requiring him, without Delay, to disarm the said Delinquent, and take from him all his Arms, Ammunition and Warlike Implements; and in case such Delinquent shall refuse to resign and give up all his Arms, Ammunition and Warlike Implements, the person to whom the said Warrant is directed, shall have Power, after demanding Admission to enter the Dwelling House, or any other Place belonging to the Delinquent, where he may have Reason to suspect such Arms are concealed, and make strict and diligent Search for the Articles aforesaid: And in case he shall find any of the said Articles, he shall take them and immediately carry and deliver them to the Justice who made the said Warrant, which Justice is hereby required to receive them, and to appoint some indifferent and judicious Person or Persons to appraise the same; and the said Justice shall keep a true Account of all such Arms, ammunition and Accoutrements, the person or Persons they were taken from, and the Sum or Sums they were appraised at, and shall return a true Account thereof into the Secretary's Office as soon as may be, and shall keep the said Arms, &c. safely to be disposed of and paid for as the General Court shall order. And if the Person to whom the Warrant is directed, shall meet with Resistance, or shall have Reason to apprehend that he shall meet with Resistance in the Execution of the said Warrant, then he shall give Information thereof to the Justice of the Peace who issued the said Warrant, who if he shall judge it needful for carrying such Warrant into Execution, shall go in Person to some Military Officer in the same County, and require him immediately to raise such a Number of the Militia as the said Justice shall judge necessary, and the said Justice shall proceed in Person with the said Militia, and the person to whom the said warrant is directed, and in the most prudent Way he can, cause the delinquent to be disarmed, and all the Articles aforesaid to be taken from him, and appraised and retained in Manner as is above directed.

And in case it shall be made to appear to any Justice of the Peace, that there is Reason to suppose that any of the Arms, Ammunition or warlike Implements, belonging to any Person who shall refuse or delay as abovesaid to subscribe the said Declaration, are concealed in any Dwelling-House or other Place not belonging to such Delinquent, such Justice shall have Power, and is hereby directed to make his Warrant to some proper Person, requiring him to make diligent search in such suspected Place or Places, to be particularly described or mentioned in such Warrant for the Articles aforesaid; and in case they shall be found, such Proceedings shall be thereupon had touching the same, as it above prescribed, when they are in the actual Possession of the Delinquent aforesaid;

and in case of Resistance or Opposition made to the Execution of such Warrant, the like Proceedings shall thereupon be had as are above directed, when Resistance is made to the searching for or taking such Articles, when in the actual Possession of such Delinquent.

7. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218-19, provides in relevant part:

An Act in addition to the several acts already made for the prudent storage of gun-powder within the town of *Boston*:

WHEREAS the depositing of loaded Arms in the Houses of the Town of Boston, *is dangerous to the Lives of those who are* disposed *to exert themselves when a Fire happens to break out in the said Town*:

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the Authority of the same, That if any Person shall take into any Dwelling-House, Stable, Barn, Out-house, Warehouse, Store, Shop, or other Building, within the Town of *Boston*, any Cannon, Swivel, Mortar, Howitzer, or Cohorn, or Fire-Arm, loaded with, or having Gun-Powder in the same, or shall receive into any Dwelling-House, Stable, Barn, Out-house, Store, Warehouse, Shop, or other Building, within the said Town, any Bomb, Grenade, or other Iron Shell, charged with, or having Gun-Powder in the same, such Person shall forfeit and pay the Sum of *Ten Pounds*, to be recovered at the Suit of the Firewards of the said Town, in an Action, of Debt, before any Court proper to try the same; one Moiety thereof to the Use of the said Firewards, and the other Moiety to the Support of the Poor of the Town of *Boston*.

And be it further enacted by the Authority aforesaid, That all Cannon, Swivels, Mortars, Howitzers, Cohorns, Fire-Arms, Bombs, Grenades, and Iron Shells of any

Kind, that shall be found in any Dwelling House, Out-House, Stable, Barn, Store, Warehouse, Shop, or other Building, charged with, or having in them any Gun-Powder, shall be liable to be seized by either of the Firewards of the said Town: And upon Complaint made by the said Firewards to the Court of Common Pleas, of such Cannon, Swivels, Mortars, or Howitzer, being so found, the Court shall proceed to try the Merits of such Complaint by a Jury; and if the Jury shall find such Complaint supported, such Cannon, Swivel, Mortar, or Howitzer, shall be adjudged forfeit, and be sold at public Auction; and one Half of the Proceeds thereof shall be disposed of to the Firewards, and the other Half to the Use of the Poor of the Town of *Boston.* And when any Fire-Arms, or any Bomb, Grenade, or other Shell, shall be found in any House, Out-House, Barn, Stable, Store, Warehouse, Shop, or other Building, so charged, or having Gun-Powder in the same, the same shall be liable to be seized in Manner aforesaid; and on complaint thereof, made and supported before a Justice of the Peace, shall be sold and disposed of as is above provided for Cannon.

Be it further enacted, That Appeals shall be allowed in Prosecutions upon this Act as is usual in other Cases.

8. Act of June 26, 1792, ch. X, 1792 Mass. Acts 208-09, provides in relevant part:

An Act in addition to the several Acts now in force, which respect the carting and transporting Gun-Powder, through the streets of the Town of *Boston,* and the storage thereof in the same Town:

WHEREAS the provision in the said acts made, have been found insufficient to prevent the carting and transporting gun-powder, through the streets of the said town, in a dangerous and alarming mode:

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, That from and after the first day of *August* next, no gun-powder shall be carried or transported to or from the magazine, within the said town, or through any of the streets thereof, in any quantity, exceeding twenty-five pounds, being the quantity allowed by law, to be kept in shops for sale, unless the same be carried and transported in a wagon or carriage, closely covered with leather or canvas, and without iron on any part thereof, to be first approbated by the Firewards of said town, and marked in capitals, with the words *approved powder carriage*, under the penalty of forfeiting all such gun-powder, one moiety thereof, to the use of the poor of the said town, and the other moiety to the use of him or them who shall inform and sue for the same.

And be it further enacted by the authority aforesaid, That all gun-powder which shall be imported into the said town of *Boston*, from and after the said first day of *August*, shall be landed at such place or places only, and be carried to the magazine aforesaid, by such passage by land or water only, as shall be directed and pointed out by the Firewards of the said town, under the penalty of forfeiting to the uses aforesaid, all such powder as shall be landed or conveyed otherwise than is in this act provided: The penalties and forfeitures aforesaid, to be sued for and recovered by bill, plaint or information in any Court proper to try the same; and the Firewards aforesaid, are hereby directed, from time to time, to publish their regulations and orders respecting the same in three of the public newspapers in the said town, six weeks successively; *provided nevertheless*, That nothing in this act shall be construed to extend, or operate as a prohibition to the transporting of powder, from and out of the magazine, in the town of *Boston*, into any part of this Commonwealth, or from the powder-mills, in the country to the magazine aforesaid, in such carts or carriages, as hath been customary, and heretofore used.

New Hampshire:

9. Act of June 24, 1786, N.H. Laws 114-25, provides in relevant part:

AN ACT, for forming and regulating the militia within this state, and for repealing all the laws heretofore made for that purpose:

WHEREAS it is the duty and interest of every state to have the militia thereof of properly armed, trained, and in complete readiness to defend against every violence of invasion whatever and whereas the laws now in force respecting the regulation of the militia, are insufficient for those purposes:

BE it therefore enacted by the Senate and house of representatives, in general court convened, and by the *authority* of the same. That the several laws, clauses and paragraphs of laws relative to regulating the militia, be and hereby are repealed, and declared null and void.

New York:

10. The Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627, provides in relevant part:

AN ACT to prevent the danger arising from the pernicious practice of lodging gun powder in dwelling houses, stores, or other places within certain parts of the city of New York, or on board of vessels within the harbour thereof:

* * * * *

WHEREAS the storing of gun powder within the city of New York is dangerous to the safety thereof.

Be it therefore enacted by the People of the State of New York, represented in Senate and Assembly, and it *is hereby enacted by the authority of the same,* That from and after the passing of this act, it shall not be lawfull for any merchant, shopkeeper, or retailer, or any other person, or persons whatsoever, to have or keep any quantity of gun powder exceeding twenty-eight pounds weight, in any one place, less than one mile to the northward of the city hall of the said city, except in the public magazine at the Fresh-water, and the said quantity of twenty-eight pounds weight, which shall be lawfull for any person to have and keep at any place within this city, shall be seperated into four stone jugs or tin canisters, which shall not contain more than seven pounds each, on pain of forfeiting all such gun powder, and the sum of fifty pounds for every hundred weight, and in that proportion for a greater or lesser quantity, and upon pain of forfeiting such quantity which any person may lawfully keep as aforesaid, and which shall not be seperated as above directed, with full costs of suit to any person, or persons, who will inform and sue for the same, by any action, bill, or information, in any of the courts of record, in this city, who are hereby impowered, and required, to give special judgment in such action bills or information's, to be brought by virtue of this act, as well for the recovery of the value of such gun powder in specie, as for the penalty aforesaid, besides costs, and to award, effectual execution thereon, provided always that all suits, actions, or prosecutions to be brought, commenced, or prosecuted, against any person or persons, for any thing done in pursuance of this act, shall be commenced and prosecuted without willful delay, within two callendar months next after the fact was committed, and not otherwise.

And whereas vessels arriving from sea, and having onboard as part of their cargo a quantity of gun powder.

Be it enacted by the authority aforesaid, That the commander, or owner or owners, of all such ships or vessels, having gun powder onboard, shall, within twenty-four hours after her arrival in the harbour, and before they hawl along side of any wharf, pier or key within the city, land the said gun powder, by means of their boat or boats, or any other craft, at any place along the ship yards on the East river, or at any place to the northward of the air furnace on the North river, which may be contigious to the magazine at Fresh water, and shall cause the same to be stored there, or in any other proper magazine, which now is or hereafter may be built for that purpose, at any place to the northward thereof, on pain of forfeiting all such gun powder, to any person or persons, who will inform and sue for the same, in like manner, as is herein before directed, with respect to the having and storing of gun powder within the city as aforesaid. And in order to prevent any fatal consequences which may arise, from the carriage of gun powder, in and through the streets of the city of New York, by carts, carriages, or by hand, or otherways, it shall be in tight cask, well headed and hooped, and shall be put into bags or leather-cases, and intirely covered therewith, so as that none be spilt or scattered in the passage thereof, on pain of forfeiting all such gun powder, as shall be conveyed through any of the streets aforesaid in any other manner than is herein directed, and it shall and may be lawfull for any person or persons, to seize the same to his or their own use and benefit—provided the person or persons so offending, be thereof lawfully convicted, before the mayor, recorder, or any two justices of the city aforesaid. And that it shall and may be lawfull, for the mayor recorder, or any two justices of the peace of the city and county of New York, upon demand made by any inhabitant or inhabitants of the said city, who assigning a reasonable cause of suspicion on oath, of the sufficiency of which the said mayor or recorder, or justices, is and are to judge, to issue his or their warrant or warrants, under his or their hands and seals, for searching in the day time for gun powder in any building or place whatsoever, within the limits aforesaid, or any ship or vessel within forty eight hours after her arrival in the harbour, or at any time after any such ship or vessel shall and may have hawled alongside of any wharf pier or key within the limits aforesaid, and that upon any such search, it shall be lawfull for the searchers or persons finding the same, immidiatly to seize, and at any time within twelve hours after such seizure, to cause the same to be removed to the magazine at Fresh water, or to any other proper magazine, which now is or hereafter may be at any place north of Fresh water aforesaid, and the same being so removed, it shall be lawfull to detain and keep the same untill it shall be determined by the mayor, recorder or any two of the justices of the peace of the city and county aforesaid, whether the same shall be forfeited by virtue of this act, and the person or persons so detaining the same, shall not be subject or liable to any action or suit, for the detention thereof, provided always that nothing in the act contained, shall be construed to authorize any person, having such warrant to take advantage of the same, for serving any civil process of any kind whatsoever.

And be further enacted by the authority aforesaid, That if any gun powder, exceeding the quantity which any person by this act may lawfully keep in his custody, shall be found during any fire, or alarm of fire, in the said city, by any of the firemen of the said city, it shall be lawfull for him to seize the same, without warrant from a majestrate, and to hold and have the same to his own use, any thing in this act to contrary notwithstanding. This act to be and continue in force from the passing thereof, untill the twenty-eight day of February in the year of our Lord one thousand, seven hundred and eighty six.

11. Act of Mar. 22, 1794, ch. 27, 1794 N.Y. Laws 503, provides in relevant part:

AN ACT to provide field artillery, arms accoutrements and ammunition for the use of the militia of this State:

Be it enacted by the People of the State of New York represented in Senate and Assembly, That a sum not exceeding seventy five thousand dollars be appropriated to the purchase of field artillery, arms, accoutrements and ammunition for the use of the militia of this State, and that Matthew Clarkson, James Watson and Benjamin Walker be commissioners for that purpose and that they or any two of them are hereby, authorized to purchase such field artillery, arms, accoutrements, and ammunition agreeably to such instructions as they may receive from the person administering the government of this State.

12. Act of Aug. 27, 1798, ch. 5, 1798 N.Y. Laws 299, provides in relevant part:

AN ACT for the further defence of this State and for other purposes:

* * * * *

And be it further enacted, That the arms, ammunition, cannon and military stores, now belonging to the people of this State, and such as may be purchased by virtue of this act, shall be distributed or deposited in such place or places, as the person administering the government of this State shall from time to time direct.

North Carolina:

13. Act of Apr. 8, 1777, ch. XV, §§ I, II, 1777 N.C. Sess. Laws 58, provides in relevant part:

An Act to amend an Act, intitled An act to establish a militia in this state:

I. Whereas a well regulated Militia is absolutely necessary for the defending and securing the Liberties of a free State;

II. *BE it Enacted by the General Assembly of the State of* North Carolina, *and it is hereby Enacted by the Authority of the same*, That every captain of Militia within this state, once in every Six Months, shall return a Muster Roll of his Company, divided and numbered as by the Act aforesaid is directed, to the commanding Officer of the Regiment, under Pain of forfeiting Five Pounds for every Default; and the commanding Officer of each Regiment shall make an exact Return from such Lifts within Twenty Days after receiving the same to the Brigadier General of the District, under Pain of forfeiting Twenty Five Pounds for every default.

14. Act of 1778, 1778 N.C. Sess. Laws 4, §VI, provides in relevant part:

VI. *AND be it further Enacted, by the Authority aforesaid*, That the Brigadier Generals of each District shall take into their Possession, and distribute to the Troops so raised, such Guns as belong to the Public, and are good and sufficient; and in case there should not be Arms for every man, then, and in that Case, the Colonel or commanding Officer of each County shall purchase Guns for the Men marching from the same, and shall give Certificates to those from whom the Guns are bought; which Certificates, countersigned by the Clerks of the respective counties, shall be paid by the Treasurer of either District, and allowed in the settlement of their accounts with the public.

Pennsylvania:

15. Act of Mar. 17, 1777, ch. 750, § XIV, 9 Pa. Stat. 84, provides in relevant part:

An Act to Regulate *the* Militia of the Commonwealth of Pennsylvania:

[Section XIV] (Section XVIII, P. L.) And be it further enacted by the authority aforesaid, That arms and accoutrements sufficient for two classes in each company shall be provided at the expense of the state as soon as convenient by the lieutenant of the city of Philadelphia and of the several counties of this state, and shall be in the care and under the direction of the said lieutenants respectively and marked with the name of the county and the number of the battalion to which they belong.

16. Act of Apr. 1, 1778, ch. 796, §§ I, II, V, 9 Pa. Stat 238-39, provides in relevant part:

An ACT *for the further Security of the Government.*

SECTION 1. WHEREAS the welfare and happiness of the good people of this Common-Wealth, do, next under God, entirely depend upon the maintaining and supporting the independence and sovereignty of the State, as declared by Congress;

SECT. 2. *Be it therefore enacted, and it is hereby enacted by the Representatives of the Freemen of the Common-Wealth of Pennsylvania, in General Assembly met, and by the authority of the same,* That all male white inhabitants of this State above the age of eighteen years, who have not hitherto taken the oath or affirmation mentioned and appointed to be taken in the Act of Assembly intitled, "An Act obliging the male white inhabitants of this State to give assurances of allegiance to the same, and for other purposes therein mentioned," enacted the thirteenth day of June last, shall, on or before the first day of June next, take and subscribe the same in manner and form as by the said Act is directed; and that every such person, neglecting to take the said oath or affirmation, shall, during the time of such neglect, be liable to all the disabilities, incapacities and penalties to which they are subjected by the said Act; and also shall be disabled, from and after the said day, to sue or use any action, bill, plaint or information, in courte of Law, or to prosecute any suit in equity or otherwise howsoever, or to be guardian of the person or estate of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to make any will or testament, and moreover shall be liable and compelled to pay double the taxes, which another person of equal estate, who has taken such oath or affirmation, shall be rated or assessed at, to be levied by the Collector of the public taxes of the Township, Ward or District in which such offender dwells.

* * * * *

SECT. 5. *And be it further enacted*, That every such person who shall refuse or neglect to take the oath or affirmation before mentioned on or before the said first day of June next, and shall refuse or neglect to deliver up his arms to the Lieutenant, or one of the Sub-Lieutenants, of the City or County where he inhabits, on or before the tenth day of June next, or who shall, from and after the same day last mentioned, carry any arms about his person or keep any arms or ammunition in his house or elsewhere, shall forfeit the said arms and ammunition to the State, and also double the value thereof to such person or persons who shall discover the same to any Justice of the Peace of the County where such offender resides, and shall legally prosecute him to conviction before two or more Justices of the Peace for the said County, who are hereby authorised, impowered and required to hear, try, and finally determine the same, and to award the legal costs without appeal to the Supream or any other Court whatsoever.

17. Act of Mar. 20, 1780, ch. 902, §§ I, II, 10 Pa. Stat. 144, provides in relevant part:

An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania:

(Section I, P. L.) Whereas a militia law founded upon just and equitable principles hath been ever regarded as the best security of liberty, and the most effectual means of drawing forth and exerting the natural strength of a state:

(Section II, P. L.) And whereas a well regulated militia is the only safe and constitutional method of defending a free state, as the necessity of keeping up a standing army, especially in times of peace is thereby superceded:

Virginia:

18. Act of May 5, 1777, 1777 Va. Acts 8, provides in relevant part:

An ACT to oblige the free male inhabitants of this state above a certain age to give assurance of ALLEGIANCE to the same, and for other purposes.

WHEREAS allegiance and protection are reciprocal, and those who will not bear the former are not entitled to the benefits of the latter: Therefore, BE it enacted by the General Assembly, that all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service, shall, on or before the tenth day of October next, take and subscribe the following oath or affirmation before some one of the justices of the peace of the county, city, or borough, where they shall respectively inhabit; and the said justice shall give a certificate thereof to every such person, and the said oath or affirmation shall be as followeth, viz. I do swear or affirm, that I renounce and refuse all allegiance to George the third, king of Great Britain, his heirs and successours, and that I will be faithful and bear true allegiance to the commonwealth of Virginia, as a free and independent state, and that I will not, at any time, do or cause to be done, any matter or thing that will be prejudicial or injurious to the freedom and independence thereof, as declared by Congress; and also, that I will discover and make known to some one justice of the peace for the said state, all treasons or traiterous conspiracies which I now or hereafter shall know to be formed against this or any of the United States of America. And the form of the said certificate shall be as follows, to wit: I do hereby certify that hath taken and subscribed the oath or affirmation of allegiance and fidelity, as directed by an act of General Assembly intituled An act to oblige the free male inhabitants of this state above a certain age to give assurance of allegiance to the same, and for other purposes. Witness my hand and seal, this day of A. B.

* * * * *

AND be it farther enacted, by the authority aforesaid, that within one month after the passing of this act, or at the next succeeding court, the court of every county in this commonwealth shall appoint some of their members to make a tour of the county, and tender the oath or affirmation aforesaid to every free born male person above the age of sixteen years, except as before excepted; and that in the certificate directed to be returned, of those who take the oath or affirmation, shall be mentioned the names of such as refuse. And the justices tendering such oath or affirmation are hereby directed to deliver a list of the names of such recusants to the county lieutenant, or chief commanding officer of the militia, who is hereby authorised and directed forthwith to cause such recusants to be disarmed.

19. Act of 1785, 1785 Va. Acts 1, ch. 1 §§ 1-2, provides in relevant part:

An ACT *to amend and reduce into one Act, the several* Laws *for* Regulating *and* Disciplining *the* Militia, *and guarding against* Invasions *and* Insurrections:

SECTION I. WHEREAS the defence and safety of the Commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty, and the different laws heretofore enacted being found inadequate to such purposes, and in order that the same may be formed into one plain and regular system;

SECT. II. *BE it enacted by the General Assembly*, That the Officers of the militia who were displaced and removed from office, by virtue of an Act "For amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections," are hereby reinstated, and shall take precedency of rank agreeable to the dates of the commissions they severally held prior to the passing of the said Act; and vacancies supplied by appointment of the Governor, with the advice of the Privy Council, or recommendation from the respective County Courts.

20. Act of Dec. 26, 1795, ch. XII, §§ I-III, 1795 Va. Acts 17, provides in relevant part:

An ACT authorizing *the Executive to procure arms for the defence of the Commonwealth*:

WHEREAS a well trained militia is the only natural and safe defence of a free state, and in order to carry this principle into effect, it is essentially expedient that the militia of this commonwealth should be armed in such manner as to answer the end of its institution:

SEC. I. *BE it therefore enacted by the General Assembly*, That the Governor, with the advice of the Privy Council, shall, and he is hereby authorized and required, annually to procure for the use and defence of this commonwealth, four thousand stand of small arms and accoutrements, to be distributed amongst the militia, when called into actual service, in such manner as the Executive may direct.

SEC. II. *AND be it further enacted*, That the Executive shall be authorized to furnish each company of artillery with one field piece in good order, if there be a sufficient number of field pieces belonging to this commonwealth, and that the commanding officer of each company shall be responsible for the preservation and return of the field piece.

SEC. III. THIS act shall commence and be in force from and after the passing thereof.

21. Act of Feb. 4, 1806, ch. XCIV, §§ 1-4, 1805-06 Va. Acts 51, provides in relevant part:

An ACT *concerning Free Negroes and Mulattoes*:

* * * * *

Section 1. *BE it enacted by the General Assembly*, That no free negro or mulatto shall be suffered to keep or carry any fire lock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court of the county or corporation in which he resides, which license may at any time be withdrawn by an order of such court. Any free negro or mulatto who shall so offend, shall, on conviction before a justice of the peace, forfeit all such arms and ammunition to the use of the informer.

Sec. 2. It shall be the duty of every constable to give information against, and prosecute every free negro or mulatto who shall keep or carry any arms or ammunition contrary to this act.

Sec. 3. If any free negro or mulatto who shall have been convicted of keeping or carrying arms or ammunition, shall a second time offend in like manner, he shall, in addition to the forfeiture aforesaid, be punished with stripes, at the discretion of the justice, not exceeding thirty-nine.

Sec. 4. This act shall commence and be in force from and after the first day of June next.

22. Act of Feb. 2, 1838, ch. 101, §§ 1-3, 1838 Va. Acts 76, provides in relevant part:

An ACT to prevent the carrying of concealed weapons.

* * * * *

1. *Be it enacted by the general assembly*, That if any person shall hereafter habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind, from the use of which the death of any person might probably ensue, and the same be hidden or concealed from common observation, and he be thereof convicted, he shall for every such offence forfeit and pay the sum of not less than fifty dollars nor more than five hundred dollars, or be imprisoned in the common jail for a term not less than one month nor more than six months, and in each instance at the discretion of the jury; and a moiety of the penalty recovered in any prosecution under this act, shall be given to any person who may voluntarily institute the same.

2. *And be it further enacted*, That if any person shall hereafter be examined in any county or corporation court upon a charge of murder or felony, perpetrated by shooting, stabbing, maiming, cutting or wounding, and it shall appear that the offence charged was in fact commit-

ted by any such weapon as is above mentioned, and that the same was hidden or concealed from or kept out of the view of the person against whom it was used, until within the space of one half hour next preceding the commission of the act, or the infliction of the wound, which shall be charged to have caused the death, or constituted the felony, it shall be the duty of the examining court to state that the fact did so appear from the evidence; and if the court shall discharge or acquit the accused, such discharge or acquittal shall be no bar to an indictment for the same offence in the superior court having jurisdiction thereof, provided the same be found within one year thereafter. And whether the accused shall be by such court sent on for further trial or discharged, it shall be lawful to charge in the indictment that the offence was committed in any of the modes herein before described; and upon the trial it shall be the duty of the jury (if they find the accused not guilty of the murder or felony) to find also whether the act charged was in fact committed by the accused, though not feloniously, and whether the same was committed or done with or by means of any pistol, dirk, bowie knife, or other dangerous weapon, which was concealed from or kept out of the view of the person on or against whom it was used, for the space before mentioned, next preceding such use thereof; and if the jury find that the act was so committed, they shall assess a fine against the accused, and it shall be lawful for the court to pronounce judgment as in cases of misdemeanor.

3. This act shall be in force from and after the first day of June next.

23. Act of Jan. 30, 1847, ch. 79, §§ 1-2, 1846-47 Va. Acts 67, provides in relevant part:

An ACT providing for the punishment of certain offences within the cities, towns and boroughs of this commonwealth:

* * * * *

1. *Be it enacted by the general assembly*, That if any person shall unlawfully shoot at another in any public square, street, lane or alley, or other place of public resort in any city, town, or borough within this commonwealth, with intent in so doing to maim, disfigure, disable or kill such person, or to do him some other bodily harm, or with intent to resist or prevent the lawful apprehension or detention of the party so offending, or of any other persons, every such offender, his aiders and abettors, shall be guilty of a high misdemeanor, and shall on conviction, be punished by imprisonment in the common jail for a period not less than six months nor more than three years; and shall moreover be fined in a sum not less than one hundred dollars, nor more than one thousand dollars, to be ascertained by the verdict of a jury.

2. This act shall be in force form the passing thereof.

APPENDIX C
HISTORICAL DEBATES AND MATERIALS

1. Proceedings of the Federal Convention, August 18, 1787, as compiled in 2 *The Records of the Federal Convention* 329-33 (Max Farrand ed., 1911) (hereafter "Farrand"), reads in relevant part as follows:

* * * * *

Mr. Gerry took notice that there was (no) check here agst. standing armies in time of peace. The existing Congs. is so constructed that it cannot of itself maintain an army. This wd. not be the case under the new system. The people were jealous on this head, and great opposition to the plan would spring from such an omission. He suspected that preparations of force were now making agst. it. (he seemed to allude to the activity of the Govr. of N. York at this crisis in disciplining the militia of that State.) He thought an army dangerous in time of peace & could never consent to a power to keep up an indefinite number. He proposed that there shall not be kept up in time of peace more than thousand troops. His idea was that the blank should be filled with two or three thousand.

Instead of "to build and equip fleets" — "to provide & maintain a navy" agreed to nem. con as a more convenient definition of the power.

"To make rules for the Government and regulation of the land & naval forces," — added from the existing Articles of Confederation.

Mr. L. Martin and Mr. Gerry now regularly moved "provided that in time of peace the army shall not consist of more than thousand men.[1]

Genl. Pinkney asked whether no troops were ever to be raised untill an attack should be made on us?

Mr. Gerry. if there be no restriction, a few States may establish a military Govt.

Mr. Williamson, reminded him of Mr. Mason's motion for limiting the appropriation of revenue as the best guard in this case.

Mr. Langdon saw no room for Mr. Gerry's distrust of the Representatives of the people.

Mr. Dayton. preparations for war are generally made in peace; and a standing force of some sort may, for ought we know, become unavoidable. He should object to no restrictions consistent with these ideas.

The motion of Mr. Martin & Mr. Gerry was disagreed to nem. con.

Mr. Mason moved as an additional power "to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointment of the Officers". He considered uniformity as necessary in the regulation of the Militia throughout the Union.

Genl Pinkney mentioned a case during the war in which a dissimilarity in the militia of different States had produced the most serious mischiefs. Uniformity was essential. The States would never keep up a proper discipline of their militia.

Mr. Elseworth was for going as far in submitting the militia to the Genl Government as might be necessary, but thought the motion of Mr. Mason went too far. He (moved) that the militia should have the same arms (& exercise and be under rules established by the Genl Govt. when in actual service of the U. States and when States neglect to provide regulations for militia, it shd. be regulated & established by the Legislature of U. S.)| | The whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power. He thought the Genl Authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people. It must be vain to ask the States to give the Militia out of their hands.

Mr Sherman 2ds. the motion.

Mr Dickenson. We are come now to a most important matter, that of the sword. His opinion was that the States never would nor ought to give up all authority over the Militia. He proposed to restrain the general power to one fourth part at a time, which by rotation would discipline the whole Militia.

Mr. Butler urged the necessity of submitting the whole Militia to the general Authority, which had the care of the general defence.

Mr. Mason– had suggested the idea of a select militia. He was led to think that would be in fact as much as the Genl. Govt could advantageously be charged with. He was afraid of creating insuperable objections to the plan. He withdrew his original motion, and moved a power "to make laws for regulating and disciplining the militia, not exceeding one tenth part in any one year, and reserving the appointment of officers to the States."

Genl Pinkney, renewed Mr. Mason's original motion. For a part to be under the genl. and a part under the State Govts. wd be an incurable evil. He saw no room for such distrust of the Genl Govt.

Mr. Langdon 2ds. Genl. Pinkney's renewal. He saw no more reason to be afraid of the Genl. Govt than of the State Govts. He was more apprehensive of the confusion of the different authorities on this subject, than of either.

Mr Madison thought the regulation of the Militia naturally appertaining to the authority charged with the public defence. It did not seem in its nature to be divisible between two distinct authorities. If the States would trust the Genl. Govt. with a power over the public treasure, they would from the same consideration of necessity grant it the direction of the public force. Those who had a full view of the public situation wd. from a sense of the danger, guard agst. it: the States would not be separately impressed with the general situation, nor have the due confidence in the concurrent exertions of each other.

Mr. Elseworth– considered the idea of a select militia as impracticable; & if it were not it would be followed by a ruinous declension of the great body of the Militia. The States will never submit to the same militia laws. Three or four shilling's as a penalty will enforce obedience better in New England, than forty lashes in some other places.

Mr. Pinkney thought the power such an one as could not be abused, and that the States would see the necessity of surrendering it. He had however but a scanty faith in Militia. There must be (also) a real military force — This alone can (effectually answer the purpose.) The United States had been making an experiment without it, and we see the consequence in their rapid approaches toward anarchy.[11]

Mr Sherman, took notice that the States might want their Militia for defence agst invasions and insurrections, and for enforcing obedience to their laws. They will not give up this point– In giving up that of taxation, they retain a concurrent power of raising money for their own use.

Mr. Gerry thought this the last point remaining to be surrendered. If it be agreed to by the Convention, the plan will have as black a mark as was set on Cain. He had no such confidence in the Genl. Govt. as some Gentlemen possessed, and believed it would be found that the States have not.

Col. Mason. thought there was great weight in the remarks of Mr. Sherman– and moved an exception to his motion "of such part of the Militia as might be required by the States for their own use."

Mr. Read doubted the propriety of leaving the appointment of the Militia officers in the States. In some States they are elected by the legislatures; in others by the people themselves. He thought at least an appointment by the State Executives ought to be insisted on.

* * * * *

2. Proceedings of the Federal Convention, August 23, 1787, as compiled in 2 Farrand, *supra*, at 384-88, reads in relevant part as follows:

The Report of the Committee of Eleven made Aug: 21. being taken up, and the following clause being under consideration to wit "To make laws for organizing, arming & disciplining the Militia, and for governing such parts of them as may be employed in the service of the U.S. reserving to the States respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed" —[11]

Mr Sherman moved to strike out the last member — "and authority of training &c. He thought it unnecessary. The States will have this authority of course if not given up.

Mr. Elsworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be so expounded as to include all power on the subject.

Mr. King, by way of explanation, said that by *organizing* the Committee meant, proportioning the officers & men — by *arming*, specifying the kind size and caliber of arms — & by *disciplining* prescribing the manual exercise evolutions &c.

Mr. Sherman withdrew his motion

Mr Gerry, This power in the U— S. as explained is making the States drill-sergeants. He had as lief let the Citizens of Massachusetts be disarmed, as to take the command from the States, and subject them to the Genl Legislature. It would be regarded as a system of Despotism.

Mr Madison observed that "*arming*" as explained did not did not extend to furnishing arms; nor the term "disciplining" to penalties & Courts martial for enforcing them.

Mr. King added, to his former explanation that *arming* meant not only to provide for uniformity of arms, but included authority to regulate the modes of furnishing, either by the militia themselves, the State Governments, or the National Treasury: that *laws* for disciplining, must involve penalties and every thing necessary for enforcing penalties.

Mr. Dayton moved to postpone the paragraph, in order to take up the following proposition

"To establish an uniform & general system of discipline for the Militia of these States, and to make laws for organizing, arming, disciplining & governing *such part of them as may be employed in the service of the U.S.*, reserving to the States respectively the appointment of the officers, and all authority over the Militia not herein given to the General Government"

* * * * *

Mr. Elsworth & Mr. Sherman moved to postpone the 2d. clause in favor of the following

"To establish an uniformity of arms, exercise & organization for the Militia, and to provide for the Government of them when called into the service of the U. States"

The object of this proposition was to refer the plan for the Militia to the General Govt. but leave the execution of it to the State Govts.

Mr Langdon said He could not understand the jealousy expressed by some Gentleman. The General & State Govts. were not enemies to each other, but different institutions for the good of the people of America. As one of the people he could say, the National Govt. is mine, the State Govt is mine — In transferring power from one to the other — I only take out of my left hand what it cannot so well use, and put it into my right hand where it can be better used.

Mr. Gerry thought it was rather taking out of the right hand & putting it into the left. Will any man say that liberty will be as safe in the hands of eighty or a hundred men taken from the whole continent, as in the hands of two or three hundred taken from a single State?

Mr. Dayton was against so absolute a uniformity. In some States there ought to be a greater proportion of cavalry than in others. In some places rifles would be most proper, in others muskets &c —

Genl Pinkney preferred the clause reported by the Committee, extending the meaning of it to the case of fines &c —

Mr. Madison. The primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety & the less prepare its Militia for that purpose; in like manner as the Militia of a State would have been still more neglected than it has been if each County had been independently charged with the care of its Militia. The Discipline of the Militia is evidently a

National concern, and ought to be provided for in the *National* Constitution.

Mr L— Martin was confident that the States would never give up the power over the Militia; and that, if they were (to do so,) the militia would be less attended to by the Genl. than by the State Governments.

Mr Randolph asked what danger there could be that the Militia could be brought into the field and made to commit suicide on themselves. This is a power that cannot from its nature be abused, unless indeed the whole mass should be corrupted. He was for trammelling the Genl Govt. whenever there was danger. but here there could be none — He urged this as an essential point; observing that the Militia were every where neglected by the State Legislatures, the members of which courted popularity too much to enforce a proper discipline. Leaving the appointment of officers to the States protects the people agst. every apprehension that could produce murmur.

On Question on Mr. Elsworth's Motion

N. H. no. Mas— no— Ct. ay. N. J. no. Pa. no. Del. no. Md. no. Va no— N— C. no. S. C no. Geo. no. [Ayes — 1; noes — 10.]

A motion was then made to recommit the 2d clause which was negatived.

On the question to agree to the 1st. part of the clause, namely

"To make laws for organizing arming & disciplining the Militia, and for governing such part of them as may be employed in the service of the U. S".

N. H ay. Mas. ay. Ct. no. N. J. ay. Pa. ay. Del. ay. Md no. Va ay. N— C— ay. S. C. ay. Geo. ay. [Ayes — 9 noes — 2.]

Mr. Madison moved to amend the next part of the clause so as to read "reserving to the States respectively, the appointment of the officers, *under the rank of General officers*."

Mr. Sherman considered this as absolutely inadmissible. He said that if the people should be so far asleep as to allow the Most influential officers of the Militia to be appointed by the Genl. Government, every man of discernment would rouse them by sounding the alarm to them —

Mr. Gerry. Let us at once destroy the State Govts have an Executive for life or hereditary, and a proper Senate, and then there would be some consistency in giving full powers to the Genl Govt. but as the States are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence. He warned the Convention agst pushing the experiment too far. Some people will support a plan of vigorous Government at every risk. Others of a more democratic cast will oppose it with equal determination. And a Civil war may be produced by the conflict.

Mr. Madison. As the greatest danger is that of disunion of the States, it is necessary to guard agst. it by sufficient powers to the Common Govt. and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia —

* * * * *

3. Noah Webster, *A Citizen of America* (Oct. 17, 1787), reprinted in *The Essential Federalist and Anti-Federalist Papers* 110, 129, 132 (David Wootton ed., 2003), states in pertinent part:

* * * * *

* * * But the constitution provides for our safety; and while it gives Congress power to raise armies, it declares that no appropriation of money to their support shall be for a longer term than two years.

Congress likewise are to have power to provide for organizing, arming, and disciplining the militia, but have no other command of them, except when in actual service. Nor are they at liberty to call out the militia at pleasure—but only, to execute the laws of the union, suppress insurrections, and repel invasions. For these purposes, government must always be armed with a military force, if the occasion should require it; otherwise laws are nugatory, and life and property insecure.

* * * * *

Another source of power in government is a military force. But this, to be efficient, must be superior to any force that exists among the people, or which they can command: for otherwise this force would be annihilated, on the first exercise of acts of oppression. Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the *power*, and jealousy will instantly inspire the *inclination*, to resist the execution of a law which appears to them unjust and oppressive.

* * * * *

4. A Democratic Federalist, Philadelphia Pennsylvania Herald (Oct. 17, 1787), excerpts reprinted in *The Origin of the Second Amendment: A Documentary History of the Bill of Rights* 45, 46 (David E. Young ed., 2d ed. 1995) (hereafter "Young"), states in pertinent part:

* * * * *

[T]he federal rulers are vested with each of the three essential powers of government—their laws are to be *paramount* to the laws of the different states. What then will there be to oppose their encroachments? Should they ever pretend to tyrannize over the people, their *standing army* will silence every popular effort; it will be theirs to explain the powers which have been granted to them. * * * [T]he liberty of the people will be no more.

5. *Essay on Federal Sentiments*, Philadelphia Independent Gazetteer (Oct. 23, 1787), excerpt reprinted in Young, *supra*, at 57, states in pertinent part:

* * * If the president and the whole senate should happen to be the boldest wealthiest, most artful men in the union, supported by the most powerful connexions, and unanimous in the design of subduing the nation; and if by the concurrence of the representatives they obtained money and troops for the purpose; yet the whole personal influence of the Congress, and their parricide army could never prevail over an hundred thousand men armed and disciplined, owners of the country, animated not only with a spirit of liberty, but ardent resentment against base treacherous tyrants.

6. Centinel II, Philadelphia Independent Gazetteer (Oct. 24, 1787), excerpt reprinted in Young, *supra*, at 58, 59, states in pertinent part:

* * * * *

* * * A standing army with regular provision of pay and contingencies, would afford a strong temptation to some ambitious man to step up into the throne, and to

seize absolute power. The keeping on foot a hired military force *in time of peace*, ought not be gone into, unless *two thirds* of the members of the federal legislature agree to the necessity of the measure, and adjust the numbers employed. * * *

* * * * *

7. An Officer of the Late Continental Army, Philadelphia Independent Gazetteer (Nov. 6, 1787), reprinted in 1 *The Debate on the Constitution* 97, 100 (Bernard Bailyn ed., 1993) (hereafter "Bailyn"), states in pertinent part:

* * * * *

The MILITIA is to be under the immediate command of congress, and men *conscientiously scrupulous of bearing arms*, may be compelled to perform military duty.

* * * * *

8. Pamphlet by Federal Farmer, *Observations Leading to a Fair Examination of the System of Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It, Letter III* (Nov. 8, 1787), excerpts reprinted in Young, *supra*, at 89, 91-92, states in pertinent part:

* * * * *

* * * It is true, the yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended—and, therefore, it is urged [by proponents of the Constitution], they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions. It is easily perceived, that if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and

strength: This may be done in a great measure by congress, if disposed to do it, by modelling the militia. Should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenceless. The state must train the militia in such form and according to such systems and rules as Congress shall prescribe: and the only actual influence the respective states will have respecting the militia will be in appointing the officers. I see no provision made for calling out the *posse commitatus* for executing the laws of the union, but provision is made for Congress to call forth the militia for the execution of them—and the militia in general, or any select part of it, may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance and thereby introduce an entire military execution of the laws.

9. Cato, *Letter No. 5* (Nov. 8, 1787), reprinted in Wootton, *supra*, at 58, 63, states in pertinent part:

* * * * *

* * * The most general objections to the first article, are * * * that standing armies may be established, and appropriation of money made for their support, for two years; that the militia of the most remote state may be marched into those states situated at the opposite extreme of this continent; that the slave trade is, to all intents and purposes permanently established; and a slavish capitation, or poll-tax, may at any time be levied—these are some of the many evils that will attend the adoption of this government.

10. Plain Truth, *Rebuttal to "An Officer of the Late Continental Army,"* Philadelphia Independent Gazetteer (Nov. 10, 1787), reprinted in Bailyn, *supra*, at 105, 112, states in pertinent part:

* * * * *

Congress may "provide for *calling forth* the militia," "and may provide for organizing, arming and disciplining it."—But the States respectively can only *raise it*, and they expressly reserve the right of "appointment of officers and of training it."—Now we know that men conscientiously scrupulous by sect or profession are not *forced* to bear arms in any of the States, a pecuniary compensation being accepted in lieu of it.—Whatever may be my sentiments on the present state of this matter is foreign to the point: But it is certain that whatever redress may be wished, for or expected, can only come from *the state Legislature*, where, and where only, the dispensing power or enforcing power is *in the first instance* placed. *Article* 1, *section* 8.

11. Cincinnatus IV, New York Journal (Nov. 22, 1787), excerpted in Young, *supra*, at 107-08, states in pertinent part:

* * * * *

Sir, The public appear to me, sir, to be much indebted to you, for informing them; for what purpose a power was given by the proposed Constitution, of raising and supporting armies.—Some, indeed, might have suspected, that such power, uncontrouled by any declaration, that the military should always be subject to the civil power, might be intended for the purposes of ambition. Your declaration has removed all doubt. Every principle of policy, you say, would be subverted unless we kept up armies—for what—for our defence?—no,—to support declarations of war—to strike home, with dispatch and secrecy, before the enemy can be apprized of your intention. Upon the same principle a small army would be rediculous. Nothing less than the Prussian number, about 200,000 men would embrace this salutary object. And as you now say— "no man that regards the dignity and safety of his country can deny the necessity of a military force."—You will next affirm, that no one, for the same reason, can deny the necessity of a large army. The safety of the country, we have already experienced to depend, upon the militia. * * *

12. Statement of Luther Martin, Maryland House of Representatives, Nov. 29, 1787, as compiled in 3 Farrand, *supra*, at 208-09, reads in relevant part as follows:

* * * * *

[53] By the *next* paragraph, Congress is to have the power to provide for *organizing, arming,* and *disciplining* the *militia,* and for *governing* such part of them as may be *employed in the service* of the United States.

[54] For this *extraordinary* provision, by which the *militia,* the *only defence* and *protection* which the *State* can have for the security of *their rights* against *arbitrary encroachments* of the *general government,* is taken entirely *out of the power* of their *respective States,* and placed under the *power of Congress,* it was speciously assigned as a reason, that the general government would cause the militia to be better regulated and better disciplined than the State governments, and that it would be proper for the whole militia of the Union to have a uniformity in their arms and exercise. To this it was answered, that the reason, however *specious,* was *not just;* that it would be absurd, the militia of the western settlements, who were exposed to an Indian enemy, should either be confined to the *same arms* or *exercise* as the militia of the eastern or middle States; that the same penalties which would be sufficient to enforce an obedience to militia laws in some States, would be totally

disregarded in others; that, leaving the power to the several States, they would respectively best know the situation and circumstances of their citizens, and the regulations that would be necessary and sufficient to effect a well-regulated militia in each; that we were satisfied the militia had heretofore been as well disciplined as if they had been under the regulations of Congress, and that the States would now have an *additional* motive to keep their militia in proper order, and fit for service, as it would be the *only chance* to preserve their *existence* against a general government armed with powers *sufficient* to destroy them.

[55] * * * [Some proponents of the Constitution] said, the States ought to be at the mercy of the general government, and, therefore, that the militia ought to be put under its power, and not suffered to remain under the power of the respective States. In answer to these declarations, it was urged, that, if after having obtained to the general government the great powers already granted, and among those, that of *raising* and *keeping* up regular troops without limitations, the *power* over the *militia* should be *taken away* from *the States*, and also given to the general government, it ought to be considered as the last *coup de grace* to the *State governments;* that it must be the most convincing proof, the advocates of this system design the *destruction* of the State governments, and that no *professions* to the contrary ought to be *trusted*; and that every State in the Union ought to reject such a system with indignation, since, if the general government should attempt to oppress and enslave them, they could not have any possible means of self-defence; because the proposed system taking away from the States the right of organizing, arming and disciplining the militia, the *first attempt* made by a *State* to put the militia in a situation to counteract the arbitrary measures of the general government would be construed into an *act* of *rebellion*

or *treason*; and Congress would *instantly march* their *troops* into the State. It was further observed that, when a government *wishes* to deprive its citizens of freedom, and reduce them to *slavery*, it *generally makes use of a standing army* for that purpose, and leaves the militia in a situation as contemptible as possible, lest they might oppose its arbitrary designs; * * *

13. John De Witt, American Herald (Dec. 3, 1787), reprinted as *Antifederalist No. 28* in *The Antifederalist Papers* 74, 75 (Morton Borden ed., 1965), states in pertinent part:

> * * * They have left the appointment of officers in the breasts of the several States; but this appears to me an insult rather than a privilege, for what avails this right if they at their pleasure may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties, however they might be encroached upon by Congress. Does any, after reading this provision for a regular standing army, suppose that they intended to apply to the militia in all cases, and to pay particular attention to making them the bulwark of this continent? And would they not be equal to such an undertaking? Are they not abundantly able to give security and stability to your government as long as it is free? Are they not the only proper persons to do it? Are they not the most respectable body of yeomanry in that character upon earth? Have they not been engaged in some of the most brilliant actions in America, and more than once decided the fate of princes? In short, do they not preclude the necessity of any standing army whatsoever, unless in case of invasion? And in that case it would be time enough to raise them, for no free government under heaven, with a well disciplined militia, was ever yet subdued by mercenary troops.

* * * * *

14. Philadelphiensis III, Philadelphia Freeman's Journal (Dec. 5, 1787), excerpts reprinted in Young, *supra*, at 138, 139, states in pertinent part:

* * * * *

* * * And in respect to the *standing army*, it will only be made up of profligate idle ruffians, whose prowess will chiefly consist in feats of cruelty exercised on their innocent fellow citizens; but in facing a foreign foe, they will prove themselves a body of mean cowards; * * *

15. Statement of James Wilson, Pennsylvania Convention Debates, Dec. 11, 1787, as compiled in 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 521-22 (Jonathan Elliot ed., 2d ed. 1836) (hereafter "Elliot"), reads in relevant part as follows:

* * * * *

It is said that Congress should not possess the power of calling out the militia, to execute the laws of the Union, suppress insurrections, and repel invasions; nor the President have the command of them when called out for such purposes.

I believe any gentleman, who possesses military experience, will inform you that men without a uniformity of arms, accoutrements, and discipline, are no more than a mob in a camp; that, in the field, instead of assisting, they interfere with one another. If a soldier drops his musket, and his companion, unfurnished with one, takes it up, it is of no service, because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States.

I really expected that, for this part of the system at least, the framers of it would have received plaudits instead of censures, as they here discover a strong anxiety to have this body put upon an effective footing, and thereby, in a great measure, to supersede the necessity of raising or keeping up standing armies.

The militia formed under this system, and trained by the several states, will be such a bulwark of internal strength, as to prevent the attacks of foreign enemies.

* * * * *

16. Philadelphiensis IV, Philadelphia Freeman's Journal (Dec. 12, 1787), reprinted in 1 Bailyn, *supra*, at 494, 497-98, states in pertinent part:

* * * * *

There is not the most distant hope, that we shall ever have a navy under this constitution which annihilates the state governments; for, if each state were to retain its *sovereignty*, I am well convinced, that we might have a considerable *fleet* in a few years; the larger states might each build a ship of the line every year, and the lesser states would furnish us with frigates; a noble emulation among the states would be the consequence, one state would vie with another, and public spirited individuals would contribute generously to raise the character of their own state. But this consolidation of all the states into one general government, renders this project impossible; the federal government having an unlimited power in taxation, which, no doubt, they will exercise to the utmost; leaves the states without the means of building even a *boat*. But had they money, they dare not use it for that purpose, for, Congress are to have an absolute power over the *standing army, navy,* and *militia*; so that it is out of the question, whether a particular state be, or be not, able to build a ship of war; she must meddle with no such matter; it only belongs to the emperor and our well born Congress to build and maintain a navy. * * *

* * * * *

17. The Republican, Hartford Connecticut Courant (Jan. 7, 1788), excerpts reprinted in Young, *supra*, at 188, 190, states in pertinent part:

* * * * *

It is a capital circumstance in favor of our liberty that the people themselves are the military power of our country. In countries under arbitrary government, the people oppressed and dispirited neither possess arms nor know how to use them. Tyrants never feel secure until they have disarmed the people. They can rely upon nothing but standing armies of mercenary troops for the support of their power. But the people of this country have arms in their hands; they are not destitute of military knowledge; every citizen is required by law to be a soldier; we are all marshaled into companies, regiments, and brigades, for the defense of our country. This is a circumstance which increases the power and consequence of the people; and enables them to defend their rights and privileges against every invader.

* * * * *

18. Centinel IX, Philadelphia Independent Gazetteer (Jan. 8, 1788), excerpt reprinted in Young, *supra*, at 191, 192, states in pertinent part:

* * * I was ever jealous of the select militia, consisting of infantry and troops of horse, instituted in this city and in some of the counties * * * [.] Are not these corps provided to suppress the first efforts of freedom, and to check the spirit of the people until a regular and sufficiently powerful military force shall be embodied to rivet the chains of slavery on a deluded nation. * * *

19. Alexander Hamilton, *The Federalist No. 29* (Jan. 9, 1788), states:

The power of regulating the militia, and of commanding its services in times of insurrection and invasion, are natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the Confederacy.

It requires no skill in the science of war to discern, that uniformity in the organization and discipline of the militia, would be attended with the most beneficial effects, whenever they were called into service for the public defense. It would enable them to discharge the duties of the camp, and of the field, with mutual intelligence and concert; an advantage of peculiar moment in the operations of an army; And it would fit them much sooner to acquire the degree of proficiency in military functions, which would be essential to their usefulness. This desirable uniformity can only be accomplished, by confiding the regulation of the militia, to the direction of the national authority. It is therefore with the most evident propriety, that the plan of the convention proposes to empower the union "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, *reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.*"

Of the different grounds, which have been taken in opposition to this plan, there is none that was so little to have been expected, or is so untenable in itself, as the one from which this particular provision has been attacked. If a well regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation, and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the same body, ought, as far as possible, to take away the inducement and the pretext, to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies, which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary, will be a more certain method of preventing its existence, than a thousand prohibitions upon paper.

In order to cast an odium upon the power of calling forth the militia to execute the laws of the Union, it has been remarked, that there is nowhere any provision in the proposed constitution for requiring the POSSE COMITATUS, to assist the magistrate in the execution of his duty; whence it has been inferred, that military force was intended to be his only auxiliary. There is a striking incoherence in the objections which have appeared, and sometimes even from the same quarter, not much calculated to inspire a very favorable opinion of the sincerity or fair dealing of their authors. The same persons who tell us in one breath, that the powers of the federal government will be despotic and unlimited, inform us in the next, that it has not authority sufficient even to call out the POSSE COMITATUS. The latter, fortunately, is as much short of the truth, as the former exceeds it. It would be as absurd to doubt, that a right to pass all laws *necessary* and *proper* to execute its declared powers, would include that of requiring the assistance of the citizens to the officers who may be intrusted with the execution of those laws; as it would be to believe, that a right to enact laws necessary and proper for the imposition and collection of taxes, would involve that of varying the rules of descent, and of the alienation of landed property, or of abolishing the trial by jury in cases relating to it. It being therefore evident, that the supposition of a want of power to require the aid of the POSSE COMITATUS is entirely destitute of colour, it will follow, that the conclusion which has been drawn from it, in its application to the authority of the federal government over the militia, is as uncandid, as it is illogical. What reason could there be to infer, that force was intended to be the sole instrument of authority, merely because there is a power to make use of it when necessary? What shall we think of the motives which could induce men of sense to reason in this extraordinary manner? How shall we prevent a conflict between charity and conviction?

By a curious refinement upon the spirit of republican jealousy, we are even taught to apprehend danger from the militia itself, in the hands of the federal government. It is observed, that select corps may be formed, composed of the young and the ardent, who may be rendered subservient to the views of arbitrary power. What plan for the regulation of the militia, may be pursued by the national government, is impossible to be foreseen. But so far from viewing the matter in the same light with those who object to select corps as dangerous, were the constitution ratified, and were I to deliver my sentiments to a member of the federal legislature on the subject of a militia establishment, I should hold to him in substance the following discourse:

"The project of disciplining all the militia of the United States, is as futile as it would be injurious, if it were capable of being carried into execution. A tolerable expertness in military movements, is a business that requires time and practice. It is not a day, nor a week, nor even a month that will suffice for the attainment of it. To oblige the great body of the yeomanry, and of the other classes of the citizens, to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary, to acquire the degree of perfection which would entitle them to the character of a well regulated militia, would be a real grievance to the people, and a serious public inconvenience and loss. It would form an annual deduction from the productive labour of the country, to an amount, which, calculating upon the present numbers of the people, would not fall far short of a million of pounds. To attempt a thing which would abridge the mass of labour and industry to so considerable an extent, would be unwise; and the experiment, if made, could not succeed, because it would not long be endured. Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.

"But, though the scheme of disciplining the whole nation must be abandoned as mischievous or impracticable; yet it is a matter of the utmost importance, that a well digested plan should, as soon as possible, be adopted for the proper establishment of the militia. The attention of the government ought particularly to be directed to the formation of a select corps of moderate size, upon such principles as will really fit it for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well trained militia, ready to take the field whenever the defense of the State shall require it. This will not only lessen the call for military establishments; but if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights, and those of their fellow citizens. This appears to me the only substitute that can be devised for a standing army; and the best possible security against it, if it should exist."

Thus differently from the adversaries of the proposed constitution should I reason on the same subject; deducing arguments of safety, from the very sources which they represent as fraught with danger and perdition.

But how the national legislature may reason on the point, is a thing which neither they nor I can foresee.

There is something so far fetched and so extravagant, in the idea of danger to liberty from the militia, that one is at a loss whether to treat it with gravity or with raillery; whether to consider it as a mere trial of skill, like the paradoxes of rhetoricians; as a disingenuous artifice, to instil prejudices at any price; or as the serious offspring of political fanaticism. Where, in the name of common-sense, are our fears to end, if we may not trust our sons, our brothers, our neighbours, our fellow-citizens? What shadow of danger can there be from men, who are daily mingling with the rest of their countrymen; and who participate with them in the same feelings, sentiments, habits and interests? What reasonable cause of apprehension can be inferred from a power in the union to prescribe regulations for the militia, and to command its services when necessary; while the particular states are to have the *sole and exclusive appointment of the officers?* If it were possible seriously to indulge a jealousy of the militia, upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the states. ought at once to extinguish it. There can be no doubt, that this circumstance will always secure to them a preponderating influence over the militia.

In reading many of the publications against the constitution, a man is apt to imagine that he is perusing some ill written tale or romance; which, instead of natural and agreeable images, exhibits to the mind nothing but frightful and distorted shapes—

> "Gorgons, hydras, and chimeras dire";

discolouring and disfiguring whatever it represents, and transforming everything it touches into a monster.

A sample of this is to be observed in the exaggerated and improbable suggestions, which have taken place respecting the power of calling for the services of the militia. That of New Hampshire is to be marched to Georgia, of Georgia to New Hampshire, of New-York to Kentucky, and of Kentucky to Lake Champlain. Nay, the debts due to the French and Dutch, are to be paid in militia-men instead of Louis d'ors and ducats. At one moment, there is to be a large army to lay prostrate the liberties of the people; at another moment, the militia of Virginia are to be dragged from their homes, five or six hundred miles, to tame the republican contumacy of Massachusetts; and that of Massachusetts is to be transported an equal distance to subdue the refractory haughtiness of the aristocratic Virginians. Do the persons, who rave at this rate, imagine that their art or their eloquence can impose any conceits or absurdities upon the people of America for infallible truths?

If there should be an army to be made use of as the engine of despotism, what need of the militia? If there should be no army, whither would the militia, irritated by being required to undertake a distant and distressed expedition, for the purpose of riveting the chains of slavery upon a part of their countrymen, direct their course, but to the seat of the tyrants, who had meditated so foolish, as well as so wicked a project, to crush them in their imagined entrenchments of power; and to make them an example of the just vengeance of an abused and incensed people? Is this the way in which usurpers stride to dominion over a numerous and enlightened nation? Do they begin by exciting the detestation of the very instruments of their intended usurpations? Do they usually commence their career by wanton and disgustful acts of power, calculated to answer no end, but to draw upon themselves universal hatred and execration? Are suppositions of this sort, the sober admonitions of discerning patriots to a discerning people? Or are they the inflammatory ravings of chagrined incendiaries, or distempered enthusiasts? If we were even to suppose the national rulers actuated by the most ungovernable ambition, it is impossible to believe that they would employ such preposterous means to accomplish their designs.

In times of insurrection, or invasion, it would be natural and proper, that the militia of a neighboring state should be marched into another, to resist a common enemy, or to guard the republic against the violences of faction or sedition. This was frequently the case, in respect to the first object, in the course of the late war; and this mutual succour is, indeed, a principal end of our political association. If the power of affording it be placed under the direction of the union, there will be no danger of a supine and listless inattention to the dangers of a neighbour, till its near approach had superadded the incitements of self-preservation, to the too feeble impulses of duty and sympathy.

20. A Farmer, New Hampshire Freeman's Oracle (Jan. 11, 1788), excerpts reprinted in Young, *supra*, at 204, 206, states in pertinent part:

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* * * An army, either in peace or war, is like the locust and caterpillers of Egypt; they bear down all before them—and many times, by designing men, have been used as an engine to destroy the liberties of a people, and reduce them to the most abject slavery. I have both summered and wintered with an army: You, my friends, in general, know nothing of the evils that attend it; guard and secure it well in your Bill of Rights, that it may not be in the power of any set of men to trample your liberties under their feet with it. Organize your militia, arm them well, and under Providence they will be a sufficient security. * * *

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21. A Landholder, Philadelphia Freeman's Journal (Jan. 16, 1788), excerpt reprinted in Young, *supra*, at 211, 211-13, states in pertinent part:

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* * * Tyrants have never placed any confidence on a militia composed of freemen. Experience has taught them that a standing body of regular forces, whenever they can be completely introduced, are always efficacious in enforcing their edicts, however arbitrary; * * *

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There is no instance of any government being reduced to a confirmed tyranny without military oppression; and the first policy of tyrants has been to annihilate all other means of national activity and defence, when they feared opposition, and to rely solely upon standing troops. * * *

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22. A Countryman, New York Journal (Jan. 22, 1788), excerpt reprinted in Young, *supra*, at 224, 224, states in pertinent part:

Should the new constitution be sufficiently corrected *by a substantial* bill of rights * * * separating the legislative, judicial and executive departments entirely, and confining the national government to its proper objects; but, by no means admitting a standing army in time of peace, nor a select militia, which last, is a scheme that a certain head has, for some time, been teeming with,[ ] and is nothing else but an artful introduction to the other—Nor ought the militia, or any part of it, I think, to be marched out of the state, without the consent of the legislature, and then, not for more than a certain reasonable time, etc.—leaving the states sovereign and independent with respect to their internal police, * * * I imagine we might become a happy and respectable people. * * *

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23. James Madison, *The Federalist No. 46* (Jan. 29, 1788), states:

Resuming the subject of the last paper, I proceed to inquire, whether the federal government or the state governments, will have the advantage with regard to the predilection and support of the people.

Notwithstanding the different modes in which they are appointed, we must consider both of them as substantially dependent on the great body of the citizens of the United States. I assume this position here as it respects the first, reserving the proofs for another place. The federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designed for different purposes. The adversaries of the constitution seem to have lost sight of the people altogether, in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superiour in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their errour. They must be told, that the ultimate authority, wherever the derivative may be found, resides in the people alone; and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires, that the event, in every case, should be supposed to depend on the sentiments and sanction of their common constituents.

Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt, that the first and most natural attachment of the people will be to the governments of their respective states. Into the administration of these, a greater number of individuals will expect to rise. From the gift of these, a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant; and with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments. On the side of these, therefore, the popular bias may well be expected most strongly to incline.

Experience speaks the same language in this case. The federal administration, though hitherto very defective, in comparison with what may be hoped under a better system, had, during the war, and particularly whilst the independent fund of paper emissions was in credit, an activity and importance as great as it can well have, in any future circumstances whatever. It was engaged, too, in a course of measures which had for their object the protection of everything that was dear, and the acquisition of everything that could be desirable to the people at large. It was, nevertheless, invariably found, after the transient enthusiasm for the early congresses was over, that the attention and attachment of the people were turned anew to their own particular governments; that the federal council was at no time the idol of popular favor; and that opposition to proposed enlargements of its powers and importance, was the side usually taken by the men who wished to build their political consequence on the prepossessions of their fellow-citizens.

If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the state governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due: but even in that case, the state governments could have little to apprehend, because it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered.

The remaining points, on which I propose to compare the federal and state governments, are the disposition and faculty they may respectively possess, to resist and frustrate the measures of each other.

It has been already proved, that the members of the federal will be more dependent on the members of the state governments, than the latter will be on the former. It has appeared also, that the prepossessions of the people, on whom both will depend, will be more on the side of the state governments, than of the federal government. So far as the disposition of each towards the other, may be influenced by these causes, the state governments must clearly have the advantage. But in a distinct and very important point of view, the advantage will lie on the same side. The prepossessions, which the members themselves will carry into the federal government, will generally be favourable to the states; whilst it will rarely happen, that the members of the state governments will carry into the public councils a bias in favour of the general government. A local spirit will infallibly prevail much more in the members of the congress, than a national spirit will prevail in the legislatures of the particular states. Everyone knows that a great proportion of the errours committed by the state legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interests of the state, to the particular and separate views of the counties or districts in which they reside. And if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular state, how can it be imagined, that they will make the aggregate prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations? For the same reason that the members of the state legislatures will be unlikely to attach themselves sufficiently to national objects, the members of the federal legislature will be likely to attach themselves too much to local objects. The states will be to the latter, what counties and towns are to the former. Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual states. What is the spirit that has in general characterized the proceedings of congress? A perusal of their journals, as well as the candid acknowledgments of such as have had a seat in that assembly, will inform us, that the members have but too frequently displayed the character, rather of partisans of their respective states, than of impartial guardians of a common interest; that where, on one occasion, improper sacrifices have been made of local considerations to the aggrandizement of the federal government, the great interests of the nation have suffered on a hundred, from an undue attention to the local prejudices, interests, and views of the particular states. I mean not by these reflections to insinuate, that the new federal government will not embrace a more enlarged plan of policy, than the existing government may have pursued; much less, that its views will be as confined as those of the state legislatures; but only that it will partake sufficiently of the spirit of both, to be disinclined to invade the rights of the individual states, or the prerogatives of their governments. The motives on the part of the state governments, to augment their prerogatives by defalcations from the federal government, will be overruled by no reciprocal predispositions in the members.

Were it admitted, however, that the federal government may feel an equal disposition with the state governments to extend its power beyond the due limits, the latter would still have the advantage in the means of defeating such encroachments. If an act of a particular state, though unfriendly to the national government, be generally popular in that state, and should not too grossly violate the oaths of the state officers, it is executed immediately, and, of course, by means on the spot, and depending on the State alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the state; and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty. On the other hand, should an unwarrantable measure of the federal government be unpopular in particular states, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the state; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any state, difficulties not to be despised; would form, in a large state, very serious impediments; and where the sentiments of several adjoining states happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government, on the authority of the state governments, would not excite the opposition of a single state, or of a few states only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations in short, would result from an apprehension of the federal, as was produced by the dread of a foreign yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case, as was made in the other. But what degree of madness could ever drive the federal government to such an extremity. In the contest with Great Britain, one part of the empire was employed against the other. The more numerous part invaded the rights of the less numerous part. The attempt was unjust and unwise; but it was not in speculation absolutely chimerical. But what would be the contest, in the case we are supposing? Who would be the parties? A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter.

The only refuge left for those who prophesy the downfall of the state governments, is the visionary supposition, that the federal government may previously accumulate a military force for the projects of ambition. The reasonings contained in these papers must have been employed to little purpose indeed, if it could be necessary now to disprove the reality of this danger. That the people and the states should, for a sufficient period of time, elect an uninterupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the states should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to every one more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it however be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the state governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced, could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone, they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it. Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. Let us rather no longer insult them with the supposition that they can ever reduce themselves to the necessity of making the experiment, by a blind and tame submission to the long train of insidious measures which must precede and produce it.

The argument under the present head may be put into a very concise form, which appears altogether conclusive. Either the mode in which the federal government is to be constructed, will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the state governments, which will be supported by the people.

On summing up the considerations stated in this and the last paper, they seem to amount to the most convincing evidence, that the powers proposed to be lodged in the federal government, are as little formidable to those reserved to the individual states, as they are indispensably necessary to accomplish the purposes of the union; and that all those alarms which have been sounded, of a meditated and consequential annihilation of the state governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them.

24. Franklin County Petition, Pennsylvania Carlisle Gazette (Jan. 30, 1788), excerpt reprinted in Young, *supra*, at 238, 238-39, states in pertinent part:

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The PETITION of the Subscribers freemen of the County of Franklin.

Most Respectfully Sheweth.

* * * * *

That the powers therein proposed to be granted to the government of the united states are too great, and that the proposed distribution of these powers are dangerous and inimical to liberty and equality amongst the people.

* * * * *

That they conceive standing armies in time of peace are dangerous to liberty, and that a well organized militia will be the proper security for our defence.

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25. Aristides' [Alexander Contee Hanson], *Remarks on the Proposed Plan of a Federal Government, Addressed to the Citizens of the United States of America, and Particularly to the People of Maryland* (Jan. 31, 1788), excerpt reprinted in Young, *supra*, at 239, 240, states in pertinent part:

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* * * It may be material here to remark, that although a well regulated militia has ever been considered as the true defence of a free republic, there are always honest purposes, which are not to be answered by a militia. * * * If indeed it be possible in the nature of things, that congress shall, at any future period, alarm us by an improper augmentation of troops, could we not, in that case, depend on the militia, which is ourselves. In such a case it would be ridiculous to urge, that the federal government is invested with a power over the whole militia of the union. Even when congress shall exercise this power, on the most proper occasions, it is provided in the constitution, that each state shall officer, and train its own militia.

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26. A Columbian Patriot [Mercy Otis Warren], *Observations on the Constitution* (Feb. 1788), reprinted in 2 Bailyn, *supra*, at 284, 291-92, states in pertinent part:

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Though it has been said by Mr. *Wilson* and many others, that a Standing-Army is necessary for the dignity and safety of America, yet freedom revolts at the idea, when the Divan, or the Despot, may draw out his dragoons to suppress the murmurs of a few, who may yet cherish those sublime principles which call forth the exertions, and lead to the best improvement of the human mind. * * * Standing armies have been the nursery of vice and the bane of liberty from the Roman legions, to the establishment of the artful Ximenes, and from the ruin of the Cortes of Spain, to the planting the British cohorts in the capitals of America: — By the edicts of authority vested in the sovereign power by the proposed constitution, the militia of the country, the bulwark of defence, and the security of national liberty is no longer under the controul of civil authority; but at the rescript of the Monarch, or the aristocracy, they may either be employed to extort the enormous sums that will be necessary to support the civil list—to maintain the regalia of power—and the splendour of the most useless part of the community, or they may be sent into foreign countries for the fulfilment of treaties, stipulated by the President and two thirds of the Senate.

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27. Statement of Samuel Nason, Massachusetts Convention Debates, Feb. 1, 1788, as compiled in 2 Elliot, *supra*, at 136-37, reads in relevant part as follows:

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* * * Suffer me, sir, to say a few words on the fatal effects of standing armies, that bane of republican governments. A standing army! Was it not with this that Caesar passed the *Rubicon*, and laid prostrate the liberties of his country? By this have seven eighths of the once free nations of the globe been brought into bondage! Time would fail me, were I to attempt to recapitulate the havoc made in the world by standing armies. Britain attempted to enforce her arbitrary measures by a standing army. But, sir, we had patriots then who alarmed us of our danger; who showed us the serpent, and bade us beware of it. Shall I name them? I fear I shall offend your excellency, but I cannot avoid it. I must. We had a Hancock, an Adams, and a Warren. Our sister states, too, produced a Randolph, a Washington, a Greene, and a

Montgomery, who led us in our way. Some of these have given up their lives in defence of the liberties of their country; and my prayer to God is, that, when this race of illustrious patriots shall have bid adieu to the world, from their dust, as from the sacred ashes of the phoenix, another race may arise, who shall take our posterity by the hand, and lead them on to trample on the necks of those who shall dare to infringe on their liberties. Sir, had I a voice like Jove, I would proclaim it throughout the world; and had I an arm like Jove, I would hurl from the globe those villains that would dare attempt to establish in our country a standing army. I wish, sir, that the gentlemen of Boston would bring to their minds the fatal evening of the 5th of March, 1770, when by standing troops they lost five of their fellow-townsmen. I will ask them, What price can atone for their lives? What money can make satisfaction for the loss? The same causes produce the same effects. An army may be raised on pretence of helping a friend; or many pretences might be used. That night, sir, ought to be a sufficient warning against standing armies, except in cases of great emergency. They are too frequently used for no other purpose than dragooning the people into slavery. But I beseech you, my countrymen, for the sake of your posterity, to act like those worthy men who have stood forth in defence of the rights of mankind, and show to the world that you will not submit to tyranny. What occasion have we for standing armies? We fear no foe. If one should come upon us, we have a militia, which is our bulwark. Let Lexington witness that we have the means of defence among ourselves. If, during the last winter, there was not much alacrity shown by the militia in turning out, we must consider that they were going to fight their countrymen.

28. Agrippa XVIII [James Winthrop], Massachusetts Gazette (Feb. 5, 1788), reprinted in 2 Bailyn, *supra*, at 155, 158, states in pertinent part:

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"Resolved, that the constitution lately proposed for the United States be received only upon the following conditions:

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"6. Each state shall have the command of its own militia.

7. No continental army shall come within the limits of any state, other than garrison to guard the publick stores, without the consent of such states in time of peace.

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29. Deliberator, Philadelphia Freeman's Journal (Feb. 20, 1788), reprinted as *Antifederalist No. 44*, in Borden, *supra*, at 122, 123, states in pertinent part:

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"Congress cannot train the militia." This is not strictly true. For by the 1st Article they are empowered "to *provide* for organizing, arming, and *disciplining*" them; and tho' the respective states are said to have the authority of training the militia, it must be "according to the discipline prescribed by Congress." In this business, therefore, they will be no other than subalterns under Congress, to execute their orders; which, if they shall neglect to do, Congress will have constitutional powers to provide for, by any other means they shall think proper. They shall have power to declare what description of persons shall compose the militia; to appoint the stated times and places for exercising them; to compel *personal* attendance, whether when called for into actual service, or on other occasions, under what penalties they shall think proper, without regard to scruples of conscience or any other consideration. Their executive officer may march and countermarch them from one extremity of the state to the other—and all this without so much as consulting the legislature of the particular states to which they belong! Where then is that boasted security against the annihilation of the state governments, arising from "the powerful military support" they will have from their militia?

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30. A Pennsylvanian III [Tench Coxe], Philadelphia Pennsylvania Gazette (Feb. 20, 1788), excerpts reprinted in Young, *supra*, at 275, 275-76, states in pertinent part:

The power of the sword, say the minority of Pennsylvania is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army must be *tremendous and irresistable.* Who are these militia? *are they not our selves.* Is it feared, then, that we shall turn our arms *each man against his own bosom.* Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are *the birthright of an American.* What clause in the state or foedral constitution hath *given away* that important right. * * * From this circumstance, and from the citizens of the United States possessing the right of creating directly or indirectly every military officer and of granting every military resource, I do not hesitate to affirm, that the unlimited power of the sword is not in the hands of either the *foederal or state governments*, but, where I trust in God it will ever remain, *in the hands of the people.*

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31. The Impartial Examiner, Virginia Independent Chronicle (Feb. 27, 1788), reprinted in 2 Bailyn, *supra*, at 251, 253-54, states in pertinent part:

> * * * It has ever been held that standing armies in times of peace are dangerous to a free country; and no observation seems to contain more reason in it. Besides being useless, as having no object of employment, they are inconvenient and expensive. * * * Hence they have in all ages afforded striking examples of contributing, more or less, to enslave mankind;—and whoever will take the trouble to examine, will find that by far the greater part of the different nations, who have fallen from the glorious state of liberty, owe their ruin to standing armies. It has been urged that they are necessary to provide against sudden attacks. Would not a well regulated militia, duly trained to discipline, afford ample security? * * *

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32. An Impartial Citizen, Petersburg Virginia Gazette (Mar. 13, 1788), excerpts reprinted in Young, *supra*, at 299, 299, states in pertinent part:

> But here the enemies of the new system frighten us with the idea of a standing army. I am a mortal enemy to standing armies, in time of peace particularly; but the necessity of armies in some cases is very obvious. If there be a probability of attack by foreign nations, or of an overthrow of the government by civil discord, we ought not to wait the enemies attack in either case. * * *

33. Luther Martin, Baltimore Maryland Journal (Mar. 18, 1788), excerpts reprinted in Young, *supra*, at 301, 301-02, states in pertinent part:

> That a system may enable government wantonly to exercise power over the militia, to call out an unreasonable number from any particular state without its permission, and to march them upon, and continue them in, remote and improper services—that the same system

should enable the government totally to discard, render useless, and even disarm the militia, when it would remove them out of the way of opposing its ambitious views, is by no means inconsistent, and is really the case in the proposed constitution:—In both these respects it is, in my opinion, highly faulty, and ought to be amended. In the proposed system the general government has a power not only *without* the *consent*, but *contrary* to the *will* of the *state government*, to call out the *whole* of its militia, without regard to *religious scruples*, or any other consideration, and to continue them in service as long as it pleases, thereby subjecting the *freemen* of a whole state to *martial* law, and reducing them to the situation of *slaves*.—It has also, by another clause, the powers, by *which only* the militia can be organized and armed, and by the neglect of which they may be rendered utterly useless and insignificant, when it suits the ambitious purposes of government:—Nor is the suggestion unreasonable, even if it had been made, that the government might improperly oppress and harass the militia, the better to reconcile them to the idea of regular troops, who might relieve them from the burthen, and to render them less opposed to the measures it might be disposed to adopt for the purpose of reducing them to that state of insignificancy and uselessness.

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34. A Ploughman, Winchester Virginia Gazette (Mar. 19, 1788), reprinted in Young, *supra*, at 303, 303, states in pertinent part:

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And in order to rivet the chains of perpetual slavery upon us, they have made a standing army an essential of the Federal Constitution, which the world cannot produce an instance of a more permanent foundation to erect the fabrick of tyranny upon; * * * to keep a standing army, gives cause to suspect that the rulers are afraid of the people, or that they have a design upon them. If their designs are oppressive, the army is necessary to compleat the tyranny; if the army is the strongest force in a State, it must be a military government, and it is eternally true, that a free government and a standing army are absolutely incompatible.

35. Federal Farmer, *An Additional Number of Letters from the Federal Farmer to the Republican, Letter XVIII* (May 1788), excerpts reprinted in Young, *supra*, at 342, 354, states in pertinent part:

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The military forces of a free country may be considered under three general descriptions—1. The militia. 2. the navy—and 3. the regular troops—and the whole ought ever to be, and understood to be, in strict subordination to the civil authority—and that regular troops, and select corps, ought not to be kept up without evident necessity. Stipulations in the constitution to this effect, are perhaps, too general to be of much service, except merely to impress on the minds of the people and soldiery, that the military ought ever to be subject to the civil authority, &c. But particular attention, and many more definite stipulations, are highly necessary to render the military safe, and yet useful in a free government; and in a federal republic, where the people meet in distinct assemblies, many stipulations are necessary to keep a part from transgressing, which would be unnecessary checks against the whole met in one legislature, in one entire government.—A militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary. The powers to form and arm the militia, to appoint their officers, and to command their services, are very important; nor ought they in a confederated republic to be lodged, solely, in any one member of the government. First, the constitution ought to secure a genuine and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include, according to the past and general usuage of the states, all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided. I am persuaded, I need not multiply words to convince you of the value and solidity of this principle, as it respects general liberty, and the duration of a free and mild government: having this principle well fixed by the constitution, then the federal head may prescribe a general uniform plan, on which the respective states shall form and train the militia, appoint their officers and solely manage them, except when called into the service of the union, and when called into that service, they may be commanded and governed by the union. This arrangement combines energy and safety in it; it places the sword in the hands of the solid interest of the community, and not in the hands of men destitute of property, of principle, or of attachment to the society and government, who often form the select corps of peace or ordinary establishments: by it, the militia are the people, immediately under the management of the state governments, but on a uniform federal plan, and called into the service, command, and government of the union, when necessary for the common defence and general tranquility. But, say gentlemen, the general militia are for the most part employed at home in their private concerns, cannot well be called out, or be depended upon; that we must have a select militia; that is, as I understand it, particular corps or bodies of young men, and of men who have but little to do at home, particularly armed and disciplined in some measure, at the public expence, and always ready to take the field. These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenceless; whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it. As a farther check, it may be proper to add, that the militia of any state shall not remain in the service of the union, beyond a given period, without the express consent of the state legislature.

36. Statement of Patrick Henry, Virginia Convention Debates, June 5, 1788, as compiled in 3 Elliot, *supra*, at 47-48, 51-52, reads in relevant part as follows:

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* * * My great objection to this government is, that it does not leave us the means of defending our rights, or of waging war against tyrants. It is urged by some gentlemen, that this new plan will bring us an acquisition of strength — an army, and the militia of the states. This is an idea extremely ridiculous: gentlemen cannot be earnest. This acquisition will trample on our fallen liberty. Let my beloved Americans guard against that fatal lethargy that has pervaded the universe. Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?

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A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to punish them? Will you order them to be punished? Who shall obey these orders? Will your mace-bearer be a match for a disciplined regiment? In what situation are we to be? The clause before you gives a power of direct taxation, unbounded and unlimited, exclusive power of legislation, in all cases whatsoever, for ten miles square, and over all places purchased for the erection of forts, magazines, arsenals, dockyards, &c. What resistance could be made? The attempt would be madness. You will find all the strength of this country in the hands of your enemies; their garrisons will naturally be the strongest places in the country. Your militia is given up to Congress, also, in another part of this plan: they will therefore act as they think proper: all power will be in their own possession. You cannot force them to receive their punishment: of what service would militia be to you, when, most probably, you will not have a single musket in the state? for, as arms are to be provided by Congress, they may or may not furnish them.

Let me here call your attention to that part which gives the Congress power "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States—reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress." By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither—this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is ridiculous; so that this pretended little remains of power left to the states may, at the pleasure of Congress, be rendered nugatory. * * *

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37. Oration of David Ramsay at Charleston South Carolina, printed in the Columbian Herald (June 5, 1788), reprinted in 2 Bailyn, *supra*, at 506, 507, states in pertinent part:

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Nothing is more likely to secure a people from foreign attacks than a preparedness for repelling them. On this principle the militia arrangements of the new constitution promise a long exemption from foreign war.—What European power will dare to attack us, when it is known that the yeomanry of the country uniformly armed and disciplined, may on any emergency be called out to our defence by one legislature, and commanded by one person? * * *

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38. Statement of Patrick Henry, Virginia Convention Debates, June 9, 1788, as compiled in 3 Elliot, *supra*, at 168-69, reads in relevant part as follows:

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* * * They [Congress] are also to have magazines in each state. These depositories for arms, though within the state, will be free from the control of its legislature. Are we at last brought to such an humiliating and debasing degradation, that we cannot be trusted with arms for our own defence? Where is the difference between having our arms in our own possession and under our own direction, and having them under the management of Congress? If our defence be the *real* object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands? If our legislature be unworthy of legislating for

every foot in this state, they are unworthy of saying another word.

The clause which says that Congress shall "provide for arming, organizing, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers," seemed to put the states in the power of Congress. I wished to be informed, if Congress neglected to discipline them, whether the states were not precluded from doing it. Not being favored with a particular answer, I am confirmed in my opinion, that the states have not the power of disciplining them, without recurring to the doctrine of constructive implied powers. If, by implication, the states may discipline them, by implication, also, Congress may officer them; because, in a partition of power, each has a right to come in for part; and because implication is to operate in favor of Congress on all occasions, where their object is the extension of power, as well as in favor of the states. We have not one fourth of the arms that would be sufficient to defend ourselves. The power of arming the militia, and the means of purchasing arms, are taken from the states by the paramount powers of Congress. If Congress will not arm them, they will not be armed at all.

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39. Statement of Henry Lee, Virginia Convention Debates. June 9, 1788, as compiled in 3 Elliot, *supra*, at 178, reads in relevant part as follows:

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I cannot understand the implication of the honorable gentleman [Patrick Henry], that, because Congress may arm the militia, the states cannot do it: nor do I understand the reverse of the proposition. The states are, by no part of the plan before you, precluded from arming and disciplining the militia, should Congress neglect it. * * *

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40. Statement of John Williams, New York Convention Debates, June 27, 1788, as compiled in 2 Elliot, *supra*, at 338, reads in relevant part as follows:

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* * * Now, if the Congress should judge it a proper provision, for the common defence and general welfare, that the state governments should be essentially destroyed, what, in the name of common sense, will prevent them? Are they not constitutionally authorized to pass such laws? Are not the terms, *common defence and general welfare*, indefinite, undefinable terms? What checks have the state governments against such encroachments? * * * And what restraint have they against tyranny in their head? Do they rely on anything but arms, the *ultima ratio*? And to this most undesirable point must the states recur, in order to secure their rights. But have they the means necessary for the purpose? Are they not deprived of the command of the purse and the sword of their citizens? Is not the power, both over taxation and the militia, wrested from their hands by this Constitution, and bestowed upon the general government? Yes, sir, it is. * * *

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41. Foreign Spectator, *Philadelphia Federal Gazette* (Nov. 14, 1788) reprinted in Young, *supra*, at 567, 567-69, states in pertinent part:

REMARKS *on the Amendments to the Federal Constitution, proposed by the Conventions of Massachusetts, New-Hampshire, New-York, Virginia, South and North-Carolina, with the minorities of Pennsylvania and Maryland, by a* FOREIGN SPECTATOR.

NUMBER VIII.

A Good militia is the natural, easy, powerful and honorable defence of a country. Even those nations which are surrounded with formidable neighbours, need not altogether depend on great standing armies, which are not favorable to liberty, and create an enormous expence. Indeed regular troops are more excellent, as they resemble a militia; which is evidently seen in the Swedish army, and acknowledged by the best military writers of different nations. America will be well defended against any attack by the united strength of a small but well appointed army, and a numerous well ordered militia. * * *

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The constitution *reserves to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.* This surely is a perfect security to any state against an encroachment of the federal power. The safety of the union requires that the militia of every state should be well armed, and in every respect qualified for the defence of the country, consequently general and effectual regulations must be made by Congress. Fines, penalties, and punishments of a proper kind are a necessary part of discipline; if these are to be exercised by the several states, it is needless to compliment the Congress with the ridiculous power of organizing the militia.

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42. A Pennsylvanian [Tench Coxe], *Remarks on the First Part of the Amendments to the Federal Constitution*, Philadelphia Federal Gazette (June 18, 1789), reprinted in Young, *supra*, at 670, 671, states in pertinent part:

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As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.

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43. Centinel *Revived No. XXIX*, Philadelphia Independent Gazetteer (Sept. 9, 1789), excerpts reprinted in Young, *supra*, at 711, 712, states in pertinent part:

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Article 5th of the proposed amendments—"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed, &c." It is remarkable that this article only makes the observation, "that a well regulated militia, composed of the *body* of the people, is the best security of a free state;" it does not ordain, or constitutionally provide for, the establishment of such a one. The absolute command vested by other sections in Congress over the militia, are not in the least abridged by this amendment. The militia may still be subjected to martial law and all its concomitant severities, and disgraceful punishments, may still be marched from state to state and made the unwilling instruments of crushing the last efforts of expiring liberty.

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44. Governor John Hancock, New York Journal (Jan. 28, 1790), reprinted in Young, *supra*, at 731, 731, states in pertinent part:

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" * * * Hence we are called upon in an especial manner, to maintain an equal and regular system of revenue and taxation, to support the faith, and perform the engagements of our republic; to arm and cause our militia to be disciplined according to the mode which shall be provided by Congress; and to see that they are officered with men, who are capable of making the greatest progress in the art military, and who delight in the freedom and happiness of their country. A well regulated and disciplined militia, is at all times a good objection to the introduction of that bane of all free governments—a standing army."

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45. A Farmer, Philadelphia Independent Gazetteer (Jan. 29, 1791), reprinted in Young, *supra*, at 741, 741-42, states in pertinent part:

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Under every government the dernier resort of the people, is an appeal to the sword; whether to defend themselves against the open attacks of a foreign enemy, or to check the insidious encroachments of domestic foes. Whenever a people are so enervated by luxury as to intrust the defence of their country to a regular, standing army, composed of mercenaries, the power of that country will remain under the direction and influence of the most wealthy citizens. The history of Holland and other modern republics will manifest, how far a *mere monied interest* is to be intrusted with the liberties of the people.—This subject requires your most serious consideration. Whatever form your government may assume, your liberties will be safe as long as you support a well regulated militia. Those who experience the labor of acquiring property, will ever be the best defenders of it.

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46. Proceedings of the Virginia Convention, as compiled in 3 Elliot, *supra* (page numbers in brackets), reads in relevant part as follows:

From June 14, 1788:

[378] Mr. CLAY wished to be informed why the Congress were to have power to provide for calling forth the militia, to put the laws of the Union into execution.

Mr. MADISON supposed the reasons of this power to be so obvious that they would occur to most gentlemen. If resistance should be made to the execution of the laws, he said, it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.

Mr. GEORGE MASON. Mr. Chairman, unless there be some restrictions on the power of calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions, we may very easily see that it will produce dreadful oppressions. It is extremely unsafe, without some alterations. It would be to use the militia to a very bad purpose, if any disturbance happened in New Hampshire, to call them from Georgia. This would harass the people so much that they would agree to abolish the use of the militia, and establish a standing army. I conceive the general government ought to have power over the militia, but it ought to have some bounds. If gentlemen say that the militia of a neighboring state is not sufficient, the government ought to have power to call forth those of other states, the most convenient and contiguous. But in this case, the consent of the state legislatures ought to be had. On *real* emergencies, this consent will never be denied, each state being concerned in the safety of the rest. This power may be restricted without any danger. I wish such an amendment as this—that the militia of any state should not be marched beyond the limits of the adjoining state; and if it be necessary to draw them from one end of the continent to [379] the other, I wish such a check, as the consent of the state legislature, to be provided. Gentlemen may say that this would impede the government, and that the state legislatures would counteract it by refusing their consent. This argument may be applied to all objections whatsoever. How is this compared to the British constitution? Though the king may declare war, the Parliament has the means of carrying it on. It is not so here. Congress can do both. Were it not for that check in the British government, the monarch would be a despot. When a war is necessary for the benefit of the nation, the means of carrying it on are never denied. If any unjust requisition be made on Parliament, it will be, as it ought to be, refused. The same principle ought to be observed in our government. In times of real danger, the states will have the same enthusiasm in aiding the general government, and granting its demands, which is seen in England, when the king is engaged in a war apparently for the interest of the nation. This power is necessary; but we ought to guard against danger. If ever they attempt to harass and abuse the militia, they may abolish them, and raise a standing army in their stead. There are various ways of destroying the militia. A standing army may be perpetually established in their stead. I abominate and detest the idea of a government, where there is a standing army. The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c. Here is a line of division drawn between them—the state and general governments. The power over the militia is divided between them. The national government has an exclusive right to provide for arming, organizing, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. The state governments have the power of appointing the officers, and of training the militia, according to the discipline prescribed by Congress, if they should think proper to prescribe any. Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.

[380] No man has a greater regard for the military gentlemen than I have. I admire their intrepidity, perseverance, and valor. But when once a standing army is established in any country, the people lose their liberty. When, against a regular and disciplined army, yeomanry are the only defence,—yeomanry, unskilful and unarmed,—what chance is there for preserving freedom? Give me leave to recur to the page of history, to warn you of your present danger. Recollect the history of most nations of the world. What havoc, desolation, and destruction, have been perpetrated by standing armies! An instance within the memory of some of this house will show us how our militia may be destroyed. Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man, [Sir William Keith] who was governor of Pennsylvania, to disarm the people; that it

was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. [Here Mr. Mason quoted sundry passages to this effect.] This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use. I am not acquainted with the military profession. I beg to be excused for any errors I may commit with respect to it. But I stand on the general principles of freedom, whereon I dare to meet any one. I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline them. With this single exception, I would agree to this part, as I am conscious the government ought to have the power.

They may effect the destruction of the militia, by rendering the service odious to the people themselves, by harassing them from one end of the continent to the other, and by keeping them under martial law.

The English Parliament never pass a mutiny bill but for [381] one year. This is necessary; for otherwise the soldiers would be on the same footing with the officers, and the army would be dissolved. One mutiny bill has been here in force since the revolution. I humbly conceive there is extreme danger of establishing cruel martial regulations. If, at any time, our rulers should have unjust and iniquitous designs against our liberties, and should wish to establish a standing army, the first attempt would be to render the service and use of militia odious to the people themselves—subjecting them to unnecessary severity of discipline in time of peace, confining them under martial law, and disgusting them so much as to make them cry out, "Give us a standing army!" I would wish to have some check to exclude this danger; as, that the militia should never be subject to martial law but in time of war. I consider and fear the natural propensity of rulers to oppress the people. I wish only to prevent them from doing evil. By these amendments I would give necessary powers, but no unnecessary power. If the clause stands as it is now, it will take from the state legislatures what divine Providence has given to every individual—the means of self-defence. Unless it be moderated in some degree, it will ruin us, and introduce a standing army.

Mr. MADISON. Mr. Chairman, I most cordially agree, with the honorable member last up, that a standing army is one of the greatest mischiefs that can possibly happen. It is a great recommendation for this system, that it provides against this evil more than any other system known to us, and, particularly, more than the old system of confederation. The most effectual way to guard against a standing army, is to render it unnecessary. The most effectual way to render it unnecessary, is to give the general government full power to call forth the militia, and exert the whole natural strength of the Union, when necessary. Thus you will furnish the people with sure and certain protection, without recurring to this evil; and the certainty of this protection from the whole will be a strong inducement to individual exertion. Does the organization of the government warrant a belief that this power will be abused? Can we believe that a government of a federal nature, consisting of many coëqual sovereignties, and particularly having one branch chosen from the people, would drag the militia unnecessarily to an immense distance? This, sir, would be unworthy the most arbitrary despot. [382] They have no temptation whatever to abuse this power; such abuse could only answer the purpose of exciting the universal indignation of the people, and drawing on themselves the general hatred and detestation of their country.

I cannot help thinking that the honorable gentleman has not considered, in all its consequences, the amendment he has proposed. Would this be an equal protection, sir, or would it not be a most partial provision? Some states have three or four states in contact. Were this state invaded, as it is bounded by several states, the militia of three or four states would, by this proposition, be obliged to come to our aid; and those from some of the states would come a far greater distance than those of others. There are other states, which, if invaded, could be assisted by the militia of one state only, there being several states which border but on one state. Georgia and New Hampshire would be infinitely less safe than the other states. Were we to adopt this amendment, we should set up those states as butts for invasions, invite foreign enemies to attack them, and expose them to peculiar hardships and dangers. Were the militia confined to any limited distance from their respective places of abode, it would produce equal, nay, more inconveniences. The principles of equality and reciprocal aid would be destroyed in either case.

I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive. Have we not found, from experience, that, while the power of arming and governing the militia has been solely vested in the state legislatures, they were neglected and rendered unfit for immediate service? Every state neglected too much this most essential object. But the general government can do it more effectually. Have we not also found that the militia of one state were almost always insufficient to succor its harassed neighbor? Did all the states furnish their quotas of militia with sufficient promptitude? The assistance of one state will be of little avail to repel invasion. But the general head of the whole Union can do it with effect, if it be vested with power to use the aggregate strength of the Union. If the regulation of the militia were to be committed to the executive authority alone, there might be reason for providing [383] restrictions. But, sir, it is the legislative authority that has this power. They must make a law for the purpose.

The honorable member is under another mistake. He wishes martial law to be exercised only in time of war, under an idea that Congress can establish it in time of peace. The states are to have the authority of training the militia according to the congressional discipline; and of governing them at all times when not in the service of the Union. Congress is to govern such part of them as may be employed in the actual service of the United States; and such part only can be subject to martial law. The gentlemen in opposition have drawn a most tremendous picture of the Constitution in this respect. Without considering that the power was absolutely indispensable, they have alarmed us with the possible abuse of it, but have shown no inducement or motive to tempt them to such abuse. Would the legislature of the state drag the militia of the eastern shore to the western frontiers, or those of the western frontiers to the eastern shore, if the local militia were sufficient to effect the intended purpose? There is something so preposterous, and so full of mischief, in the idea of dragging the militia unnecessarily from one end of the continent to the other, that I think there can be no ground of apprehension. If you limit their power over the militia, you give them a pretext for substituting a standing army. If you put it in the power of the state governments to refuse the militia, by requiring their consent, you destroy the general government, and sacrifice particular states. The same principles and motives which produce disobedience to requisitions, will produce refusal in this case.

The restrictions which the honorable gentleman mentioned to be in the British constitution are all provisions against the power of the executive magistrate; but the House of Commons may, if they be so disposed, sacrifice the interest of their constituents in all those cases. They may prolong the duration of mutiny bills, and grant supplies to the king to carry on an impolitic war. But they have no motives to do so; for they have strong motives to do their duty. We halve more ample security than the people of Great Britain. The powers of the government are more limited and guarded, and our representatives are more responsible than the members of the British House of Commons.

[384] Mr. CLAY apprehended that, by this power, our militia might be sent to the Mississippi. He observed that the sheriff might raise the *posse comitatus* to execute the laws. He feared it would lead to the establishment of a military government, as the militia were to be called forth to put the laws into execution. He asked why this mode was preferred to the old, established custom of executing the laws.

Mr. MADISON answered, that the power existed in all countries; that the militia might be called forth, for that purpose, under the laws of this state and every other state in the Union; that public force must be used when resistance to the laws required it, otherwise society itself must be destroyed; that the mode referred to by the gentleman might not be sufficient on every occasion, as the sheriff must be necessarily restricted to the *posse* of his own county. If the *posse* of one county were insufficient to overcome the resistance to the execution of the laws, this power must be resorted to. He did not, by any means, admit that the old mode was superseded by the introduction of the new one. And it was obvious to him, that, when the civil power was sufficient, this mode would never be put in practice.

Mr. HENRY. Mr. Chairman, in my judgment the friends of the opposition have to act cautiously. We must make a firm stand before we decide. I was heard to say, a few days ago, that the sword and purse were the two great instruments of government; and I professed great repugnance at parting with the purse, without any control, to the proposed system of government. And now, when we proceed in this formidable compact, and come to the national defence, the sword, I am persuaded we ought to be still more cautious and circumspect; for I feel still more reluctance to surrender this most valuable of rights.

The honorable member who has risen to explain several parts of the system was pleased to say, that the best way of avoiding the danger of a standing army, was, to have the militia in such a way as to render it unnecessary; and that, as the new government would have power over the militia, we should have no standing army—it being unnecessary. This argument destroys itself. It demands a power, and denies the probability of its exercise. There are suspicions of power on one hand, and absolute and unlimited confi[385]dence on the other. I hope to be one of those who have a large share of suspicion. I leave it to this house, if there be not too small a portion on the other side, by giving up too much to that government. You can easily see which is the worst of two extremes. Too much suspicion may be corrected. If you give too little power to-day, you may give more to-morrow. But the reverse of the proposition will not hold. If you give too much power to-day, you cannot retake it to-morrow: for to-morrow will never come for that purpose. If you have the fate of other nations, you will never see it. It is easier to supply deficiencies of power than to take back excess of power. This no man can deny.

But, says the honorable member, Congress will keep the militia armed; or, in other words, they will do their duty. Pardon me if I am too jealous and suspicious to confide in this remote possibility. My honorable friend went on a supposition that the American rulers, like all others, will depart from their duty without bars and checks. No government can be safe without checks. Then he told us they had no temptation to violate their duty, and that it would be their interest to perform it. Does he think you are to trust men who cannot have separate interests from the people? It is a novelty in the political world (as great a novelty as the system itself) to find rulers without private interests, and views of personal emoluments, and ambition. His supposition, that they will not depart from their duty, as having no interest to do so, is no satisfactory answer to my mind. This is no check. The government may be most intolerable and destructive, if this be our only security.

My honorable friend attacked the honorable gentleman with universal principles—that, in all nations and ages, rulers have been actuated by motives of individual interest and private emoluments, and that in America it would be so also. I hope, before we part with this great bulwark, this noble palladium of safety, we shall have such checks interposed as will render us secure. The militia, sir, is our ultimate safety. We can have no security without it. But then, he says that the power of arming and organizing the militia is concurrent, and to be equally exercised by the general and state governments. I am sure, and I trust in the candor of that gentleman, that he will recede from that [386] opinion, When his recollection will be called to the particular clause which relates to it.

As my worthy friend said, there is a positive partition of power between the two governments. To Congress is given the power of "arming, organizing, and disciplining the militia, and governing such part of them as may be employed in the service of the United States." To the state legislatures is given the power of "appointing the officers, and training the militia according to the discipline prescribed by Congress." I observed before, that, if the power be concurrent as to arming them, it is concurrent in other respects. If the states have the right of arming them, &c., concurrently, Congress has a concurrent power of appointing the officers, and training the militia. If Congress have that power, it is absurd. To admit this mutual concurrence of powers will carry you into endless absurdity—that Congress has nothing exclusive on the one hand, nor the states on the other. The rational explanation is, that Congress shall have exclusive power of arming them, &c., and that the state governments shall have exclusive power of appointing the officers, &c. Let me put it in another light.

May we not discipline and arm them, as well as Congress, if the power be concurrent? so that our militia shall have two sets of arms, double sets of regimentals, &c.; and thus, at a very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms, &c.? Every one who is able may have a gun. But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance; for sure I am that that nation which shall trust its liberties in other hands cannot long exist. If gentlemen are serious when they suppose a concurrent power, where can be the impolicy to amend it? Or, in other words, to say that Congress shall not arm or discipline them, till the states shall have refused or neglected to do it? This is my object. I only wish to bring it to what they themselves say is implied. Implication is to be the foundation of our civil liberties; and when you speak of arming the militia by a [387] concurrence of power, you use implication. But implication will not save you, when a strong army of veterans comes upon you. You would be laughed at by the whole world, for trusting your safety implicitly to implication.

The argument of my honorable friend was, that rulers might tyrannize. The answer he received was, that they will not. In saying that they would not, he admitted they might. In this great, this essential part of the Constitution, if you are safe, it is not from the Constitution, but from the virtues of the men in government. If gentlemen are willing to trust themselves and posterity to so slender and improbable a chance, they have greater strength of nerves than I have.

The honorable gentleman, in endeavoring to answer the question why the militia were to be called forth to execute the laws, said that the civil power would probably do it. He is driven to say, that the civil power may do it instead of the militia. Sir, the military power ought not to interpose till the civil power refuse. If this be the spirit of your new Constitution, that the laws are to be enforced by military coercion, we may easily divine the happy consequences which will result from it. The civil power is not to be employed at all. If it be, show me it. I read it attentively, and could see nothing to warrant a belief that the civil power can be called for. I should be glad to see the power that authorizes Congress to do so. The sheriff will be aided by military force. The most wanton excesses may be committed under color of this; for every man in office, in the states, is to take an oath to support it in all its operations. The honorable gentleman said, in answer to the objection that the militia might be marched from New Hampshire to Georgia, that the members of the government would not attempt to excite the indignation of the people. Here, again, we have the general unsatisfactory answer, that they will be virtuous, and that there is no danger.

Will gentlemen be satisfied with an answer which admits of dangers and abuses if they be wicked? Let us put it out of their power to do mischief. I am convinced there is no safety in the paper on the table as it stands now. I am sorry to have an occasion to pass a eulogium on the British government, as gentlemen may object to it. But how natural it is, when comparing deformities to beauty, to be [388] struck with the superiority of the British government to that system! In England, self-love — self-interest — powerfully stimulates the executive magistrate to advance the prosperity of the nation. In the most distant part, he feels the loss of his subjects. He will see the great advantage of his posterity inseparable from the felicity of his people. Man is a fallen creature, a fallible being, and cannot be depended on without self-love. Your President will not have the same motives of self-love to impel him to favor your interests. His political character is but transient, and he will promote, as much as possible, his own private interests. He will conclude, the constant observation has been that he will abuse his power, and that it is expected. The king of England has a more permanent interest. His stock, his family, is to continue in possession of the same emolument. The more flourishing his nation, the more formidable and powerful is he. The sword and purse are not united, in that government, in the same hands, as in this system. Does not infinite security result from a separation?

But it is said that our Congress are more responsible than the British Parliament. It appears to me that there is no real, but there may be some specious responsibility.

If Congress, in the execution of their unbounded powers, shall have done wrong, how will you come at them to punish them, if they are at the distance of five hundred miles? At such a great distance, they will evade responsibility altogether. If you have given up your militia, and Congress shall refuse to arm them, you have lost every thing. Your existence will be precarious, because you depend on others, whose interests are not affected by your infelicity. If Congress are to arm us exclusively, the man of New Hampshire may vote for or against it, as well as the Virginian. The great distance and difference between the two places render it impossible that the people of that country can know or pursue what will promote our convenience. I therefore contend that, if Congress do not arm the militia, we ought to provide for it ourselves.

Mr. NICHOLAS. Mr. Chairman, the great object of government, in every country, is security and public defence. I suppose, therefore, that what we ought to attend to here, is, what is the best mode of enabling the general government to protect us. One of three ways must be pursued [389] for this purpose. We must either empower them to employ, and rely altogether on, a standing army; or depend altogether on militia; or else we must enable them to use the one or the other of these two ways, as may be found most expedient. The least reflection will satisfy us that the Convention has adopted the only proper method. If a standing army were alone to be employed, such an army must be kept up in time of peace as would be sufficient in war. The dangers of such an army are so striking that every man would oppose the adoption of this government, had it been proposed by it as the only mode of defence. Would it be safe to depend on militia alone, without the agency of regular forces, even in time of war? Were we to be invaded by a powerful, disciplined army, should we be safe with militia? Could men unacquainted with the hardships, and un-skilled in the discipline of war,—men only inured to the peaceable occupations of domestic life,—encounter with success the most skilful veterans, inured to the fatigues and toils of campaigns? Although some people are pleased with the theory of reliance on militia, as the sole defence of a nation, yet I think it will be found, in practice, to be by no means adequate. Its inadequacy is proved by the experience of other nations. But were it fully adequate, it would be unequal. If war be supported by militia, it is by personal service. The poor man does as much as the rich. Is this just? What is the consequence when war is carried on by regular troops? They are paid by taxes raised from the people, according to their property; and then the rich man pays an adequate share.

But, if you confine yourselves to militia alone, the poor man is oppressed. The rich man exempts himself by furnishing a substitute. And, although it be oppressive to the poor, it is not advantageous to the rich? For what he gives would pay regular troops. It is therefore neither safe nor just to depend entirely on militia. As these two ways are ineligible, let us consider the third method. Does this Constitution put this on a proper footing? It enables Congress to raise an army when necessary, or to call forth the militia when necessary. What will be the consequence of their having these two powers? Till there be a necessity for an army to be raised, militia will do. And when an army will be raised, the militia will still be employed, which [390] will render a less numerous army sufficient. By these means, there will be a sufficient defence for the country, without having a standing army altogether, or oppressing the people. The worthy member has said, that it ought to be a part of the Constitution that the militia ought not to go out of the state without the consent of the state legislature. What would be the consequence of this? The general defence is trusted to the general government. How is it to protect the Union?

It must apply to the state governments before it can do it. Is this right? Is it not subjecting the general will to the particular will, and exposing the general defence to the particular caprice of the members of the state governments? This would entirely defeat the power given to Congress to provide for the general defence; and unless the militia were to aid in the execution of the laws when resisted, the other powers of Congress would be nugatory. But he has said that this idea is justified by the English history; for that the king has the power of the sword, but must apply to the commons for the means of using it—for the purse. This is not a similar case. The king and commons are parts of the same government. But the general government is separate and perfectly distinct from the individual governments of the states. Should Congress be obliged to apply to the particular states for the militia, they may be refused, and the government overturned. To make the case similar, he ought to show us that the king and Parliament were obliged to call on some other power to raise forces, and provide for the means of carrying on war; for, otherwise, there is no similitude.

If the general government be obliged to apply to the states, a part will be thereby rendered superior to the whole. What are to be the effects of the amendments proposed? To destroy one of the most beneficial parts of the Constitution, put an obstacle in the way of the general government, and put it in the power of the state governments to take away the aid of the militia. Who will be most likely to want the aid of the militia? The Southern States, from their situation. Who are the most likely to be called for? The Eastern States, from their strength, &c. Should we put it in the power of particular states to refuse the militia, it ought to operate against ourselves. It is the height of bad policy to alter this part of the system. But it is said, the [391] militia are to be disarmed. Will they be worse armed than they are now? Still, as my honorable friend said, the states would have power to arm them. The power of arming them is concurrent between the general and state governments; for the power of arming them rested in the state governments before; and although the power be given to the general government, yet it is not given exclusively; for, in every instance where the Constitution intends that the general government shall exercise any power exclusively of the state governments, words of exclusion are particularly inserted. Consequently, in every case where such words of exclusion are not inserted, the power is concurrent to the state governments and Congress, unless where it is impossible that the power should be exercised by both. It is, therefore, not an absurdity to say, that Virginia may arm the militia, should Congress neglect to arm them. But it would be absurd to say that we should arm them after Congress had armed them, when it would be unnecessary; or that Congress should appoint the officers, and train the militia, when it is expressly excepted from their powers.

But his great uneasiness is, that the militia may be under martial law when not on duty. A little attention will be sufficient to remove this apprehension. The Congress is to have power "to provide for the arming, organizing, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." Another part tells you that they are to provide for calling them forth, to execute the laws of the Union, suppress insurrections, and repel invasions. These powers only amount to this—that they can only call them forth in these three cases, and that they can only govern such part of them as may be in the actual service of the United States. This causes a sufficient security that they will not be under martial law but when in actual service. If, sir, a mutiny bill has continued since the revolution, recollect that this is done under the present happy government. Under the new government, no appropriation of money, to the use of raising or supporting an army, shall be for a longer term than two years. The President is to command. But the regulation of the army and navy is given to Congress. Our representatives will be a powerful check here. The influence of the commons, in England, in this case, is very predominant. But the worthy member [392] on the other side of the house has said that the militia are the great bulwark of the nation, and wishes to take no step to bring them into disuse. What is the inference? He wishes to see the militia employed. The Constitution provides what he wants. This is, to bring them frequently into use. If he expects that, by depriving the general government of the power of calling them into more frequent use, they will be rendered more useful and expert, he is greatly deceived. We ought to part with the power to use the militia to somebody. To whom? Ought we not to part with it for the general defence? If you give it not to Congress, it may be denied by the states. If you withhold it, you render a standing army absolutely necessary; for if they have not the militia, they must have such a body of troops as will be necessary for the general defence of the Union.

It was said, by the gentleman, that there was something singular in this government, in saying that the militia shall be called forth to execute the laws of the Union. There is a great difference between having the power in three cases, and in all cases. They cannot call them forth for any other purpose than to execute the laws, suppress insurrections, and repel invasions. And can any thing be more demonstrably obvious, than that the laws ought to be enforced if resisted, and insurrections quelled, and foreign invasions repelled? But it is asked, Why has not the Constitution declared that the civil power shall be employed to execute the laws? Has it said that the civil power shall not be employed? The civil officer is to execute the laws on all occasions; and, if he be resisted, this auxiliary power is given to Congress of calling forth the militia to execute them, when it shall be found absolutely necessary.

From his argument on this occasion, and his eulogium on the executive magistrate of Britain, it might be inferred that the executive magistrate here was to have the power of calling forth the militia. What is the idea of those gentlemen who heard his argument on this occasion? Is it not that the President is to have this power —that President, who, he tells us, is not to have those high feelings, and that fine sensibility, which the British monarch possesses? No, sir, the President is not to have this power. God forbid we should ever see a public man in this country who should [393] have this power. Congress only are to have the power of calling forth the militia. And will the worthy member say that he would trust this power to a prince, governed by the dictates of ambition, or mere motives of personal interest, sooner than he would trust it in the hands of Congress? I will trust Congress, because they will be actuated by motives of fellow-feeling. They can make no regulations but what will affect themselves, their friends, and relations. But I would not trust a prince, whose ambition and private views would be the guide of his actions. When the government is carried on by representatives, and persons of my own choice, whom I can follow when far removed, who can be displaced at stated and short periods,—I can safely confide the power to them. It appears to me that this power is essentially necessary; for, as the general defence is trusted to Congress, we ought to intrust fully the means. This cannot be fully done without giving the power of calling forth the militia; and this power is sufficiently guarded.

Mr. MADISON. Mr. Chairman, the honorable gentleman has laid much stress on the maxim, that the purse and sword ought not to be put in the same hands, with a view of pointing out the impropriety of vesting this power in the general government. But it is totally inapplicable to this question. What is the meaning of this maxim? Does it mean that the sword and purse ought not to be trusted in the hands of the same government? This cannot be the meaning; for there never was, and I can say there never will be, an efficient government, in which both are not vested. The only rational meaning is, that the sword and purse are not to be given to the same member. Apply it to the British government, which has been mentioned. The sword is in the hands of the British king; the purse in the hands of the Parliament. It is so in America, as far as any analogy can exist. Would the honorable member say that the sword ought to be put in the hands of the representatives of the people, or in other hands independent of the government altogether? If he says so, it will violate the meaning of that maxim. This would be a novelty hitherto unprecedented. The purse is in the hands of the representatives of the people. They have the appropriation of all moneys. They have the direction and regulation of land and naval forces. They are to provide for calling forth the militia; and the [394] President is to have the command, and, in conjunction with the Senate, to appoint the officers. The means ought to be commensurate to the end. The end is general protection. This cannot be effected without a general power to use the strength of the Union.

We are told that both sides are distinguished by these great traits, confidence and distrust. Perhaps there may be a less or greater tincture of suspicion on one side than the other. But give me leave to say that, where power can be safely lodged, if it be necessary, reason commands its cession. In such case, it is imprudent and unsafe to withhold it. It is universally admitted that it must be lodged in some hands or other. The question, then, is, in what part of the government it ought to be placed; and not whether any other political body, independent of the government, should have it or not. I profess myself to have had a uniform zeal for a republican government. If the honorable member, or any other person, conceives that my attachment to this system arises from a different source, he is greatly mistaken. From the first moment that my mind was capable of contemplating political subjects, I never, till this moment, ceased wishing success to a well-regulated republican government. The establishment of such in America was my most ardent desire. I have considered attentively (and my consideration has been aided by experience) the tendency of a relaxation of laws and a licentiousness of manners.

If we review the history of all republics, we are justified in the supposition that, if the bands of the government be relaxed, confusion will ensue. Anarchy ever has produced, and I fear ever will produce, despotism. What was the state of things that preceded the wars and revolutions in Germany? Faction and confusion. What produced the disorders and commotions of Holland? The like causes. In this commonwealth, and every state in the Union, the relaxed operation of the government has been sufficient to alarm the friends of their country. The rapid increase of population in every state is an additional reason to check dissipation and licentiousness. Does it not strongly call for the friends of republican government to endeavor to establish a republican organization? A change is absolutely necessary. I can see no danger in submitting to practice an experiment which seems to be founded on the best theoretic principles.

[395] But the honorable member tells us there is not an equal responsibility delineated, on that paper, to that which is in the English government. Calculations have

been made here, that, when you strike off those entirely elected by the influence of the crown, the other part does not bear a greater proportion to the number of their people, than the number fixed in that paper bears to the number of inhabitants in the United States. If it were otherwise, there is still more responsibility in this government. Our representatives are chosen for two years. In Great Britain, they are chosen for seven years. Any citizen may be elected here. In Great Britain, no one can be elected, to represent a county, without having an estate of the value of six hundred pounds sterling a year; nor to represent a corporation, without an annual estate of three hundred pounds. Yet we are told, there is no sympathy or fellow-feeling between the people here and their representatives; but that in England they have both. A just comparison will show that, if confidence be due to the government there, it is due tenfold here.

[Mr. Madison made many other observations, but spoke so very low that he could not be distinctly heard.]

Mr. HENRY. Mr. Chairman, it is now confessed that this is a national government. There is not a single federal feature in it. It has been alleged, within these walls, during the debates, to be national and federal, as it suited the arguments of gentlemen.

But now, when we have heard the definition of it, it is purely national. The honorable member was pleased to say that the sword and purse included every thing of consequence. And shall we trust them out of our hands without checks and barriers? The sword and purse are essentially necessary for the government. Every essential requisite must be in Congress. Where are the purse and sword of Virginia? They must go to Congress. What is become of your country? The Virginian government is but a name. It clearly results, from his last argument, that we are to be consolidated. We should be thought unwise indeed to keep two hundred legislators in

Virginia, when the government is, in fact, gone to Philadelphia or New York. We are, as a state, to form no part of the government. Where are your checks? The most essential objects of government are to be adminis-[396]tered by Congress. How, then, can the state governments be any check upon them? If we are to be a republican government, it will be consolidated, not confederated.

The means, says the gentleman, must be commensurate to the end. How does this apply? All things in common are left with this government. There being an infinitude in the government, there must be an infinitude of means to carry it on. This is a sort of mathematical government that may appear well on paper, but cannot sustain examination, or be safely reduced to practice. The delegation of power to an adequate number of representatives, and an unimpeded reversion of it back to the people, at short periods, form the principal traits of a republican government. The idea of a republican government, in that paper, is something superior to the poor people. The governing persons are the servants of the people. There, the servants are greater than their masters; because it includes infinitude, and infinitude excludes every idea of subordination. In this the creature has destroyed and soared above the creator. For if its powers be infinite, what rights have the people remaining? By that very argument, despotism has made way in all countries where the people unfortunately have been enslaved by it. We are told, the sword and purse are necessary for the national defence. The junction of these, without limitation, in the same hands, is, by logical and mathematical conclusions, the description of despotism.

The reasons adduced here to-day have long ago been advanced in favor of passive obedience and non-resistance. In 1688, the British nation expelled their monarch for attempting to trample on their liberties. The doctrine of divine right and passive obedience was said to be commanded by Heaven — it was inculcated by his minions and adherents. He wanted to possess, without control, the sword and purse. The attempt cost him his crown. This government demands the same powers. I see reason to be more and more alarmed. I fear it will terminate in despotism. As to his objection of the abuse of liberty, it is denied. The political inquiries and promotions of the peasants are a happy circumstance. A foundation of knowledge is a great mark of happiness. When the spirit of inquiry after political discernment goes forth among the lowest of the people, it rejoices my heart. Why such fearful apprehensions? I [397] defy him to show that liberty has been abused. There has been no rebellion here, though there was in Massachusetts. Tell me of any country which has been so long without a rebellion. Distresses have been patiently borne, in this country, which would have produced revolutions in other countries. We strained every nerve to make provisions to pay off our soldiers and officers. They, though not paid, and greatly distressed at the conclusion of the war, magnanimously acquiesced. The depreciation of the circulating currency very much involved many of them, and thousands of other citizens, in absolute ruin; but the same patient fortitude and forbearance marked their conduct. What would the people of England have done in such a situation? They would have resisted the government, and murdered the tyrant. But in this country, no abuse of power has taken place. It is only a general assertion, unsupported, which suggests the contrary. Individual licentiousness will show its baneful consequences in every country, let its government be what it may.

But the honorable gentleman says, responsibility will exist more in this than in the British government. It exists here more in name than any thing else. I need not speak of the executive authority. But consider the two houses — the American Parliament. Are the members of the Senate responsible? They may try themselves, and, if found guilty on impeachment, are to be only removed from office. In England, the greatest characters are brought to the block for their sinister administration. They have a power there, not to dismiss them from office, but from life, for mal-practices. The king himself cannot pardon in this case. How does it stand with respect to your lower house? You have but ten. Whatever number may be there, six is a majority. Will your country afford no temptation, no money to corrupt them? Cannot six fat places be found to accommodate them? They may, after the first Congress, take any place. There will be a multiplicity of places. Suppose they corruptly obtain places. Where will you find them, to punish them? At the farthest parts of the Union; in the ten miles square, or within a state where there is a stronghold. What are you to do when these men return from Philadelphia? Two things are to be done. To detect the offender and bring him to punishment. You will find it difficult to do either.

[398] In England, the proceedings are openly transacted. They deliver their opinions freely and openly. They do not fear all Europe. Compare it to this. You cannot detect the guilty. The publication from time to time is merely optional in them. They may prolong the period, or suppress it altogether, under pretence of its being necessary to be kept secret. The yeas and nays will avail nothing. Is the publication daily? It may be a year, or once in a century. I know this would be an unfair construction in the common concerns of life. But it would satisfy the words of the Constitution. It would be some security were it once a year, or even once in two years. When the new election comes on, unless you detect them, what becomes of your responsibility? Will they discover

their guilt when they wish to be reëlected? This would suppose them to be not only bad, but foolish men, in pursuit of responsibility. Have you a right to scrutinize into the conduct of your representatives? Can any man, who conceives himself injured, go and demand a sight of their journals? But it will be told that I am suspicious. I am answered, to every question, that they will be good men. In England, they see daily what is doing in Parliament. They will hear from their Parliament in one thirty-ninth part of the time that we shall hear from Congress in this scattered country. Let it be proposed, in England, to lay a poll tax, or enter into any measure, that will injure one part and produce emoluments to another, intelligence will fly quickly as the rays of light to the people. They will instruct their representatives to oppose it, and will petition against it, and get it prevented or redressed instantly. Impeachment follows quickly a violation of duty. Will it be so here? You must detect the offence, and punish the defaulter. How will this be done when you know not the offender, even though he had a previous design to commit the misdemeanor? Your Parliament will consist of sixty-five. Your share will be ten out of the sixty-five. Will they not take shelter, by saying they were in the minority — that the men from New Hampshire and Kentucky outvoted them? Thus will responsibility, that great pillar of a free government, be taken away.

The honorable gentleman wished to try the experiment. Loving his country as he does, he would not surely wish to trust his happiness to an experiment, from which much harm, but no good, may result.

[399] I will speak another time, and will not fatigue the committee now. I think the friends of the opposition ought to make a pause here; for I can see no safety to my country, if you give up this power.

Mr. MADISON. Mr. Chairman, the honorable member expresses surprise that I wished to see an experiment made of a republican government, or that I would risk the happiness of my country on an experiment. What is the situation of this country at this moment? Is it not rapidly approaching to anarchy? Are not the bands of the Union so absolutely relaxed as almost to amount to a dissolution? What has produced despotism and tyranny in other parts of the world? Is it not agreed, upon all hands, that a reform is necessary? If any takes place, will it not be an experiment, as well as this system? He acknowledges the existing system to be defective. He admits the necessity of *some* change. Would not the change he would choose himself be also an experiment? He has repeated objections which have already been clearly refuted, and which, therefore, I will pass over.

With respect to responsibility, still the honorable member thinks that the House of Representatives and Senate will suffer by a comparison with the British Parliament. I will not repeat the contrast made before, which he has mentioned. He tells us what may be done by our representatives with respect to the admission to offices, and insinuates that less may be done in Great Britain by the members of Parliament. In this country, by this system, no new office can be taken by a member of the government, and if he takes an old one, he loses his seat. If the emoluments of any existing office be increased, he cannot take it. How is it in Great Britain? Any member may have any place; for Parliament may create any new offices they please, or increase the emoluments of existing offices, and yet the members may accept any such places. Any member may accept any office whatever, and go again into Parliament. Does this comparison militate against this system? He tells us the affairs of our country are not alarming. I wish this assertion was well founded. I concur with him in rejoicing to see the people enlightened and vigilant. I should be happy to see the people paying respect to the laws and magistracy. But is respect paid to our laws? Every man's experience will tell him more, perhaps, than any thing I could say. [400] Public and private confidence daily and rapidly decrease. Experiments must be made, and in that form which we must find most to the interest of our country.

Gov. RANDOLPH. Mr. Chairman, our attention is summoned to this clause respecting the militia, and alarms are thrown out to persuade us that it involves a multiplicity of danger. It is supposed by the honorable gentleman lately up, and another gentleman, that the clause for calling forth the militia to suppress insurrections, repel invasions, and execute the laws of the Union, implies that, instead of using civil force in the first instance, the militia are to be called forth to arrest petty offenders against the laws. Ought not common sense to be the rule of interpreting this Constitution? Is there an exclusion of the civil power? Does it provide that the laws are to be enforced by military coercion in all cases? No, sir. All that we are to infer is, that when the civil power is not sufficient, the militia must be drawn out. Who are they? He says (and I cheerfully acquiesce in the rectitude of the assertion) that they are the bulwarks of our liberties. Shall we be afraid that the people, this bulwark of freedom, will turn instruments of slavery? The officers are to be appointed by the states. Will you admit that they will act so criminally as to turn against their country? The officers of the general government are attached to it, because they derive their appointment from it. Admitting the militia officers to be corrupt, what is to make them be in favor of the general government? Will not the same reason attach them to the state governments? But it is feared that the militia are to be subjected to martial law when not in service. They are only to be called out in three cases, and only to be governed by the authority of Congress when in the actual service of the United States; so that their articles of war can no longer operate upon them than when in the actual service of the Union.

Can it be presumed that you can vest the supreme power of the United States with the power of defence, and yet take away this natural defence from them? You risk the general defence by withholding this power.

The honorable gentleman, speaking of responsibility, has mistaken facts. He says the king cannot pardon offenders found guilty on impeachment. The king can pardon after [401] impeachment, though not before. He says, further, that in America every thing is concealed, whereas in England the operations of the government are openly transacted. In England, those subjects which produce impeachments are not opinions. No man ever thought of impeaching a man for an opinion. It would be impossible to discover whether the error in opinion resulted from a wilful mistake of the heart, or an involuntary fault of the head. What are the occasions of impeachments most commonly? Treaties. Are these previously known? No. Till after they are presented to the public eye, they are not known. Those who advised a treaty are not known till then. There ought not to be a publication on the subject of negotiations till they are concluded. So that, when he thinks there is a greater notoriety in this case in England than here, I say he is mistaken. There will be as much notoriety in America as in England. The spirit of the nation occasions the notoriety of their political operations, and not any constitutional requisition. The spirit of liberty will not be less predominant in America, I hope, than there. With respect to a standing army, I believe there was not a member in the federal Convention, who did not feel indignation at such an institution. What remedy, then, could be provided?

Leave the country defenceless? In order to provide for our defence, and exclude the dangers of a standing army, the general defence is left to those who are the objects of defence. It is left to the militia, who will suffer if they become the instruments of tyranny. The general government must have power to call them forth when the general defence requires it. In order to produce greater security, the state governments are to appoint the officers. The President, who commands them when in actual service of the Union, is appointed secondarily by the people. This is a further security. Is it not incredible that men who are interested in the happiness of their country—whose friends, relations, and connections, must be involved in the fate of their country—should turn against their country? I appeal to every man whether, if any of our own officers were called upon to destroy the liberty of their country, he believes they would assent to such an act of suicide. The state governments, having the power of appointing them, may elect men who are the most remarkable for their virtue of attachment to their country.

[402] Mr. GEORGE MASON, after having read the clause which gives Congress power to provide for arming, organizing, and disciplining the militia, and governing those in actual service of the Union, declared it as his firm belief, that it included the power of annexing punishments, and establishing necessary discipline, more especially as the construction of this, and every other part of the Constitution, was left to those who were to govern. If so, he asked if Congress could not inflict the most ignominious punishments on the most worthy citizens of the community. Would freemen submit to such indignant treatment? It might be thought a strained construction, but it was no more than Congress might put upon it. He thought such severities might be exercised on the militia as would make them wish the use

of the militia to be utterly abolished, and assent to the establishment of a standing army. He then adverted to the representation, and said it was not sufficiently full to take into consideration the feelings and sentiments of all the citizens. He admitted that the nature of the country rendered a full representation impracticable. But he strongly urged that impracticability as a conclusive reason for granting no powers to the government but such as were absolutely indispensable, and these to be most cautiously guarded.

He then recurred to the power of impeachment. On this subject he entertained great suspicions. He apologized for being suspicious. He entered into the world with as few suspicious as any man. Young men, he said, were apt to think well of every one, till time and experience taught them better. After a treaty manifestly repugnant to the interests of the country was made, he asked how they were to be punished. Suppose it had been made by the means of bribery and corruption. Suppose they had received one hundred thousand guineas, or louis d'ors, from a foreign nation, for consenting to a treaty, how was the truth to be come at? Corruption and bribery of that kind had happened in other governments, and might in this. The House of Representatives were to impeach them. The senators were to try themselves. If a majority of them were guilty of the crime, would they pronounce themselves guilty? Yet, says he, this is called responsibility. He wished to know in what court the members of the government were to be tried for the commission of indictable offences, or injuries to individuals. [403] He acknowledged himself to be no lawyer; but he thought he could see that they could be tried neither in the state nor federal courts. The only means, therefore, of bringing them to punishment, must be by a court appointed by law; and the law to punish them must also be made by themselves. By whom is it to be made?

demanded he. By the very men who are interested in not inflicting punishment. Yet, says he, though they make the law, and fix the punishment to be inflicted on themselves, it is called responsibility. If the senators do not agree to the law, it will not be made, and thus they will escape altogether.

[Mr. Mason then animadverted on the ultimate control of Congress over the elections, and was proceeding to prove that it was dangerous, when he was called to order, by Mr. Nicholas, for departing from the clause under consideration. A desultory conversation ensued, and Mr. Mason was permitted to proceed. He was of opinion that the control over elections tended to destroy responsibility. He declared he had endeavored to discover whether this power was really necessary, or what was the necessity of vesting it in the government, but he could find no good reason for giving it; that the reasons suggested were that, in case the states should refuse or neglect to make regulations, or in case they should be prevented from making regulations by rebellion or invasion, then the general government should interpose.]

Mr. Mason then proceeded thus: If there be any other cases, I should be glad to know them; for I know them not. If there be no other, why not confine them to these cases? But the power here, as in a thousand other instances, is without reason. I have no power which any other person can take from me. I have no right of representation, if they can take it from me. I say, therefore, that Congress may, by this claim, take away the right of representation, or render it nugatory, despicable, or oppressive. It is at least argumentative, that what may be done will be done, and that a favorite point will be done by those who can.

Suppose the state of Virginia should adopt such regulations as gentlemen say, (and in which I accord with all my heart,) and divide the state into ten districts.

Suppose, then, that Congress should order, instead of this, that the elections should be held in the borough of Norfolk. Will any man say that any man in Frederick or Berkely county would have any share in this representation, if the members were chosen in Norfolk? Nay, I might go farther, and say that [404] the elections for all the states might be had in New York, and then we should have to go so far that the privilege would be lost altogether; for but few gentlemen could afford to go thither. Some of the best friends of the Constitution have advocated that the elections should be in one place. This power is not necessary, and is capable of great abuse. It ought to be confined to the particular cases in which they assert it to be necessary. Whatever gentlemen may think of the opposition, I will never agree to give any power which I conceive to be dangerous.

I have doubts on another point. The 5th section of the 1st article provides, "that each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy." This enables them to keep the negotiations about treaties secret. Under this veil they may conceal any thing and every thing. Why not insert words that would exclude ambiguity and danger? The words of the Confederation, that defective system, are, in this respect, more eligible. What are they? In the last clause of the 9th article it is provided, "that Congress shall publish the journal of their proceedings monthly, except such parts thereof, relating to treaties, alliances, or military operations, as, in their judgment, require secrecy." The proceedings, by that system, are to be published monthly, with certain exceptions. These are proper guards. It is not so here. On the contrary, they may conceal what they please.

Instead of giving information, they will produce suspicion. You cannot discover the advocates of their iniquitous acts. This is an additional defect of responsibility. Neither house can adjourn, without the consent of the other, for more than three days. This is no parliamentary rule. It is untrodden ground, and it appears to me liable to much exception.

The senators are chosen for six years. They are not recallable for those six years, and are reëligible at the end of the six years. It stands on a very different ground from the Confederation. By that system, they were only elected for one year, might be recalled, and were incapable of reëlection. But in the new Constitution, instead of being elected for one, they are chosen for six years. They cannot be recalled, in all that time, for any misconduct, and at the end of that long term may again be elected. What will be [405] the operation of this? Is it not probable that those gentlemen, who will be elected senators, will fix themselves in the federal town, and become citizens of that town more than of our state? They will purchase a good seat in or near the town, and become inhabitants of that place. Will it not be, then, in the power of the Senate to worry the House of Representatives into any thing? They will be a continually existing body. They will exercise those machinations and contrivances which the many have always to fear from the few. The House of Representatives is the only check on the Senate, with their enormous powers. But, by that clause, you give them the power of worrying the House of Representatives into a compliance with any measure. The senators, living on the spot, will feel no inconvenience from long sessions, as they will vote themselves handsome pay, without incurring any additional expenses. Your representatives are on a different ground, from their shorter continuance in office. The gentlemen from Georgia are six or seven hundred miles from home, and wish to go home. The Senate, taking advantage of this, by stopping the other house from adjourning, may worry them into any thing. These are my doubts, and I think the provision not consistent with the usual parliamentary modes.

Mr. LEE, (of Westmoreland.) Mr. Chairman, I am anxious to know the truth on this great occasion. I was in hopes of receiving true information, but have been disappointed. I have heard suspicions against possibility, and not against probability. As to the distinction which lies between the gentlemen for and against the Constitution, — in the first place, most of the arguments the latter use pay no regard to the necessity of the Union, which is our object. In the next place, they use contradictory arguments. It may be remembered that we were told there was great danger of an aristocracy governing this country; for that their wages would be so low, that the rich alone could serve. And what does another gentleman say? That the price will be so high, that they will fix themselves comfortably in office, and, by their power and extravagant emoluments, ruin us. Ought we to adduce arguments like these, which imply a palpable contradiction? We ought to use arguments capable of discussion.

I beg leave to make some reply to what the honorable [406] gentleman over the way said. He rose with great triumph and exultation, saying that we had conceded that the government was national. The honorable gentleman is so little used to triumph on the grounds of reasoning, that he suffers himself to be quite captivated by the least appearance of victory. What reason had he to say that we admitted it to be a national government? We agree that the sword and the purse are in the hands of the general government for different designated purposes. What had the honorable member conceded? That the objects of the government were general, as designated in that system, equally affecting the interests of the people of every state. This was the sole concession, and which by no means warrants his conclusion. Then why did the honorable gentleman seize it as a victory? Does he mean to object to the Constitution by putting words into our mouths which we never uttered? Did that gentleman say that the happiness of the people depended on the private virtues of the members of the government, and not on its construction? Did any gentleman admit this, as he insinuated? No, sir, we never admitted such a conclusion. Why, then, take up the time of this house in declaiming on words we never said? We say that it will secure our liberty and happiness, and that it is so constructed and organized, that we need apprehend no danger.

But, says he, the creature destroys the creator. How has he proved it? By his bare assertion. By ascribing infinitude to powers clearly limited and defined, for certain designated purposes. I shall not repeat the arguments which have fully refuted this idea of the honorable gentleman.

But gentlemen say that we must apply to the militia to execute the constitutional laws, without the interposition of the civil power, and that a military officer is to be substituted for the sheriff in all cases. This unwarrantable objection is urged, like many others, to produce the rejection of this government, though contrary to reason. What is the meaning of the clause under debate? Does not their explanation violate the natural meaning of language? Is it to be inferred that, when the laws are not opposed, judgments must be executed by the militia? Is this the right and liberal way of discussing the general national objects? I am astonished that gentlemen should attempt to impose so absurd a construction upon us.

[407] The honorable gentleman last up says, that organizing the militia gives Congress power to punish them when not in the actual service of the government. The gentleman is mistaken in the meaning of the word *organization*, to explain which would unnecessarily take

up time. Suffice it to say, it does not include the infliction of punishments. The militia will be subject to the common regulations of war when in actual service; but not in time of peace.

But the honorable gentleman said there is danger of an abuse of the power, and attempted to exemplify. And delegated power may be abused. It would be civil and candid in those gentlemen, who inveigh against this Constitution with such malignity, to show in what manner adequate powers can be given without a possibility of being abused. It appears to me to be as well secured as it can be, and that the alterations he proposes would involve many disadvantages. I cannot, then, but conclude that this government will, in my opinion, secure our liberty and happiness, without any alteration.

Mr. CLAY made several remarks; but he spoke too low. He admitted that he might be mistaken with respect to the exclusion of the civil power in executing the laws. As it was insinuated that he was not under the influence of common sense in making the objection, his error might result from his deficiency in that respect. But he thought that another gentleman was as deficient in common decency as he was in common sense. He was not, however, convinced that the civil power would be employed. If it was meant that the militia should not be called out to execute the laws in all cases, why were they not satisfied with the words, "repel invasions, suppress insurrections"? He thought the word *insurrection* included every opposition to the laws; and if so, it would be sufficient to call them forth to suppress insurrections, without mentioning that they were to execute the laws of the Union. He added that, although the militia officers were appointed by the state governments, yet, as they were sworn to obey the superior power of Congress, no check or security would result from their nomination of them.

Mr. MADISON. Mr. Chairman, I cannot think that the explanation of the gentleman last up is founded in reason. It does not say that the militia shall be called out in all cases, [408] but in certain cases. There are cases in which the execution of the laws may require the operation of militia, which cannot be said to be an invasion or insurrection. There may be a resistance to the laws which cannot be termed an insurrection.

My honorable friend over the way has opened a new source of argument. He has introduced the assertions of gentlemen out of doors. If we thus depart from regularity, we shall never be able to come to a decision.

If there be any gentleman who is a friend to the government, and says that the elections may or ought to be held in one place, he is an enemy to it on that ground. With respect to the time, place, and manner of elections, I cannot think, notwithstanding the apprehensions of the honorable gentleman, that there is any danger, or, if abuse should take place, that there is not sufficient security. If all the people of the United States should be directed to go to elect in one place, the members of the government would be execrated for the infamous regulation. Many would go to trample them under foot for their conduct; and they would be succeeded by men who would remove it. They would not dare to meet the universal hatred and detestation of the people, and run the risk of the certain dreadful consequences. We must keep within the compass of human probability. If a possibility be the cause of objection, we must object to every government in America. But the honorable gentleman may say that better guards may be provided. Let us consider the objection. The power of regulating the time, place, and manner of elections, must be vested somewhere. It could not be fixed in the Constitution without involving great inconveniences. They could then have no authority to adjust the regulation to the changes of circumstances. The question then is, whether it ought to be fixed unalterably in the state governments, or be subject to the control of the general government. Is it not obvious that the general government would be destroyed without this control? It has already been demonstrated that it will produce many conveniences. Have we not sufficient security against abuse? Consider fully the principles of the government. The sum of the powers given up by the people of Virginia is divided into two classes — one to the federal and the other to the state government. Each is subdivided into three branches. These [409] may be kept independent of each other in the one as well as the other. In this system, they are as distinct as is consistent with good policy. This, in my opinion, instead of diminishing, increases the security of liberty more than any government that ever was; for the powers of government which, in every other country, are given to one body, are here given to two, and are favorable to public liberty. With respect to secrecy, if every thing in which it is necessary could be enumerated, I would have no objection to mention them. All the state legislatures can keep secret what they think ought to be concealed. The British House of Commons can do it. They are in this respect under much less restraint than Congress. There never was any legislative assembly without a discretionary power of concealing important transactions, the publication of which might be detrimental to the community. There can be no real danger as long as the government is constructed on such principles.

He objects also to the clause respecting adjournment — that neither house shall, without the consent of the other, adjourn for more than three days. It was before remarked that, if a difference should take place between the houses about the time of adjournment, the President could still determine it; from which no danger could arise, as he is chosen in a secondary degree by the people, and would consequently fix no time which would be repugnant to the sense of the representatives of the people. Another and more satisfactory answer is this: Suppose the Senate wished to chain down the House of Representatives; what is to hinder them from going home? How bring them back again? It would be contrary to the spirit of the Constitution to impede the operations of the government, perhaps at a critical period. I cannot conceive that such difference will often happen. Were the Senate to attempt to prevent an adjournment, it would but serve to irritate the representatives without having the intended effect, as the President could adjourn them. There will not be occasion for the continual residence of the senators at the seat of government. What business have they more than the House of Representatives? The appointment of officers and treaties. With respect to the appointment of officers, a law may be made to grant it to the President alone. It must be supposed there will be but few and subordinate officers to be appointed, as the principal [410] offices will be filled. It is observed that the President, when vacancies happen during the recess of the Senate, may fill them till it meets. With respect to treaties, the occasions of forming them will not be many, and will make but a small proportion of the time of session.

Mr. CLAY wished to know the instances where an opposition to the laws did not come within the idea of an insurrection.

Mr. MADISON replied, that a riot did not come within the legal definition of an insurrection. There might be riots, to oppose the execution of the laws, which the civil power might not be sufficient to quell. This was one case, and there might probably be other cases. He referred to the candor of the committee, whether the militia could ever be used to destroy themselves.

From June 16, 1788:

[410] The Convention, according to the order of the day, again resolved itself into a committee of the whole Convention, to take into further consideration the proposed plan of government. Mr. WYTHE in the chair.

[The 8th section still under consideration. See page 378.]

Mr. HENRY thought it necessary and proper that they should take a collective view of this whole section, and revert again to the first clause. He adverted to the clause which gives Congress the power of raising armies, and proceeded as follows: To me this appears a very alarming power, when unlimited. They are not only to raise, but to support, armies; and this support is to go to the utmost abilities of the United States. If Congress shall say that the general welfare requires it, they may keep armies continually on foot. There is no control on Congress in raising or stationing them. They may billet them on the people at pleasure. This unlimited authority is a most dangerous power: its principles are despotic. If it be unbounded, it must lead to despotism; for the power of a people in a free government is supposed to be paramount to the existing power.

We shall be told that, in England, the king, lords, and commons, have this power; that armies can be raised by the prince alone, without the consent of the people. How does this apply here? Is this government to place us in the situation of the English? Should we suppose this government to resemble king, lords, and commons, we of this state [411] should be like an English county. An English county cannot control the government. Virginia cannot control the government of Congress any more than the county of Kent can control that of England. Advert to the power thoroughly. One of our first complaints, under the former government, was the quartering of troops upon us. This was one of the principal reasons for dissolving the connection with Great Britain. Here we may have troops in time of peace. They may be billeted in any manner — to tyrannize, oppress, and crush us.

We are told, we are afraid to trust ourselves; that our own representatives — Congress — will not exercise their powers oppressively; that we shall not enslave ourselves; that the militia cannot enslave themselves, &c. Who has enslaved France, Spain, Germany, Turkey, and other countries which groan under tyranny? They have been enslaved by the hands of their own people. If it will be so in America, it will be only as it has been every where else. I am still persuaded that the power of calling forth the militia, to execute the laws of the Union, &c., is dangerous. We requested the gentleman to show the cases where the militia would be wanting to execute the laws. Have we received a satisfactory answer? When we consider this part, and compare it to other parts, which declare that Congress may declare war, and that the President shall command the regular troops, militia, and navy, we shall find great danger. Under the order of Congress, they shall suppress insurrections. Under the order of Congress, they shall be called to execute the laws. It will result, of course, that this is to be a government of force. Look at the part which speaks of excises, and you will recollect that those who are to collect excises and duties are to be aided by military force. They have power to call them out, and to provide for arming, organizing, disciplining, them. Consequently, they are to make militia laws for this state.

The honorable gentleman said that the militia should be called forth to quell riots. Have we not seen this business go on very well to-day without military force? It is a long-established principle of the common law of England, that civil force is sufficient to quell riots. To what length may it not be carried? A law may be made that, if twelve men assemble, if they do not disperse, they may be fired upon. [412] I think it is so in England. Does not this part of the paper bear a strong aspect? The honorable gentleman, from his knowledge, was called upon to show the instances, and he told us the militia may be called out to quell riots. They may make the militia travel, and act under a colonel, or perhaps under a constable. Who are to determine whether it be a riot or not? Those who are to execute the laws of the Union? If they have power to execute their laws in this manner, in what situation are we placed! Your men who go to Congress are not restrained by a bill of rights. They are not restrained from inflicting unusual and severe punishments, though the bill of rights of Virginia forbids it. What will be the consequence? They may inflict the most cruel and ignominious punishments on the militia, and they will tell you that it is necessary for their discipline.

Give me leave to ask another thing. Suppose an excise-man will demand leave to enter your cellar, or house, by virtue of his office; perhaps he may call on the militia to enable him to go. If Congress be informed of it, will they give you redress? They will tell you that he is executing the laws under the authority of the continent at large, which must be obeyed, for that the government cannot be carried on without exercising severity. If, without any reservation of rights or control, you are contented to give up your rights, I am not. There is no principle to guide the legislature to restrain them from inflicting the utmost severity of punishment. Will gentlemen voluntarily give up their liberty? With respect to calling the militia to enforce every execution indiscriminately, it is unprecedented. Have we ever seen it done in any free country? Was it ever so in the mother country? It never was so in any well-regulated country. It is a government of force, and the genius of despotism expressly. It is not proved that this power is necessary, and if it be unnecessary, shall we give it up?

Mr. MADISON. Mr. Chairman, I will endeavor to follow the rule of the house, but must pay due attention to the observations which fell from the gentleman. I should conclude, from abstracted reasoning, that they were ill founded. I should think that, if there were any object which the general government ought to command, it would be the direction of the national forces. And as the force which lies in militia is most safe, the direction of that part ought to be [413] submitted to, in order to render another force unnecessary. The power objected to is necessary, because it is to be employed for national purposes. It is necessary to be given to every government. This is not opinion, but fact. The highest authority may be given, that the want of such authority in the government protracted the late war, and prolonged its calamities.

He says that one ground of complaint, at the beginning of the revolution, was, that a standing army was quartered upon us. This was not the whole complaint. We complained because it was done without the local authority of this country — without the consent of the people of America. As to the exclusion of standing armies in the bill of rights of the states, we shall find that though, in one or two of them, there is something like a prohibition, yet, in most of them, it is only provided that no armies shall be kept without the legislative authority; that is, without the consent of the community itself. Where is the impropriety of saying that we shall have an army, if necessary? Does not the notoriety of this constitute security? If inimical nations were to fall upon us when defenceless, what would be the consequence? Would it be wise to say, that we should have no defence? Give me leave to say, that the only possible way to provide against standing armies is to make them unnecessary.

The way to do this is to organize and discipline our militia, so as to render them capable of defending the country against external invasions and internal insurrections. But it is urged that abuses may happen. How is it possible to answer objections against the possibility of abuses? It must strike every logical reasoner, that these cannot be entirely provided against. I really thought that the objection in the militia was at an end. Was there ever a constitution, in which if authority was vested, it must not have been executed by force, if resisted? Was it not in the contemplation of this state, when contemptuous proceedings were expected, to recur to something of this kind? How is it possible to have a more proper resource than this? That the laws of every country ought to be executed, cannot be denied. That force must be used if necessary, cannot be denied. Can any government be established, that will answer any purpose whatever, unless force be provided for executing its [414] laws? The Constitution does not say that a standing army shall be called out to execute the laws. Is not this a more proper way? The militia ought to be called forth to suppress smugglers. Will this be denied? The case actually happened at Alexandria. There were a number of smugglers, who were too formidable for the civil power to overcome. The military quelled the sailors, who otherwise would have perpetrated their intentions. Should a number of smugglers have a number of ships, the militia ought to be called forth to quell them. We do not know but what there may be a combination of smugglers in Virginia hereafter. We all know the use made of the Isle of Man. It was a general depository of contraband goods. The Parliament found the evil so great, as to render it necessary to wrest it out of the hands of its possessor.

The honorable gentleman says that it is a government of force. If he means military force, the clause under consideration proves the contrary. There never was a government without force. What is the meaning of government? An institution to make people do their duty. A government leaving it to a man to do his duty or not, as he pleases, would be a new species of government, or rather no government at all. The ingenuity of the gentleman is remarkable in introducing the riot act of Great Britain. That act has no connection, or analogy, to any regulation of the militia; nor is there any thing in the Constitution to warrant the general government to make such an act. It never was a complaint, in Great Britain, that the militia could be called forth. If riots should happen, the militia are proper to quell it, to prevent a resort to another mode. As to the infliction of ignominious punishments, we have no ground of alarm, if we consider the circumstances of the people at large. There will be no punishments so ignominious as have been inflicted already. The militia law of every state to the north of Maryland is less rigorous than the particular law of this state. If a change be necessary to be made by the general government, it will be in our favor. I think that the people of those states would not agree to be subjected to a more harsh punishment than their own militia laws inflict. An observation fell from a gentleman, on the same side with myself, which deserves to be attended to. If we be dissatisfied with the national government, if we should choose to re[415]nounce it, this is an additional safeguard to our defence. I conceive that we are peculiarly interested in giving the general government as extensive means as possible to protect us. If there be a particular discrimination between places in America, the Southern States are, from their situation and circumstances, most interested in giving the national government the power of protecting its members.

[Here Mr. Madison made some other observations, but spoke so very low, that his meaning could not be comprehended.]

An act passed, a few years ago, in this state, to enable the government to call forth the militia to enforce the laws when a powerful combination should take place to oppose them. This is the same power which the Constitution is to have. There is a great deal of difference between calling forth the militia, when a combination is formed to prevent the execution of the laws, and the sheriff or constable carrying with him a body of militia to execute them in the first instance; which is a construction not warranted by the clause. There is an act, also, in this state, empowering the officers of the customs to summon any persons to assist them when they meet with obstruction in executing their duty. This shows the necessity of giving the government power to call forth the militia when the laws are resisted. It is a power vested in every legislature in the Union, and which is necessary to every government. He then moved that the clerk should read those acts — which were accordingly read.

Mr. GEORGE MASON asked to what purpose the laws were read. The objection was, that too much power was given to Congress — power that would finally destroy the state governments more effectually by insidious, underhanded means, than such as could be openly practised. This, said he, is the opinion of many worthy men, not only in this Convention, but in all parts of America. These laws could only show that the legislature of this state could pass such acts. He thought they militated against the cession of this power to Congress, because the state governments could call forth the militia when necessary, so as to compel a submission to the laws; and as they were competent to it, Congress ought not to have the power. The meeting of three or four persons might be called an insurrection, and the militia might be called out to disperse them. He was not satisfied with [416] the explanation of the word *organization* by the gentleman in the military line, (Mr. Lee.)

He thought they were not confined to the technical explanation, but that Congress could inflict severe and ignominious punishments on the militia, as a necessary incident to the power of organizing and disciplining them. The gentleman had said there was no danger, because the laws respecting the militia were less rigid in the other states than this. This was no conclusive argument. His fears, as he had before expressed, were, that grievous punishments would be inflicted, in order to render the service disagreeable to the militia themselves, and induce them to wish its abolition, which would afford a pretence for establishing a standing army. He was convinced the state governments ought to have the control of the militia, except when they were absolutely necessary for general purposes. The gentleman had said that they would be only subject to martial law when in actual service. He demanded what was to hinder Congress from inflicting it always, and making a general law for the purpose. If so, said he, it must finally produce, most infallibly, the annihilation of the state governments. These were his apprehensions; but he prayed God they might be groundless.

Mr. MADISON replied, that the obvious explanation was, that the states were to appoint the officers, and *govern all* the militia except that part which was called into the actual service of the United States. He asked, if power were given to the general government, if we must not give it executive power to use it. The vice of the old system was, that Congress could not execute the powers nominally vested in them. If the contested clause were expunged, this system would have nearly the same defect.

Mr. HENRY wished to know what authority the state governments had over the militia.

Mr. MADISON answered, that the state governments might do what they thought proper with the militia, when they were not in the actual service of the United States. They might make use of them to suppress insurrections, quell riots, &c., and call on the general government for the militia of any other state, to aid them, if necessary.

Mr. HENRY replied that, as the clause expressly vested the general government with power to call them out to sup[417]press insurrections, &c., it appeared to him, most decidedly, that the power of suppressing insurrections was *exclusively* given to Congress. If it remained in the states, it was by implication.

Mr. CORBIN, after a short address to the chair, in which he expressed extreme reluctance to get up, said, that all contentions on this subject might be ended, by adverting to the 4th section of the 4th article, which provides, "that the United States shall guaranty to every state in the Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence." He thought this section gave the states power to use their own *militia*, and call on Congress for the militia of other states. He observed that our representatives were to return every second year to mingle with their fellow-citizens. He asked, then, how, in the name of God, they would make laws to destroy themselves. The gentleman had told us that nothing could be more humiliating than that the *state governments* could not control the general government. He thought the gentleman might as well have complained that one county could not control the state at large. Mr. Corbin then said that all confederate governments had the care of the national defence, and that Congress ought to have it. Animadverting on Mr. Henry's observations, that the French had been the instruments of their own slavery, that the Germans had enslaved the Germans, and the Spaniards the Spaniards, &c., he asked if those nations knew any thing of representation. The want of this knowledge was the principal cause of their bondage. He concluded by observing that the general government had no power but such as the state government had, and that arguments against the one held against the other.

Mr. GRAYSON, in reply to Mr. Corbin, said he was mistaken when he produced the 4th section of the 4th article, to prove that the state governments had a right to intermeddle with the militia. He was of opinion that a previous application must be made to the federal head, by the legislature when in session, or otherwise by the executive of any state, before they could interfere with the militia. In his opinion, no instance could be adduced where the states could employ the militia; for, in all the cases wherein they could be [418] employed, Congress had the exclusive direction and control of them. Disputes, he observed, had happened in many countries, where this power should be lodged. In England, there was a dispute between the Parliament and King Charles who should have power over the militia. Were this government well organized, he would not object to giving it power over the militia. But as it appeared to him to be without checks, and to tend to the formation of an aristocratic body, he could not agree to it. Thus organized, his imagination did not reach so far as to know where this power should be lodged. He conceived the state governments to be at the mercy of the generality. He wished to be open to conviction, but he could see no case where the states could command the militia. He did not believe that it corresponded with the intentions of those who formed it, and it was altogether without an equilibrium. He humbly apprehended that the power of providing for organizing and disciplining the militia, enabled the government to make laws for regulating them, and inflicting punishments for disobedience, neglect, &c. Whether it would be the spirit of the generality to lay unusual punishments, he knew not; but he thought they had the power, if they thought proper to exercise it. He thought that, if there was a constructive implied power left in the states, yet, as the line was not clearly marked between the two governments, it would create differences. He complained of the uncertainty of the expression, and wished it to be so clearly expressed that the people might see where the states could interfere.

As the exclusive power of arming, organizing, &c., was given to Congress, they might entirely neglect them; or they might be armed in one part of the Union, and totally neglected in another. This he apprehended to be a probable circumstance. In this he might be thought suspicious; but he was justified by what had happened in other countries. He wished to know what attention had been paid to the militia of Scotland and Ireland since the union, and what laws had been made to regulate them. There is, says Mr. Grayson, an excellent militia law in England, and such as I wish to be established by the general government. They have thirty thousand select militia in England. But the militia of Scotland and Ireland are neglected. I see the necessity of the concentration of the forces of the Union. [419] I acknowledge that militia are the best means of quelling insurrections, and that we have an advantage over the English government, for their regular forces answer the purpose. But I object to the want of checks, and a line of discrimination between the state governments and the generality.

Mr. JOHN MARSHALL asked if gentlemen were serious when they asserted that, if the state governments had power to interfere with the militia, it was by implication. If they were, he asked the committee whether the least attention would not show that they were mistaken. The state governments did not derive their powers from the general government; but each government derived its powers from the people, and each was to act according to the powers given it. Would any gentleman deny this? He demanded if powers not given were retained by implication. Could any man say so? Could any man say that this power was not retained by the states, as they had not given it away? For, says he, does not a power remain till it is given away? The state legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away.

For Continental purposes Congress may call forth the militia, — as to suppress insurrections and repel invasions. But the power given to the states by the people is not taken away; for the Constitution does not say so. In the Confederation Congress had this power; but the state legislatures had it also. The power of legislating given them within the ten miles square is exclusive of the states, because it is expressed to be exclusive. The truth is, that when power is given to the general legislature, if it was in the state legislature before, both shall exercise it; unless there be an incompatibility in the exercise by one to that by the other, or negative words precluding the state governments from it. But there are no negative words here. It rests, therefore, with the states. To me it appears, then, unquestionable that the state governments can call forth the militia, in case the Constitution should be adopted, in the same manner as they could have done before its adoption. Gentlemen have said that the states cannot defend themselves without an application to Congress, because Congress can interpose! Does not every man feel a refutation of the argument in his own breast? I will show [420] that there could not be a combination, between those who formed the Constitution, to take away this power. All the restraints intended to be laid on the state governments (besides where an exclusive power is expressly given to Congress) are contained in the 10th section of the 1st article. This power is not included in the restrictions in that section. But what excludes every possibility of doubt, is the last part of it — that "no state shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." When invaded, they can engage in war, as also when in imminent danger. This clearly proves that the states can use the militia when they find it necessary. The worthy member last up objects to the Continental government's possessing the power of disciplining the militia, because, though all its branches be derived from the people, he says they will form an aristocratic government, unsafe and unfit to be trusted.

Mr. GRAYSON answered, that he only said it was so constructed as to form a great aristocratic body.

Mr. MARSHALL replied, that he was not certain whether he understood him; but he thought he had said so. He conceived that, as the government was drawn from the people, the feelings and interests of the people would be attended to, and that we should be safe in granting them power to regulate the militia. When the government is drawn from the people, continued Mr. Marshall, and depending on the people for its continuance, oppressive measures will not be attempted, as they will certainly draw on their authors the resentment of those on whom they depend. On this government, thus depending on ourselves for its existence, I will rest my safety, notwithstanding the danger depicted by the honorable gentleman. I cannot help being surprised that the worthy member thought this power so dangerous. What government is able to protect you in time of war? Will any state depend on its own exertions? The consequence of such dependence, and withholding this power from Congress, will be, that state will fall after state, and be a sacrifice to the want of power in the general government. *United we are strong, divided we fall.* Will you prevent the general government from drawing the militia of one state to another, when the consequence would be, that every state must depend on itself? The enemy, possessing [421] the water, can quickly go from one state to another. No state will spare to another its militia, which it conceives necessary for itself. It requires a superintending power, in order to call forth the resources of all to protect all. If this be not done, each state will fall a sacrifice. This system merits the highest applause in this respect. The honorable gentleman said that a general regulation may be made to inflict punishments. Does he imagine that a militia law is to be ingrafted on the scheme of government, so as to render it incapable of being changed? The idea of the worthy member supposes that men renounce their own interests. This would produce general inconveniences throughout the Union, and would be equally opposed by all the states. But the worthy member fears, that in one part of the Union they will be regulated and disciplined, and in another neglected. This danger is enhanced by leaving this power to each state; for some states may attend to their militia, and others may neglect them. If Congress neglect our militia, we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militia-men?

He then concluded by observing, that the power of governing the militia was not vested in the states by implication, because, being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been. And it could not be said that the states derived any powers from that system, but retained them, though not acknowledged in any part of it.

Mr. GRAYSON acknowledged that all power was drawn from the people. But he could see none of those checks which ought to characterize a free government. It had not such checks as even the British government had. He thought it so organized as to form an aristocratic body. If we looked at the democratic branch, and the great extent of country, he said, it must be considered, in a great degree, to be an aristocratic representation. As they were elected with craving appetites, and wishing for emoluments, they might unite with the other two branches. They might give reciprocally good offices to one another, and mutually protect each other; for he considered them all as united in interest, and as but one branch. There was no check to prevent such [422] a combination; nor, in cases of concurrent powers, was there a line drawn to prevent interference between the state governments and the generality.

Mr. HENRY still retained his opinion, that the states had no right to call forth the militia to suppress insurrections, &c. But the right interpretation (and such as the nations of the earth had put upon the concession of power) was that, when power was given, it was given exclusively. He appealed to the committee, if power was not confined in the hands of a *few* in almost all countries of the world. He referred to their candor, if the construction of conceded power was not an exclusive concession, in nineteen twentieth parts of the world. The nations which retained their liberty were comparatively few. America would add to the number of the oppressed nations, if she depended on constructive rights and argumentative implication. That the powers given to Congress were exclusively given, was very obvious to him. The rights which the states had must be founded on the restrictions on Congress. He asked, if the doctrine which had been so often circulated, that rights not given were retained, was true, why there were negative clauses to restrain Congress. He told gentlemen that these clauses were sufficient to shake all their implication; for, says he, if Congress had no power but that given to them, why restrict them by negative words? Is not the clear implication this — that, if these restrictions were not inserted, they could have performed what they prohibit?

The worthy member had said that Congress ought to have power to protect all, and had given this system the highest encomium. But he insisted that the power over the militia was concurrent. To obviate the futility of this doctrine, Mr. Henry alleged that it was not reducible to practice. Examine it, says he; reduce it to practice. Suppose an insurrection in Virginia, and suppose there be danger apprehended of an insurrection in another state, from the exercise of the government; or suppose a national war, and there be discontents among the people of this state, that produce, or threaten, an insurrection; suppose Congress, in either case, demands a number of militia, — will they not be obliged to go? Where are your reserved rights, when your militia go to a neighboring state? Which call is to be obeyed, the congressional call, or the call of the state legislature? The call of Congress must be obeyed. I need not remind this [423] committee that the sweeping clause will cause their demands to be submitted to. This clause enables them "to make all laws which shall be necessary and proper to carry into execution all the powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Mr. Chairman, I will turn to another clause, which relates to the same subject, and tends to show the fallacy of their argument.

The 10th section of the 1st article, to which reference was made by the worthy member, militates against himself. It says, that "no state shall engage in war, unless actually invaded." If you give this clause a fair construction, what is the true meaning of it? What does this relate to? Not domestic insurrections, but war. If the country be invaded, a state may go to war, but cannot suppress insurrections. If there should happen an insurrection of slaves, the country cannot be said to be invaded. They cannot, therefore, suppress it without the interposition of Congress. The 4th section of the 4th article expressly directs that, in case of domestic violence, Congress shall protect the states on application of the legislature or executive; and the 8th section of the 1st article gives Congress power to call forth the militia to quell insurrections: there cannot, therefore, be a concurrent power. The state legislatures ought to have power to call forth the efforts of the militia, when necessary. Occasions for calling them out may be urgent, pressing, and instantaneous. The states cannot now call them, let an insurrection be ever so perilous, without an application to Congress. So long a delay may be fatal.

There are three clauses which prove, beyond the possibility of doubt, that Congress, and *Congress only*, can call forth the militia. The clause giving Congress power to call them out to suppress insurrections, &c.; that which restrains a state from engaging in war except when actually invaded; and that which requires Congress to protect the states against domestic violence, — render it impossible that a state can have power to intermeddle with them. Will not Congress find refuge for their actions in these clauses? With respect to the concurrent jurisdiction, it is a political monster of absurdity. We have passed that clause which gives Congress an unlimited authority over the national wealth; and here is an unbounded control over the national strength. Notwithstand[424]ing this clear, unequivocal relinquishment of the power of controlling the militia, you say the states retain it, for the very purposes given to Congress. Is it fair to say that you give the power of arming the militia, and at the same time to say you reserve it? This great national government ought not to be left in this condition. If it be, it will terminate in the destruction of our liberties.

Mr. MADISON. Mr. Chairman, let me ask this committee, and the honorable member last up, what we are to understand from this reasoning. The power must be vested in Congress, or in the state governments; or there must be a division or concurrence. He is against division. It is a political monster. He will not give it to Congress for fear of oppression. Is it to be vested in the state governments? If so, where is the provision for general defence? If ever America should be attacked, the states would fall successively. It will prevent them from giving aid to their sister states; for, as each state will expect to be attacked, and wish to guard against it, each will retain its own militia for its own defence. Where is this power to be deposited, then, unless in the general government, if it be dangerous to the public safety to give it exclusively to the states? If it must be divided, let him show a better manner of doing it than that which is in the Constitution. I cannot agree with the other honorable gentleman, that there is no check. There is a powerful check in that paper. The state governments are to govern the militia when not called forth for general national purposes; and Congress is to govern such part only as may be in the actual service of the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the service of the United States. It is, then, clear that the states govern them when they are not. With respect to suppressing insurrections, I say that those clauses which were mentioned by the honorable gentleman are compatible with a concurrence of the power. By the first, Congress is to call them forth to suppress insurrections, and repel invasions of foreign powers. A concurrence in the former case is necessary, because a whole state may be in insurrection against the Union. What has passed may perhaps justify this apprehension. The safety of the Union and particular states requires that the general government should have power to [425] repel foreign invasions. The 4th section of the 4th article is perfectly consistent with the exercise of the power by the states. The words are, "The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence." The word *invasion* here, after power had been given in the former clause to repel invasions, may be thought tautologous, but it has a different meaning from the other. This clause speaks of a particular state. It means that it shall be protected from invasion by other states. A republican government is to be guarantied to each state, and they are to be protected from invasion from other states, as well as from foreign powers; and, on application by the legislature or executive, as the case may be, the militia of the other states are to be called to suppress domestic insurrections. Does this bar the states from calling forth their own militia? No; but it gives them a supplementary security to suppress insurrections and domestic violence.

The other clause runs in these words: "No state shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." They are restrained from making war, unless invaded, or *in imminent danger*. When in such danger, they are not restrained. I can perceive no competition in these clauses. They cannot be said to be repugnant to a concurrence of the power. If we object to the Constitution in this manner, and consume our time in verbal criticism, we shall never put an end to the business.

Mr. GEORGE MASON. Mr. Chairman, a worthy member has asked who are the militia, if they be not the *people* of this country, and if we are not to be protected from the fate of the Germans, Prussians, &c., by our representation? I ask, Who are the militia? They consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and [426] rich and poor; but they may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people. If we should ever see that day, the most ignominious punishments and heavy fines may be expected. Under the present government, all ranks of people are subject to militia duty. Under such a full and equal representation as ours, there can be no ignominious punishment inflicted. But under this national, or rather consolidated government, the case will be different. The representation being so small and inadequate, they will have no fellow-feeling for the people. They may discriminate people in their own predicament, and exempt from duty all the officers and lowest creatures of the national government. If there were a more particular definition of their powers, and a clause exempting the militia from martial law except when in actual service, and from fines and punishments of an unusual nature, then we might expect that the militia would be what they are. But, if this be not the case, we cannot say how long all classes of people will be included in the militia. There will not be the same reason to expect it, because the government will be administered by different people. We know what they are now, but know not how soon they may be altered.

Mr. GEORGE NICHOLAS. Mr. Chairman, I feel apprehensions lest the subject of our debates should be misunderstood. Every one wishes to know the true meaning of the system; but I fear those who hear us will think we are captiously quibbling on words. We have been told, in the course of this business, that the government will operate like a *screw.* Give me leave to say that the exertions of the opposition are like that instrument. They catch at every thing, and take it into their vortex. The worthy member says that this government is defective, because it comes from the people. Its greatest recommendation, with me, is putting the power in the hands of the people. He disapproves of it because it does not say in what particular instances the militia shall be called out to execute the laws. This is a power of the Constitution, and particular instances must be defined by the legislature. But, says the worthy member, those laws which have been read are arguments against the Constitution, because they show that the states are now in possession of the power, and competent to its execution. [427] Would you leave this power in the states, and by that means deprive the general government of a power which will be necessary for its existence? If the state governments find this power necessary, ought not the general government to have a similar power? But, sir, there is no state check in this business. The gentleman near me has shown that there is a very important check.

Another worthy member says there is no power in the states to quell an insurrection of slaves. Have they it now? If they have, does the Constitution take it away? If it does, it must be in one of the three clauses which have been mentioned by the worthy member. The first clause gives the general government power to call them out when necessary. Does this take it away from the states? No. But it gives an additional security; for, besides the power in the state governments to use their own militia, it will be the duty of the general government to aid them with the strength of the Union when called for. No part of this Constitution can show that this power is taken away.

But an argument is drawn from that clause which says "that no state shall engage in war unless actually invaded, or in such imminent danger as will not admit of delay." What does this prohibition amount to? It must be a war with a foreign enemy that the states are prohibited from making; for the exception to the restriction proves it. The restriction includes only offensive hostility, as they are at liberty to engage in war when invaded, or in imminent danger. They are, therefore, not restrained from quelling domestic insurrections, which are totally different from making war with a foreign power. But the great thing to be dreaded is that, during an insurrection, the militia will be called out from the state. This is his kind of argument. Is it possible that, at such a time, the general government would order the militia to be called? It is a groundless objection, to work on gentlemen's apprehensions within these walls. As to the 4th article, it was introduced wholly for the particular aid of the states. A republican form of government is guarantied, and protection is secured against invasion and domestic violence on application. Is not this a guard as strong as possible? Does it not exclude the unnecessary interference of Congress in business of this sort?

The gentleman over the way cannot tell who will be the [428] militia at a future day, and enumerates dangers of select militia. Let me attend to the nature of gentlemen's objections. One objects because there will be select militia; another objects because there will be no select militia; and yet both oppose it on these contradictory principles. If you deny the general government the power of calling out the militia, there must be a recurrence to a standing army. If you are really jealous of your liberties, confide in Congress.

Mr. MASON rose, and said that he was totally misunderstood. The contrast between his friend's objection and his was improper. His friend had mentioned the propriety of having select militia, like those of Great Britain, who should be more thoroughly exercised than the militia at large could possibly be. But *he*, himself, had not spoken of a selection of militia, but of the exemption of the highest classes of the people from militia service; which would justify apprehensions of severe and ignominious punishments.

Mr. NICHOLAS wished to know whether the representatives of the people would consent to such exemptions, as every man who had twenty-five acres of land could vote for a federal representative.

Mr. GRAYSON. Mr. Chairman, I conceive that the power of providing and maintaining a navy is at present dangerous, however warmly it may be urged by gentlemen that America ought to become a maritime power. If we once give such power, we put it in the hands of men whose interest it will be to oppress us. It will also irritate the nations of Europe against us. Let us consider the situation of the maritime powers of Europe: they are separated from us by the Atlantic Ocean. The riches of all those countries come by sea. Commerce and navigation are the principal sources of their wealth. If we become a maritime power, we shall be able to participate in their most beneficial business. Will they suffer us to put ourselves in a condition to rival them? I believe the first step of any consequence, which will be made towards it, will bring war upon us. Their ambition and avarice most powerfully impel them to prevent our becoming a naval nation. We should, on this occasion, consult our ability. Is there any gentleman here who can say that America can support a navy? The riches of America are not sufficient to bear the enormous expense it must certainly occasion. I may be supposed to exagger[429]ate, but I leave it to the committee to judge whether my information be right or not.

It is said that shipwrights can be had on better terms in America than in Europe; but necessary materials are so much dearer in America than in Europe, that the aggregate sum would be greater. A seventy-four gun ship will cost you ninety-eight thousand pounds, including guns, tackle, &c. According to the usual calculation in England, it will cost you the further sum of forty-eight thousand pounds to mail it, furnish provisions, and pay officers and men. You must pay men more here than in Europe, because, their governments being arbitrary, they can command the services of their subjects without an adequate compensation; so that, in all, the expenses of such a vessel would be one hundred and forty thousand pounds in one year. Let gentlemen consider, then, the extreme difficulty of supporting a navy, and they will concur with me, that America cannot do it. I have no objection to such a navy as will not excite the jealousy of the European countries. But I would have the Constitution to say, that no greater number of ships should be had than would be sufficient to protect our trade. Such a fleet would not, probably, offend the Europeans. I am not of a jealous disposition; but when I consider that the welfare and happiness of my country are in danger, I beg to be excused for expressing my apprehensions. Let us consider how this navy shall be raised. What would be the consequence under those general words, "to provide and maintain a navy"? All the vessels of the intended fleet would be built and equipped in the Northern States, where they have every necessary material and convenience for the purpose. Will any gentleman say that any ship of war can be raised to the south of Cape Charles? The consequence will be that the Southern States will be in the power of the Northern States.

We should be called upon for our share of the expenses, without having equal emoluments. Can it be supposed, when this question comes to be agitated in Congress, that the Northern States will not take such measures as will throw as much circulating money among them as possible, without any consideration as to the other states? If I know the nature of man, (and I believe I do,) they will have no consideration for us. But, supposing it were not so, America [430] has nothing at all to do with a fleet. Let us remain for some time in obscurity, and rise by degrees. Let us not precipitately provoke the resentment of the maritime powers of Europe. A well-regulated militia ought to be the defence of this country. In some of our constitutions it is said so. This Constitution should have inculcated the principle. Congress ought to be under some restraint in this respect. Mr. Grayson then added, that the Northern States would be principally benefited by having a fleet; that a majority of the states could vote the raising a great navy, or enter into any commercial regulation very detrimental to the other states. In the United Netherlands there was much greater security, as the commercial interest of no state could be sacrificed without its own consent. The raising a fleet was the daily and favorite subject of conversation in the Northern States. He apprehended that, if attempted, it would draw us into a war with Great Britain or France. As the American fleet would not be competent to the defence of all the states, the Southern States would be most exposed. He referred to the experience of the late war, as a proof of what he said. At the period the Southern States were most distressed, the Northern States, he said, were most happy. They had privateers in abundance, whereas we had but few. Upon the whole, he thought we should depend on our troops on shore, and that it was very impolitic to give this power to Congress without any limitation.

Mr. NICHOLAS remarked that the gentleman last up had made two observations — the one, that we ought not to give Congress power to raise a navy; and the other, that we had not the means of supporting it. Mr. Nicholas thought it a false doctrine. Congress, says he, has a discretionary power to do it when necessary. They are not bound to do it in five or ten years, or at any particular time. It is presumable, therefore, that they will postpone it until it be proper.

Mr. GRAYSON had no objection to giving Congress the power of raising such a fleet as suited the circumstances of the country. But he could not agree to give that unlimited power which was delineated in that paper.

Adverting to the clause investing Congress with the power of exclusive legislation in a district not exceeding ten miles square, he said he had before expressed his doubts that this [431] district would be the favorite of the generality, and that it would be possible for them to give exclusive privileges of commerce to those residing within it. He had illustrated what he said by European examples. It might be said to be impracticable to exercise this power in this manner. Among the various laws and customs which pervaded Europe, there were exclusive privileges and immunities enjoyed in many places. He thought that this ought to be guarded against; for should such exclusive privileges be granted to merchants residing within the ten miles square, it would be highly injurious to the inhabitants of other places.

Mr. GEORGE MASON thought that there were few clauses in the Constitution so dangerous as that which gave Congress exclusive power of legislation within ten miles square. Implication, he observed, was capable of any extension, and would probably be extended to augment the congressional powers. But here there was no need of implication. This clause gave them an unlimited authority, in every possible case, within that district. This ten miles square, says Mr. Mason, may set at defiance the laws of the surrounding states, and may, like the custom of the superstitious days of our ancestors, become the sanctuary of the blackest crimes. Here the federal courts are to sit. We have heard a good deal said of justice.

It has been doubted whether jury trial be secured in civil eases. But I will suppose that we shall have juries in civil cases. What sort of a jury shall we have within the ten miles square? The immediate creatures of the government. What chance will poor men get, where Congress have the power of legislating in all cases whatever, and where judges and juries may be under their influence, and bound to support their operations? Even with juries the chance of justice may here be very small, as Congress have unlimited authority, legislative, executive, and judicial. Lest this power should not be sufficient, they have it in every case. Now, sir, if an attempt should be made to establish tyranny over the people, here are ten miles square where the greatest offender may meet protection. If any of their officers, or creatures, should attempt to oppress the people, or should actually perpetrate the blackest deed, he has nothing to do but get into the ten miles square. Why was this dangerous power given? Felons may receive an asylum there and in [432] their strongholds. Gentlemen have said that it was dangerous to argue against possible abuse, because there could be no power delegated but might be abused. It is an incontrovertible axiom, that, when the dangers that may arise from the *abuse* are greater than the benefits that may result from the use, the power ought to be withheld. I do not conceive that this power is at all necessary, though capable of being greatly abused.

We are told by the honorable gentleman that Holland has its Hague. I confess I am at a loss to know what inference he could draw from that observation. This is the place where the deputies of the United Provinces meet to transact the public business. But I do not recollect that they have any exclusive jurisdiction whatever in that place, but are subject to the laws of the province in which the Hague is. To what purpose the gentleman mentioned that Holland has its Hague, I cannot see.

Mr. MASON then observed that he would willingly give them exclusive power, as far as respected the police and good government of the place; but he would give them no more, because he thought it unnecessary. He was very willing to give them, in this as well as in all other cases, those powers which he thought indispensably necessary.

Mr. MADISON. Mr. Chairman: I did conceive, sir, that the clause under consideration was one of those parts which would speak its own praise. It is hardly necessary to say any thing concerning it. Strike it out of the system, and let me ask whether there would not be much larger scope for those dangers. I cannot comprehend that the power of legislating over a small district, which cannot exceed ten miles square, and may not be more than one mile, will involve the dangers which he apprehends. If there be any knowledge in my mind of the nature of man, I should think it would be the last thing that would enter into the mind of any man to grant exclusive advantages, in a very circumscribed district, to the prejudice of the community at large. We make suppositions, and afterwards deduce conclusions from them, as if they were established axioms. But, after all, bring home this question to ourselves. Is it probable that the members from Georgia, New Hampshire, &c., will concur to sacrifice the privileges of their friends? I believe that, whatever state may become the seat of the gen[433]eral government, it will become the object of the jealousy and envy of the other states. Let me remark, if not already remarked, that there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether. How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the session and deliberations of Congress, would they be secure from insults, or the influence of such state? If this commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit, would it not be liable to attacks of that nature (and with more indignity) which have been already offered to Congress? With respect to the government of Holland, I believe the States General have no jurisdiction over the Hague; but I have heard that mentioned as a circumstance which gave undue influence to Holland over the rest. We must limit our apprehensions to certain degrees of probability. The evils which they urge must result from this clause are extremely improbable; nay, almost impossible.

Mr. GRAYSON. Mr. Chairman, one answer which has been given is, the improbability of the evil — that it will never be attempted, and that it is almost impossible. This will not satisfy us, when we consider the great attachments men have to a great and magnificent capital. It would be the interest of the citizens of that district to aggrandize themselves by every possible means in their power, to the great injury of the other states. If we travel all over the world, we shall find that people have aggrandized their own capitals. Look at Russia and Prussia. Every step has been taken to aggrandize their capitals. In what light are we to consider the ten miles square? It is not to be a fourteenth state. The inhabitants will in no respect whatever be amenable to the laws of any state. A clause in the 4th article, highly extolled for its wisdom, will be rendered nugatory by this exclusive legislation. This clause runs thus: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such [434] service or labor, but shall be delivered up on the claim of the party to whom such labor or service may be due." Unless you consider the ten miles square as a state, persons bound to labor, who shall escape thither, will not be given up; for they are only to be delivered up after they shall have escaped into a state. As my honorable friend mentioned, felons, who shall have fled from justice to the ten miles square, cannot be apprehended. The executive of a state is to apply to that of another for the delivery of a felon. He cannot apply to the ten miles square. It was often in contemplation of Congress to have power of regulating the police of the seat of government; but they never had an idea of exclusive legislation in all cases. The power of regulating the police and good government of it will secure Congress against insults. What originated the idea of the exclusive legislation was, some insurrection in Pennsylvania, whereby Congress was insulted, — on account of which, it is supposed, they left the state.

It is answered that the consent of the state must be required, or else they cannot have such a district, or places for the erecting of forts, &c. But how much is already given them! Look at the great country to the north-west of the Ohio, extending to and commanding the lakes.

Look at the other end of the Ohio, towards South Carolina, extending to the Mississippi. See what these, in process of time, may amount to. They may grant exclusive privileges to any particular part of which they have the possession. But it may be observed that those extensive countries will be formed into independent states, and that their consent will be necessary. To this I answer, that they may still grant such privileges as, in that country, are already granted to Congress by the states. The grants of Virginia, South Carolina, and other states, will be subservient to Congress in this respect. Of course, it results from the whole, that requiring the consent of the states will be no guard against this abuse of power.

[A desultory conversation ensued.]

Mr. NICHOLAS insisted that as the state, within which the ten miles square might be, could prescribe the terms on which Congress should hold it, no danger could arise, as no state would consent to injure itself: there was the same [435] security with respect to the places purchased for the erection of forts, magazines, &c.; and as to the territory of the United States, the power of Congress only extended to make needful rules and regulations concerning it, without prejudicing the claim of any particular state, the right of territory not being given up; that the grant of those lands to the United States was for the general benefit of all the states, and not to be perverted to their prejudice; that, consequently, whether that country were formed into new states or not, the danger apprehended could not take place; that the seat of government was to be still a part of the state, and, as to general regulations, was to be considered as such.

Mr. GRAYSON, on the other hand, contended that the ten miles square could not be viewed as a state; that the state within which it might be would have no power of legislating over it; that, consequently, persons bound to labor, and felons, might receive protection there; that exclusive emoluments might be granted to those residing within it; that the territory of the United States, being a part of no state or states, might be appropriated to what use Congress pleased, without the consent of any state or states; and that, consequently, such exclusive privileges and exemptions might be granted, and such protection afforded to fugitives, within such places, as Congress should think proper; that, after mature consideration, he could not find that the ten miles square was to be looked upon even as a part of a state, but to be totally independent of all, and subject to the exclusive legislation of Congress.

Mr. LEE strongly expatiated on the impossibility of securing any human institution from possible abuse. He thought the powers conceded in the paper on the table not so liable to be abused as the powers of the state governments. Gentlemen had suggested that the seat of government would become a sanctuary for state villains, and that, in a short time, ten miles square would subjugate a country of eight hundred miles square. This appeared to him a most improbable possibility; nay, he might call it impossibility. Were the place crowded with rogues, he asked if it would be an agreeable place of residence for the members of the general government, who were freely chosen by the people and the state governments. Would the people be so lost to honor and virtue, as to select men who would willingly [436] associate with the most abandoned characters? He thought the honorable gentleman's objections against remote possibility of abuse went to prove that government of no sort was eligible, but that a state of nature was preferable to a state of civilization. He apprehended no danger; and thought that persons bound to labor, and felons, could not take refuge in the ten miles square, or other places exclusively governed by Congress, because it would be contrary to the Constitution, and a palpable usurpation, to protect them.

Mr. HENRY entertained strong suspicions that great dangers must result from the clause under consideration. They were not removed, but rather confirmed, by the remarks of the honorable gentleman, in saying that it was extremely improbable that the members from New Hampshire and Georgia would go and legislate exclusively for the ten miles square. If it was so improbable, why ask the power? Why demand a power which was not to be exercised? Compare this power, says he, with the next clause, which gives them power to make all laws which shall be necessary to carry their laws into execution. By this they have a right to pass any law that may facilitate the execution of their acts. They have a right, by this clause, to make a law that such a district shall be set apart for any purpose they please, and that any man who shall act contrary to their commands, within certain ten miles square, or any place they may select, and strongholds, shall be hanged without benefit of clergy. If they think any law necessary for their personal safety, after perpetrating the most tyrannical and oppressive deeds, cannot they make it by this sweeping clause? If it be necessary to provide, not only for this, but for any department or officer of Congress, does not this clause enable them to make a law for the purpose? And will not these laws, made for those purposes, be paramount to the laws of the states? Will not this clause give them a right to keep a powerful army continually on foot, if they think it necessary to aid the execution of their laws? Is there any act, however atrocious, which they cannot do by virtue of this clause? Look at the use which has been made, in all parts of the world, of that human thing called power. Look at the predominant thirst of dominion which has invariably and uniformly prompted rulers to abuse their powers. Can you say that you will be safe when you give such unlimited pow[437]ers, without any real responsibility? Will you be safe when you trust men at Philadelphia with power to make any law that will enable them to carry their acts into execution? Will not the members of Congress have the same passions which other rulers have had? They will not be superior to the frailties of human nature. However cautious you may be in the selection of your representatives, it will be dangerous to trust them with such unbounded powers. Shall we be told, when about to grant such illimitable authority, that it will never be exercised!

I conjure you once more to remember the admonition of that sage man who told you that, when you give power, you know not what you give. I know the absolute necessity of an energetic government. But is it consistent with any principle of prudence or good policy to grant unlimited, unbounded authority, which is so totally unnecessary that gentlemen say it will never be exercised? But gentlemen say that we must make experiments. A wonderful and unheard-of experiment it will be, to give unlimited power unnecessarily! I admit my inferiority in point of historical knowledge; but I believe no man can produce an instance of an unnecessary and unlimited power, given to a body independent of the legislature, within a particular district. Let any man in this Convention show me an instance of such separate and different powers of legislation in the same country — show me an instance where a part of the community was independent of the whole.

The people within that place, and the strongholds, may be excused from all the burdens imposed on the rest of the society, and may enjoy exclusive emoluments, to the great injury of the rest of the people. But gentlemen say that the power will not he abused. They ought to show that it is necessary. All their powers may be fully carried into execution, without this exclusive authority in the ten miles square. The sweeping clause will fully enable them to do what they please. What could the most extravagant and boundless imagination ask, but power to do every thing? I have reason to suspect ambitious grasps at power. The experience of the world teaches me the jeopardy of giving enormous power. Strike this clause out of the form of the government, and how will it stand? Congress will still have power, by the sweeping clause, to make laws within that [438] place and the strongholds, independently of the local authority of the state. I ask you, if this clause be struck out, whether the sweeping clause will not enable them to protect themselves from insult. If you grant them these powers, you destroy every degree of responsibility. They will fully screen them from justice, and preclude the possibility of punishing them. No instance can be given of such a wanton grasp of power as an exclusive legislation in all cases whatever.

Mr. MADISON. Mr. Chairman, I am astonished that the honorable member should launch out into such strong descriptions without any occasion. Was there ever a legislature in existence that held their sessions at a place where they had not jurisdiction? I do not mean such a legislature as they have in Holland; for it deserves not the name. Their powers are such as Congress have now, which we find not reducible to practice. If you be satisfied with the shadow and form, instead of the substance, you will render them dependent on the local authority. Suppose the legislature of this country should sit in Richmond, while the exclusive jurisdiction of the place was in some particular county; would this country think it safe that the general good should be subject to the paramount authority of a part of the community?

The honorable member asks, Why ask for this power, and if the subsequent clause be not fully competent for the same purpose. If so, what new terrors can arise from this particular clause? It is only a superfluity. If that latitude of construction which he contends for were to take place with respect to the sweeping clause, there would be room for those horrors. But it gives no supplementary power. It only enables them to execute the delegated powers. If the delegation of their powers be safe, no possible inconvenience can arise from this clause. It is at most but explanatory. For when any power is given, its delegation necessarily involves authority to make laws to execute it. Were it possible to delineate on paper all those particular cases and circumstances in which legislation by the general legislature would be necessary, and leave to the states all the other powers, I imagine no gentleman would object to it. But this is not within the limits of human capacity. The particular powers which are found necessary to be given [439] are therefore delegated generally, and particular and minute specification is left to the legislature.

[Here Mr. Madison spoke of the distinction between regulation of police and legislation, but so low he could not be heard.]

When the honorable member objects to giving the general government jurisdiction over the place of their session, does he mean that it should be under the control of any particular state, that might, at a critical moment, seize it? I should have thought that this clause would have met with the most cordial approbation. As the consent of the state in which it may be must be obtained, and as it may stipulate the terms of the grant, should they violate the particular stipulations it would be an usurpation; so that, if the members of Congress were to be guided by the laws of their country, none of those dangers could arise.

[Mr. Madison made several other remarks, which could not be heard.]

Mr. HENRY replied that, if Congress were vested with supreme power of legislation, paramount to the constitution and laws of the states, the dangers he had described might happen; for that Congress would not be confined to the enumerated powers. This construction was warranted, in his opinion, by the addition of the word *department*, at the end of the clause, and that they could make any laws which they might think necessary to execute the powers of any department or officer of the government.

Mr. PENDLETON. Mr. Chairman, this clause does not give Congress power to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the Union at large. But it gives them power over the local police of the place, so as to be secured from any interruption in their proceedings. Notwithstanding the violent attack upon it, I believe, sir, this is the fair construction of the clause. It gives them power of exclusive legislation in any case within that district. What is the meaning of this? What is it opposed to? Is it opposed to the general powers of the federal legislature, or to those of the state legislatures? I understand it as opposed to the legislative power of that state where it shall be. What, then, is the power? It is, that Congress shall exclusively legislate there, in order to pre[440]serve the police of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be. This is the fair construction. Can we suppose that, in order to effect these salutary ends, Congress will make it an asylum for villains and the vilest characters from all parts of the world? Will it not degrade their own dignity to make it a sanctuary for villains? I hope that no man that will ever compose that Congress will associate with the most profligate characters.

Why oppose this power? Suppose it was contrary to the sense of their constituents to grant exclusive privileges to citizens residing within that place; the effect would be directly in opposition to what he says. It could have no operation without the limits of that district. Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, it could have no effect the moment it would go without that place; for their exclusive power is confined to that district. Were they to pass such a law, it would be nugatory; and every member of the community at large could trade to the East Indies as well as the citizens of that district. This exclusive power is limited to that place solely, for their own preservation, which all gentlemen allow to be necessary.

Will you pardon me when I observe that their construction of the preceding clause does not appear to me to be natural, or warranted by the words.

They say that the state governments have no power at all over the militia. The power of the general government to provide for arming and organizing the militia is to introduce a uniform system of discipline to pervade the United States of America. But the power of *governing* the militia, so far as it is in Congress, extends only to such parts of them as may be employed in the service of the United States. When not in their service, Congress has no power to govern them. The states then have the sole government of them; and though Congress *may* provide for arming them, and prescribe the mode of discipline, yet the states have the authority of training them, according to the uniform discipline prescribed by Congress. But there is nothing to preclude them from arming and disciplining them, should Congress neglect to do it. As to calling the militia to execute the laws of the [441] Union, I think the fair construction is directly opposite to what the honorable member says. The 4th section of the 4th article contains nothing to warrant the supposition that the states cannot call them forth to suppress domestic insurrections. [*Here he read the section.*] All the restraint here contained is, that Congress may, at their pleasure, on application of the state legislature, or (in vacation) of the executive, protect each of the states against domestic violence. This is a restraint on the general government not to interpose. The state is in full possession of the power of using its own militia to protect itself against domestic violence; and the power in the general government cannot be exercised, or interposed, without the application of the state itself. This appears to me to be the obvious and fair construction.

With respect to the necessity of the ten miles square being superseded by the subsequent clause, which gives them power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof, I understand that clause as not going a single step beyond the delegated powers. What can it act upon? Some power given by this Constitution. If they should be about to pass a law in consequence of this clause, they must pursue some of the delegated powers, but can by no means depart from them, or arrogate any new powers; for the plain language of the clause is, to give them power to pass laws in order to give effect to the delegated powers.

Mr. GEORGE MASON. Mr. Chairman, gentlemen say there is no new power given by this clause. Is there any thing in this Constitution which secures to the states the powers which are said to be retained? Will powers remain to the states which are not expressly guarded and reserved? I will suppose a case. Gentlemen may call it an impossible case, and suppose that Congress will act with wisdom and integrity. Among the enumerated powers, Congress are to lay and collect taxes, duties, imposts, and excises, and to pay the debts, and to provide for the general welfare and common defence; and by that clause (so often called the *sweeping clause*) they are to make all laws necessary to execute those laws. Now, suppose oppressions [442] should arise under this government, and any writer should dare to stand forth, and expose to the community at large the abuses of those powers; could not Congress, under the idea of providing for the general welfare, and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press? Might they not even bring the trial of this restriction within the ten miles square, when there is no prohibition against it? Might they not thus destroy the trial by jury? Would they not extend their implication? It appears to me that they may and will. And shall the support of our rights depend on the bounty of men whose interest it may be to oppress us? That Congress should have power to provide for the general welfare of the Union, I grant. But I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power of providing for the general welfare may be perverted to its destruction.

Many gentlemen, whom I respect, take different sides of this question. We wish this amendment to be introduced, to remove our apprehensions. There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States. This clause has never been complained of, but approved by all. Why not, then, have a similar clause in this Constitution, in which it is the more indispensably necessary than in the Confederation, because of the great augmentation of power vested in the former? In my humble apprehension, unless there be some such clear and finite expression, this clause now under consideration will go to any thing our rulers may think proper. Unless there be some express declaration that every thing not given is retained, it will be carried to any power Congress may please.

Mr. HENRY moved to read from the 8th to the 13th article of the declaration of rights; which was done.

Mr. GEORGE NICHOLAS, in reply to the gentlemen opposed to the clause under debate, went over the same grounds, and developed the same principles, which Mr. Pendleton and Mr. Madison had done. The opposers of the [443] clause, which gave the power of providing for the general welfare, supposed its dangers to result from its connection with, and extension of, the powers granted in the other clauses. He endeavored to show the committee that it only empowered Congress to make such laws as would be necessary to enable them to pay the public debts and provide for the common defence; that this general welfare was united, not to the general power of legislation, but to the particular power of laying and collecting taxes, imposts, and excises, for the purpose of paying the debts and providing for the common defence, — that is, that they could raise as much money as would pay the debts and provide for the common defence, in consequence of this power. The clause which was affectedly called the *sweeping clause* contained no new grant of power. To illustrate this position, he observed that, if it had been added at the end of every one of the enumerated powers, instead of being inserted at the end of all, it would be obvious to any one that it was no augmentation of power. If, for instance, at the end of the clause granting power to lay and collect taxes, it had been added that they should have power to make necessary and proper laws to lay and collect taxes, who could suspect it to be an addition of power? As it would grant no new power if inserted at the end of each clause, it could not when subjoined to the whole.

He then proceeded thus: But, says he, who is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void. Is this depending on any man? But, says the gentleman, it may go to any thing. It may destroy the trial by jury; and they may say it is necessary for providing for the general defence. The power of providing for the general defence only extends to raise any sum of money they may think necessary, by taxes, imposts, &c. But, says he, our only defence against oppressive laws consists in the virtue of our representatives. This was misrepresented. If I understand it right, no new power can be exercised. As to those which are actually granted, we trust to the fellow-feelings of our representatives; and if we are deceived, we then trust to altering our [444] government. It appears to me, however, that we can confide in their discharging their powers rightly, from the peculiarity of their situation, and connection with us. If, sir, the powers of the former Congress were very inconsiderable, that body did not deserve to have great powers.

It was so constructed that it would be dangerous to invest it with such. But why were the articles of the bill of rights read? Let him show us that those rights are given up by the Constitution. Let him prove them to be violated. He tells us that the most worthy characters of the country differ as to the necessity of a bill of rights. It is a simple and plain proposition. It is agreed upon by all that the people have all power. If they part with any of it, is it necessary to declare that they retain the rest? Liken it to any similar case. If I have one thousand acres of land, and I grant five hundred acres of it, must I declare that I retain the other five hundred? Do I grant the whole thousand acres, when I grant five hundred, unless I declare that the five hundred I do not give belong to me still? It is so in this case. After granting some powers, the rest must remain with the people.

Gov. RANDOLPH observed that he had some objections to the clause. He was persuaded that the construction put upon it by the gentlemen, on both sides, was erroneous; but he thought any construction better than going into anarchy.

Mr. GEORGE MASON still thought that there ought to be some express declaration in the Constitution, asserting that rights not given to the general government were retained by the states. He apprehended that, unless this was done, many valuable and important rights would be concluded to be given up by implication. All governments were drawn from the people, though many were perverted to their oppression. The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people, by their bill of rights, declared to be paramount to the power of the legislature. He asked, Why should it not be so in this Constitution? Was it because we were more substantially represented in it than in the state government? If, in the state government, where the people were substantially and fully represented, it was necessary that the great rights of human nature should [445] be secure from the encroachments of the legislature, he asked if it was not more necessary in this government, where they were but inadequately represented?

He declared that artful sophistry and evasions could not satisfy him. He could see no clear distinction between rights relinquished by a positive grant, and lost by implication. Unless there were a bill of rights, implication might swallow up all our rights.

Mr. HENRY. Mr. Chairman, the necessity of a bill of rights appears to me to be greater in this government than ever it was in any government before. I have observed already, that the sense of the European nations, and particularly Great Britain, is against the construction of rights being retained which are not expressly relinquished. I repeat, that all nations have adopted this construction — that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers. It is so in Great Britain; for every possible right, which is not reserved to the people by some express provision or compact, is within the king's prerogative. It is so in that country which is said to be in such full possession of freedom. It is so in Spain, Germany, and other parts of the world. Let us consider the sentiments which have been entertained by the people of America on this subject. At the revolution, it must be admitted that it was their sense to set down those great rights which ought, in all countries, to be held inviolable and sacred. Virginia did so, we all remember. She made a compact to reserve, expressly, certain rights.

When fortified with full, adequate, and abundant representation, was she satisfied with that representation? No. She most cautiously and guardedly reserved and secured those invaluable, inestimable rights and privileges, which no people, inspired with the least glow of patriotic liberty, ever did, or ever can, abandon. She is called upon now to abandon them, and dissolve that compact which secured them to her. She is called upon to accede to another compact, which most infallibly supersedes and annihilates her present one. Will she do it? This is the question. If you intend to reserve your unalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights. If the people do not think it necessary to [446] reserve them, they will be supposed to be given up. How were the congressional rights defined when the people of America united by a confederacy to defend their liberties and rights against the tyrannical attempts of Great Britain? The states were not then contented with implied reservation. No, Mr. Chairman. It was expressly declared in our Confederation that every right was retained by the states, respectively, which was not given up to the government of the United States. But there is no such thing here. You, therefore, by a natural and unavoidable implication, give up your rights to the general government.

Your own example furnishes an argument against it. If you give up these powers, without a bill of rights, you will exhibit the most absurd thing to mankind that ever the world saw — government that has abandoned all its powers — the powers of direct taxation, the sword, and the purse. You have disposed of them to Congress, without a bill of rights — without check, limitation, or control. And still you have checks and guards; still you keep barriers — pointed where? Pointed against your weakened, prostrated, enervated state government! You have a bill of rights to defend you against the state government, which is bereaved of all power, and yet you have none against Congress, though in full and exclusive possession of all power! You arm yourselves against the weak and defenceless, and expose yourselves naked to the armed and powerful. Is not this a conduct of unexampled absurdity? What barriers have you to oppose to this most strong, energetic government? To that government you have nothing to oppose. All your defence is given up. This is a real, actual defect. It must strike the mind of every gentleman. When our government was first instituted in Virginia, we declared the common law of England to be in force.

That system of law which has been admired, and has protected us and our ancestors, is excluded by that system. Added to this, we adopted a bill of rights. By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? By the ancient common law, the trial of all facts is decided by a jury of impartial men from the immediate vicinage. This paper speaks of different juries from the common law in criminal cases; and in civil controversies [447] excludes trial by jury altogether. There is, therefore, more occasion for the supplementary check of a bill of rights now than then. Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence — petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights? — "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more — you depart from the genius of your country. That paper tells you that the trial of crimes shall be by jury, and held in the state where the crime shall have been committed. Under this extensive provision, they may proceed in a manner extremely dangerous to liberty:

a person accused may be carried from one extremity of the state to another, and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both, and who may be biased against him. Is not this sufficient to alarm men? How different is this from the immemorial practice of your British ancestors, and your own! I need not tell you that, by the common law, a number of hundredors were required on a jury, and that afterwards it was sufficient if the jurors came from the same county. With less than this the people of England have never been satisfied. That paper ought to have declared the common law in force.

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? — That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may [448] introduce the practice of France, Spain, and Germany — of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. And can any man think it troublesome, when we can, by a small interference, prevent our rights from being lost? If you will, like the Virginian government, give them knowledge of the extent of the rights retained by the people, and the powers of themselves, they will, if they be honest men, thank you for it. Will they not wish to go on sure grounds? But if you leave them otherwise, they will not know how to proceed; and, being in a state of uncertainty, they will assume rather than give up powers by implication.

A bill of rights may be summed up in a few words. What do they tell us? — That our rights are reserved. Why not say so? Is it because it will consume too much paper? Gentlemen's reasoning against a bill of rights does not satisfy me. Without saying which has the right side, it remains doubtful. A bill of rights is a favorite thing with the Virginians and the people of the other states likewise. It may be their prejudice, but the government ought to suit their geniuses; otherwise, its operation will be unhappy. A bill of rights, even if its necessity be doubtful, will exclude the possibility of dispute; and, with great submission, I think the best way is to have no dispute. In the present Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, &c. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and [449] measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds. With respect to the freedom of the press, I need say nothing; for it is hoped that the gentlemen who shall compose Congress will take care to infringe as little as possible the rights of human nature. This will result from their integrity. They should, from prudence, abstain from violating the rights of their constituents. They are not, however, expressly restrained. But whether they will intermeddle with that palladium of our liberties or not, I leave you to determine.

Mr. GRAYSON thought it questionable whether rights not given up were reserved. A majority of the states, he observed, had expressly reserved certain important rights by bills of rights, and that in the Confederation there was a clause declaring expressly that every power and right not given up was retained by the states. It was the general sense of America that such a clause was necessary; otherwise, why did they introduce a clause which was totally unnecessary? It had been insisted, he said, in many parts of America, that a bill of rights was only necessary between a prince and people, and not in such a government as this, which was a compact between the people themselves. This did not satisfy his mind; for so extensive was the power of legislation, in his estimation, that he doubted whether, when it was once given up, *any thing* was retained. He further remarked, that there were some negative clauses in the Constitution, which refuted the doctrine contended for by the other side. For instance; the 2d clause of the 9th section of the 1st article provided that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." And, by the last clause of the same section, "no title of nobility shall be granted by the United States." Now, if these restrictions had not been here inserted, he asked whether Congress would not most clearly have had a right to suspend that great and valuable right, and to grant titles of nobility. When, in addition to these considerations, he saw they had an indefinite power to provide for the general welfare, he thought there were great reasons to apprehend great dangers. He thought, therefore, that there ought to be a bill of rights.

Mr. GEORGE NICHOLAS, in answer to the two gen[450]tlemen last up, observed that, though there was a declaration of rights in the government of Virginia, it was no conclusive reason that there should be one in this Constitution; for, if it was unnecessary in the former, its omission in the latter could be no defect. They ought, therefore, to prove that it was essentially necessary to be inserted in the Constitution of Virginia. There were five or six states in the Union which had no bill of rights, separately and distinctly as such; but they annexed the substance of a bill of rights to their respective constitutions. These states, he further observed, were as free as this state, and their liberties as secure as ours. If so, gentlemen's arguments from the precedent were not good. In Virginia, all powers were given to the government without any exception. It was different in the general government, to which certain special powers were delegated for certain purposes. He asked which was the more safe. Was it safer to grant general powers than certain limited powers? This much as to the theory, continued he. What is the practice of this invaluable government? Have your citizens been bound by it? They have not, sir. You have violated that maxim, "that no man shall be condemned without a fair trial." That man who was killed, not *secundum artem*, was deprived of his life without the benefit of law, and in express violation of this declaration of rights, which they confide in so much. But, sir, this bill of rights was no security. It is but a paper check. It has been violated in many other instances. Therefore, from theory and practice, it may be concluded that this government, with special powers, without any express exceptions, is better than a government with general powers and special exceptions.

But the practice of England is against us. The rights there reserved to the people are to limit and check the king's prerogative. It is easier to enumerate the exceptions to his prerogative, than to mention all the cases to which it extends. Besides, these reservations, being only formed in acts of the legislature, may be altered by the representatives of the people when they think proper. No comparison can be made of this with the other governments he mentioned. There is no stipulation between the king and people. The former is possessed of absolute, unlimited authority.

But, sir, this Constitution is defective because the common [451] law is not declared to be in force! What would have been the consequence if it had? It would be immutable. But now it can be changed or modified as the legislative body may find necessary for the community. But the common law is not excluded. There is nothing in that paper to warrant the assertion. As to the exclusion of a jury from the vicinage, he has mistaken the fact. The legislature may direct a jury to come from the vicinage. But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. Treason against the United States is defined in the Constitution, and the forfeiture limited to the life of the person attainted. Congress have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution. If we had no security against torture but our declaration of rights, we might be tortured to-morrow; for it has been repeatedly infringed and disregarded. A bill of rights is only an acknowledgment of the preëxisting claim to rights in the people. They belong to us as much as if they had been inserted in the Constitution. But it is said that, if it be doubtful, the possibility of dispute ought to be precluded. Admitting it was proper for the Convention to have inserted a bill of rights, it is not proper here to propose it as the condition of our accession to the Union. Would you reject this government for its omission, dissolve the Union, and bring miseries on yourselves and posterity? I hope the gentleman does not oppose it on this ground solely. Is there another reason? He said that it is not only the general wish of this state, but all the states, to have a bill of rights. If it be so, where is the difficulty of having this done by way of subsequent amendment? We shall find the other states willing to accord with their own favorite wish. The gentleman last up says that the power of legislation includes every thing. A general power of legislation does. But this is a special power of legislation. Therefore, it does not contain that plenitude of power which he imagines. They cannot legislate in any case but those particularly enumerated. No gentleman, who is a friend to the government, ought to withhold his assent from it for this reason.

[452] Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.

Mr. NICHOLAS acknowledged the bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity.

From June 27, 1788:

[657] *Another engrossed form of the ratification*, agreed to on Wednesday last, containing the proposed Constitution of government, as recommended by the federal Convention on the seventeenth day of September, one thousand seven hundred and eighty-seven, being prepared by the secretary, was read and signed by the president, in behalf of the Convention.

On motion, *Ordered*, That the said ratification be deposited by the secretary of this Convention in the archives of the General Assembly of this state.

Mr. WYTHE reported, from the committee appointed, such *amendments* to the proposed Constitution of government for the United States as were by them deemed necessary to be recommended to the consideration of the Congress which shall first assemble under the said Constitution, to be acted upon according to the mode prescribed in the 5th article thereof; and he read the same in his place, and afterwards delivered them in at the clerk's table, where the same were again read, and are as follows: —

"That there be a declaration or bill of rights asserting, and securing from encroachment, the essential and unalienable rights of the people, in some such manner as the following: —

"1st. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.

"2d. That all power is naturally invested in, and consequently derived from, the people; that magistrates therefore are their *trustees* and *agents*, at all times amenable to them.

"3d. That government ought to be instituted for the common benefit, protection, and security of the people; and that the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind.

"4th. That no man or set of men are entitled to separate or exclusive public emoluments or privileges from the community, but in consideration of public services, which not being descendible, neither ought the offices of magistrate, legislator, or judge, or any other public office, to be hereditary.

"5th. That the legislative, executive, and judicial powers of govern[658]ment should be separate and distinct; and, that the members of the two first may be restrained from oppression by feeling and participating the public burdens, they should, at fixed periods, be reduced to a private station, return into the mass of the people, and the vacancies be supplied by certain and regular elections, in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of government, and the laws, shall direct.

"6th. That the elections of representatives in the legislature ought to be free and frequent, and all men having sufficient evidence of permanent common interest with, and attachment to, the community, ought to have the right of suffrage; and no aid, charge, tax, or fee, can be set, rated, or levied, upon the people without their own consent, or that of their representatives, so elected; nor can they be bound by any law to which they have not, in like manner, assented, for the public good.

"7th. That all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people in the legislature, is injurious to their rights, and ought not to be exercised.

"8th. That, in all criminal and capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces;) nor can he be compelled to give evidence against himself.

"9th. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land.

"10th. That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed.

"11th. That, in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and to remain sacred and inviolable.

"12th. That every freeman ought to find a certain remedy, by recourse to the laws, for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely, without sale, completely and without denial, promptly and without delay; and that all establishments or regulations contravening these rights are oppressive and unjust.

"13th. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

"14th. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous, and ought not to be granted.

"15th. That the people have a right peaceably to assemble together to [659] consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.

"16th. That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

"17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

"18th. That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the law directs.

"19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.

"20th. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others."

AMENDMENTS TO THE CONSTITUTION.

"1st. That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government.

"2d. That there shall be one representative for every thirty thousand, according to the enumeration or census mentioned in the Constitution, until the whole number of representatives amounts to two hundred; after which, that number shall be continued or increased, as Congress shall direct, upon the principles fixed in the Constitution, by apportioning the representatives of each state to some greater number of people, from time to time, as population increases.

"3d. When the Congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state, of the quota of such state, according to the census herein directed, which is proposed to be thereby raised; and if the legislature of any state shall pass a law which shall be effectual for raising such quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected in such state.

"4th. That the members of the Senate and House of Representatives shall be ineligible to, and incapable of holding, any civil office under the authority of the United

States, during the time for which they shall respectively be elected.

"5th. That the journals of the proceedings of the Senate and House of Representatives shall be published at least once in every year. except such [660] parts thereof, relating to treaties, alliances, or military operations, as, in their judgment, require secrecy.

"6th. That a regular statement and account of the receipts and expenditures of public money shall be published at least once a year.

"7th. That no commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the Senate; and no treaty ceding, contracting, restraining, or suspending, the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.

"8th. That no navigation law, or law regulating commerce, shall be passed without the consent of two thirds of the members present, in both houses.

"9th. That no standing army, or regular troops, shall be raised, or kept up, in time of peace, without the consent of two thirds of the members present, in both houses.

"10th. That no soldier shall be enlisted for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war.

"11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.

"12th. That the exclusive power of legislation given to Congress over the federal town and its adjacent district, and other places, purchased or to be purchased by Congress of any of the states, shall extend only to such regulations as respect the police and good government thereof.

"13th. That no person shall be capable of being President of the United States for more than eight years in any term of sixteen years.

"14th. That the judicial power of the United States shall be vested in one Supreme Court, and in such courts of admiralty as Congress may from time to time ordain and establish in any of the different states. The judicial power shall extend to all cases in law and equity arising under treaties made, or which shall be made, under the authority of the United States; to all cases affecting ambassadors, other foreign ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, and between parties claiming lands under the grants of different states. In all cases affecting ambassadors, other foreign ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction; in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, as to matters of law only, except in cases of equity, and of admiralty, and maritime jurisdiction, in which the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make: but the judicial power of [661] the United States shall extend to no case where the cause of action shall have originated before the ratification of the Constitution, except in disputes between states about their territory, disputes between persons claiming lands under the grants of different states, and suits for debts due to the United States.

"15th. That, in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury.

"16th. That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.

"17th. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

"18th. That the laws ascertaining the compensation of senators and representatives for their services, be postponed, in their operation, until after the election of representatives immediately succeeding the passing thereof; that excepted which shall first be passed on the subject.

"19th. That some tribunal other than the Senate be provided for trying impeachments of senators.

"20th. That the salary of a judge shall not be increased or diminished during his continuance in office, otherwise than by general regulations of salary, which may take place on a revision of the subject at stated periods of not less than seven years, to commence from the time such salaries shall be first ascertained by Congress."

AMICUS
CURIAE
BRIEF

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No. 07-290

FILED

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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR AMICUS CURIAE AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions, D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Mission Statement

The American Legislative Exchange Council's mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government and the general public. The District of Columbia handgun ban is inconsistent with this mission statement.

Operational Strategy

- To promote the principles of federalism by developing and promoting policies that reflect the Jeffersonian principles that the powers of government are derived from, and assigned to, first the People, then the States, and finally the National Government.

- To enlist state legislators from all parties and members of the private sector who share ALEC's mission.

- To engage in an ongoing effort to promote Jeffersonian principles among elected officials, the private sector, and the general public, for the purpose of enacting substantive and genuine legislative reforms consistent with the ALEC mission.

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[1] Rule 37.6 notice. No counsel for any party authored this brief in whole or in part. No counsel for a party or party made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided by NRA Civil Rights Defense Fund. This brief is filed with the written consent of all parties, reflected in letters filed by the parties with the clerk. Amicus complied with the conditions of those consents by providing advance notice of its intention to file this brief.

- To conduct a policy making program that unites members of the public and private sector in a dynamic partnership to support research, policy development, and dissemination activities.

- To prepare the next generation of political leadership through educational programs that promote the principles of Jeffersonian democracy, which are necessary for a free society.

SUMMARY OF ARGUMENT

The Second Amendment guarantees that "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This case involves the right to keep arms in the home. This case does not involve bearing arms outside the home.

When viewed from a national perspective, the right to keep and bear arms is not an archaic right. The right to arms is deeply rooted in our nation's tradition and history. The Second Amendment to the Bill of Rights was adopted in 1791. The earliest guarantees to arms were adopted in 1776 by Pennsylvania and North Carolina. The most recent guarantee was adopted by Wisconsin in 1998. Since 1945, twenty-one (21) states have adopted or readopted the right to bear arms in their state constitutions. Presently, forty-four (44) states have a guarantee to arms. The people have spoken in support of the right to arms. It is a mainstream right that is still valued in the 21st Century, and it is a vital part of the constitution.

Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), should be affirmed. From a national perspective, *Parker* is compatible with a long line of decisions from state courts that strike down unreasonable arms laws. *Parker* is supported by the plain text of the Second Amendment, by the history surrounding the adoption of that amendment, and by the nation's tradition and history on the right to keep arms in the home.

There is a national consensus that the Second Amendment is not restricted to the militia, and there is a national consensus that handguns should not be banned. This national consensus is supported by polls showing that 73% believe the Second Amendment guarantees "the right to individuals to own guns" (ABC News Poll, May 8-12, 2002), and that 66% are opposed to a handgun ban (Gallup Poll, October 9-12, 2006). Furthermore, in the wake of Hurricane Katrina, recent laws demonstrate that even in an emergency law-abiding adults should not be deprived of firearms, including handguns. 42 U.S. Code § 5207. Congress has also found that "The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms." 15 U.S. Code § 7901(a)(2). Thus, a clear majority of the people's representatives have found that the Second Amendment secures an individual right. At the state level, for example, California enacted an amendment to its emergency powers act commanding that "[n]othing in this article shall authorize the seizure or confiscation of any firearm or ammunition from any individual who is lawfully carrying or possessing the firearm or ammunition, or authorize any order to that effect...." Calif. Govt. Code § 8571.5 (signed by governor October 14, 2007).

ARGUMENT

I. THE TEXT OF THE SECOND AMENDMENT SUPPORTS THE RIGHT TO KEEP ARMS IN THE HOME.

The plain language of the constitution controls its interpretation. *Solorio v. United States*, 483 U.S. 435, 441, 447 (1987). The Second Amendment commands that "the right of the people to keep and bear arms shall not be infringed." The Second Amendment's preamble ("A well regulated militia being necessary to the security of a free state") does not limit its operative language. The preamble is an ablative absolute or nominative absolute. The preamble is independent of the rest of the sentence, and it does not qualify any word in the operative clause to which it is appended. Because no word in the amendment's command is grammatically qualified by the prefatory assertion, the Second Amendment has exactly the same meaning that it would have if the preamble had been omitted, or indeed if the preamble is inaccurate. Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 Geo. Mason Univ. Civil Rights Law Journal 1001 (2008).

However, even the broad-based unorganized militia has a place in the modern world. In the Second World War the unorganized militia served as a substitute for the National Guard, which was federalized and activated for overseas duty. For example, Maryland Governor Herbert R. O'Conor called on men "of all ages and stations in life" to volunteer for the manning of home guard stations for the task of "repelling invasion forays, parachute raids and sabotage uprisings in the state." Before the end of 1943, 15,000 Maryland Minute Men, as these men were designated, manned home guard stations. They served without pay and were expected to bring their own arms — rifles, shotguns, handguns — for training and for guard duty. Their training stressed guerilla tactics, patrolling, demolitions, and roadblock techniques. Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okl. City Univ. L. Rev. 177, 197-98, 233-35 (1982).

A law that forbids law-abiding, adult individuals a right to keep ordinary, functional firearms, including handguns, in their homes is inconsistent with the command of the Second Amendment. "The plain meaning of the right of the people to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service or as a member of a select militia such as the National Guard." *United States v. Emerson*, 270 F.3d 203, 232 (5th Cir. 2001). The command language of the Second Amendment was to withdraw the right to keep arms in the home from the vicissitudes of political controversy, to place the right beyond the reach of majorities and officials, and to establish the right as a legal principle to be applied by the courts.

One's right to keep arms in the home for self-defense may not be submitted to vote; it depends on the outcome of no elections.

II. THE HISTORY OF THE ADOPTION OF THE SECOND AMENDMENT SUPPORTS THE RIGHT TO KEEP ARMS IN THE HOME.

The history of the adoption of the Second Amendment supports the right to keep arms in the home. Pulitzer Prize winning historian Leonard W. Levy instructs:

> Believing that the [Second] [A]mendment does not authorize an individual's right to keep and bear arms is wrong. The right to bear arms is an individual right. The military connotation of bearing arms does not necessarily determine the meaning of a right to bear arms. If all it meant was the right to be a soldier or serve in the military, whether in the militia or the army, it would hardly be a cherished right and would never have reached constitutional status in the Bill of Rights. The "right" to be a soldier does not make much sense. Life in the military is dangerous and lonely, and a constitutionally protected claim or entitlement to serve in uniform does not have to exist in order for individuals to enlist if they so choose. Moreover, the right to bear arms does not necessarily have a military connotation, because Pennsylvania, whose constitution of 1776 first used the phrase "the right to bear arms," did not even have a state militia. In Pennsylvania, therefore, the right to bear arms was devoid of military significance.

> Moreover, such significance need not necessarily be inferred even with respect to states that had militias. Bearing arms could mean having arms. Indeed, Blackstone's *Commentaries* spoke expressly of the "right to have arms." An individual could bear arms without being a soldier or militiaman.

Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 134-35 (Yale Univ. Press 1999).

Historian Joyce Lee Malcolm instructs that

> "The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defense and self-preservation....The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public.... The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army."

TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162-63 (1994 Harvard University Press).

Professor Laurence H. Tribe concludes the following:

> Perhaps the most accurate conclusion one can reach with any confidence is that the core meaning of the Second Amendment is a populist/republican/federalism one. Its central object is to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit. Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes — not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons — a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action.

Laurence H. Tribe, I AMERICAN CONSTITUTIONAL LAW 901-02 n.221 (Foundation Press 2000).

In view of this history, the *Parker* decision correctly interpreted an explicit constitutional right. The text of the amendment and its history preordained the result reached in *Parker*.

III. PAST AND CURRENT STATE GUARANTEES SUPPORT THE RIGHT TO KEEP ARMS IN THE HOME.

State constitutions existed prior to the adoption of the federal Bill of Rights. State constitutions and state case law serve as guides to interpreting the federal Bill of Rights. *Harmelin v. Michigan*, 495 U.S. 956 (1990). State constitutions show a national consensus supporting the right to keep and bear arms, including handguns.

There are three broad classes of firearms: rifles, shotguns, and handguns. Banning any one of the three classes would be inconsistent with the historical reason for the recognition of this right.

The British effort to disarm the inhabitants of Boston (a seizure of 1,778 muskets, 973 bayonets, 634 pistols, and 38 blunderbusses) was addressed in the July 6, 1775, *Declaration of the Causes and Necessity of Taking Up Arms* by the Continental Congress. Such unhappy experiences with government efforts to disarm the people served as an impetus to include a right to bear arms in state constitutions as well as in the Bill of Rights. *The Declaration of the Causes and Necessity of Taking Up Arms* (1775), reprinted in DOCUMENTS OF AMERICAN HISTORY 92, 94 (Henry Steele Commager, ed., 5th ed. 1949); see also Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON AND

OF THE BATTLES OF LEXINGTON, CONCORD AND BUNKER HILL 95 (6th ed. 1903).

From 1822 to 2003, state courts have voided a law as an infringement on the right to bear arms or an infringement on the right to keep arms at least twenty-four times.[2] Some of these cases involved handguns. Therefore, from a national perspective, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), is compatible with a long line of decisions that strike down unreasonable arms laws.

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[2] *State v. Spiers*, 119 Wash.App. 85, 79 P.3d 30 (2003) (struck down that part of statute forbidding ownership of a firearm while free on bond for a serious offense); *State v. Hamdan*, 264 Wis.2d 433, 665 N.W.2d 785 (2003) (pistol concealed carrying statute unconstitutional as applied); *Baca v. New Mexico Department of Public Safety*, 132 N.M. 282, 47 P.3d 441 (2002) (local government prohibited from regulating in any way an incident of the right to bear arms); *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988) (struck down pistol carrying law as too restrictive); *Barnett v. State*, 72 Or. App. 585, 695 P.2d 991 (1985) (struck down prohibition of possession of black jack); *State v. Delgado*, 298 Or. 395, 692 P.2d 610 (1984) (struck down prohibition of possession of switchblade knife); *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981) (struck down prohibition of carrying a club); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980) (struck down prohibition of possession of a club); *Junction City v. Mevis*, 226 Kan. 526, 601 P.2d 1145 (1979) (struck down gun carrying ordinance as too broad); *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972) (struck down gun law on sale, possession, and carrying as too broad); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (Ct.App. 1971) (struck down gun carrying ordinance as too restrictive); *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936) (struck down law prohibiting possession of a firearm); *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928) (struck down pistol carrying ordinance as too restrictive); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922) (struck down statute prohibiting possession of a pistol); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921) (struck down pistol carrying license and bond requirement law as too restrictive); *In re Reilly*, 31 Ohio Dec. 364 (C.P. 1919) (struck down ordinance forbidding hiring armed guard to protect property); *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903) (struck

In the so-called assault firearm cases, courts did not uphold the banning of all handguns or all rifles or all shotguns. None of the three broad classes of firearms was banned. The laws focused on a narrow subset of semiautomatic handguns, semiautomatic rifles, and semiautomatic shotguns. *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 36 n. 1, 616 N.E.2d 163, 164 n. 1 (1993); *Robertson v. Denver*, 874 P.2d 325, 336 appendix (Colo. 1994); *Benjamin v. Bailey*, 234 Conn. 455, 459 n.4, 662 A.2d 1226, 1229 n. 4 (1995).

The District of Columbia's ban of an entire class of firearm, the handgun, is unconstitutional in the face of a constitutional command that the right to keep arms shall not be infringed.

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down pistol carrying ordinance as too restrictive); *In re Brickey*, 8 Ida. 597, 70 P. 609 (1902) (struck down gun carrying statute as too restrictive); *Jennings v. State*, 5 Tex. App. 298 (1878) (struck down statute requiring forfeiture of pistol after misdemeanor conviction as infringement on right to arms); *Wilson v. State*, 33 Ark. 557, 34 Am.Rep. 52 (1878) (struck down pistol carrying statute as too restrictive); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 8 Am.Rep. 8 (1871) (struck down pistol carrying statute as too restrictive); *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214 (1866) (struck down gun confiscation law as infringement on right to arms); *Nunn v. State*, 1 Ga. (1 Kel.) 243 (1846) (struck down pistol carrying statute as too restrictive); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 13 Am.Dec. 251 (1822) (struck down concealed carrying statute as infringement on right to arms; the constitution was later amended to allow regulation of concealed carrying of arms).

The state guarantees to arms are listed here along with some case law.[3]

Alabama 1819:

> "That every citizen has a right to bear arms in defense of himself and the state." ALA. CONST. art. I, § 27 ("[t]hat" added, and "defence" changed to "defense," in 1875).

Alaska 1994:

> "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State." ALASKA CONST. art. I, § 19.

1959: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." *Id.*

Arizona 1912:

> "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be

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[3] Each guarantee is listed with the year it was first enacted; moves to different sections are not noted. If a guarantee to arms first enacted in one year was changed very slightly some years later, the latter version is listed together with the original year, and the changes and change dates are noted parenthetically. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. of Law & Politics 191 (2006).

construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." ARIZ. CONST. art. II, § 26.

Arkansas 1868:

"The citizens of this State shall have the right to keep and bear arms, for their common defense." ARK. CONST. art. II, § 5 (comma after "arms" added, and "defence" changed to "defense," in 1874).

Wilson v. State, 33 Ark. 557, 34 Am.Rep. 52 (1878) (struck down pistol carrying statute as too restrictive).

1864: "That the free white men of this State shall have a right to keep and to bear arms for their common defence." ARK. CONST. OF 1864, art. II, § 21.

1861: "That the free white men and Indians of this State have the right to keep and bear arms for their individual or common defense." ARK. CONST. OF 1861, art. I, § 21.

1836: "That the free white men of this State shall have a right to keep and to bear arms for their common defence." ARK. CONST. OF 1836, art. II, § 21.

California: No provision.

Colorado 1876:

"The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to

> justify the practice of carrying concealed weapons." COLO. CONST. art. II, § 13.

City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972) (struck down gun law on sale, possession, and carrying as too broad); *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936) (struck down law prohibiting possession of a firearm).

Connecticut 1818:

> "Every citizen has a right to bear arms in defense of himself and the state." CONN. CONST. art. I, § 15 ("defence" changed to "defense" in 1956).

Delaware 1987:

> "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." DEL. CONST. art. I, § 20.

Florida 1990:

> "(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.
>
> (b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, 'purchase' means the transfer of money or other valuable consideration to the retailer, and 'handgun' means a firearm capable of being carried and used by one hand, such as a pistol or

> revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.
>
> (c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.
>
> (d) This restriction shall not apply to a trade in of another handgun." FLA. CONST. art. I § 8.

1968: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." *Id.*

The right to possess a firearm is a civil right. *Williams v. State*, 402 So.2d 78 (Fla. App. 1981).

To avoid "a construction [that] might run counter to the historic constitutional right of the people to keep and bear arms.... We, therefore, hold that the statute does not prohibit the ownership, custody and possession of weapons not concealed upon the person, which, although designed to shoot more than one shot semi-automatically, are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles." *Rinzler v. Carson*, 262 So.2d 661, 666 (Fla. 1972).

1885: "The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the

Legislature may prescribe the manner in which they may be borne." FLA. CONST. OF 1885, art. I, § 20.

1868: "The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State." FLA. CONST. OF 1868, art. I, § 22.

1865: Provision deleted.

1838: "That the free white men of this State shall have a right to keep and to bear arms for their common defence." FLA. CONST. OF 1838, art. I, § 21.

Georgia 1877:

"The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § 1, para. VIII.

1868: "A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne." GA. CONST. OF 1868, art. I, § 14.

1865: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." GA. CONST. OF 1865, art. I, § 4.

Nunn v. State, 1 Ga. (1 Kel.) 243 (1846) (struck down restrictive pistol carrying statute on Second Amendment grounds):

> It is true, that these adjudications are all made on clauses in the State Constitutions; but these instruments confer no new rights on the people which did not belong to them before. When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country? ....The language of the second amendment is broad enough to embrace both Federal and State Governments—nor is there anything in its terms which restricts its meaning.... [D]oes it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed to rest it in the State governments? Is this a right reserved to the States or to themselves? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures....If a well-regulated militia is necessary to the security of the State of Georgia and of the United States, it is competent for the General Assembly to take way this security, by disarming the people? What advantage would it be to tie up the hands of the national legislature, if it were in the power of the States to destroy this bulwark of defence? ... The right of the whole people, old and young, men, women and boys,

> and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of free State.

Nunn v. State, 1 Ga. (1 Kel.) 243, 249-51 (1846).

Nunn should be given great weight because Chief Justice Joseph Henry Lumpkin, author of the opinion, started practicing law at a time when several of the framers were still alive, and he grew up in a prominent Georgia family surrounded by members of the generation that conceived of and made the United States Constitution and its Bill of Rights. He was known as a reformer. *Judge Lumpkin In Memoriam*, 36 Ga. 19 (1867); 6 DICTIONARY OF AMERICAN BIOGRAPHY 502 (Dumas Malone ed. 1933); THE STORY OF GEORGIA 243 (Am. Historical Society 1938).

Hawaii 1959:

> "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." HAW. CONST. art. I, § 17.

State v. Mendoza, 82 Haw. 143, 920 P.2d 357 (1996) (assume individual right is protected but is subject to reasonable regulation).

Idaho 1978:

> "The people have the right to keep and bear arms, which right shall not be abridged; but this

> provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony." IDAHO CONST. art. I, § 11.

1889: "The people have the right to bear arms for their security and defence; but the Legislature shall regulate the exercise of this right by law." IDAHO CONST. OF 1889, art. I, § 11.

In re Brickey, 8 Ida. 597, 70 P. 609 (1902) (struck down gun carrying statute as too restrictive).

Illinois 1970:

> "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." ILL. CONST. art. I, § 22.

In a 4 to 3 opinion, the court upheld a village handgun ban. *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483, 83 Ill.Dec. 308, 470 N.E.2d 266 (1984). The legislature subsequently enacted a state law that creates an affirmative defense to a charge of violating a local firearm law if the firearm is used in defense of self or another. 720 Ill. Comp. Stat. 5/24-10. The legislature has refused to ban handguns. *Kalodimos* is an outlier decision.

Prior to *Kalodimos*, in *People v. Liss*, 406 Ill. 419, 424, 94 N.E.2d 320, 323 (1950), the court opined: "The second amendment to the constitution of the United States provides the right of the people to keep and bear arms. This, of course, does not prevent the enactment of a law against carrying concealed weapons, but it does indicate it should be kept in mind, in the construction of a statute of such character, that it is aimed at persons of criminal instincts, and for the prevention of crime, and not against use in the protection of person or property."

Indiana 1851:

> "The people shall have a right to bear arms, for the defense of themselves and the State." IND. CONST. art. I, § 32.

Schubert v. DeBard, 398 N.E.2d 1339 (Ind. App. 1980) (self-defense is constitutionally proper reason for obtaining a pistol license).

1816: "That the people have a right to bear arms for the defence of themselves, and the State; and that the military shall be kept in strict subordination to the civil power." IND. CONST. of 1816, art. I, § 20.

Iowa: No provision.

Kansas 1859:

> "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall

> not be tolerated, and the military shall be in strict subordination to the civil power." KAN. CONST. BILL OF RIGHTS, § 4.

Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979) (struck down gun carrying ordinance as too broad).

Kentucky 1891:

> "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." KY. CONST. BILL OF RIGHTS § 1, para. 7.

1850: "That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned; but the general assembly may pass laws to prevent persons from carrying concealed arms." KY. CONST. OF 1850, art. XIII, § 25.

1799: "That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned." KY. CONST. OF 1792, art. XII, cl. 23 ("That" and the "s" in "rights" added in 1799).

Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 13 Am.Dec. 251 (1822) (struck down concealed carrying statute as infringement on right to arms; the constitution was later amended to allow regulation of concealed carrying of arms).

Louisiana 1974:

> "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." LA. CONST. art. I, § 11.

1879: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed." LA. CONST. OF 1879, art. 3.

"The constitutional right is to bear arms openly, so that when one meets an armed man there can be no mistake about the fact that he is armed. When we see a man with musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense. Of course there are other examples. These are but illustrations." *State v. Bias*, 37 La. Ann. 259, 260 (1885).

Maine 1987:

> "Every citizen has a right to keep and bear arms and this right shall never be Questioned." ME. CONST. art. I, § 16 (enacted after Maine Supreme Court interpreted original provision as securing only collective right, *State v. Friel*, 508 A.2d 123, 125 (Me. 1986)).

1819: "Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned." ME. CONST. OF 1819, art. I, § 16.

Maryland: No provision.

Massachusetts 1780:

> "The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it." MASS. CONST. part 1, art. 17.

Michigan 1963:

> "Every person has a right to keep and bear arms for the defense of himself and the state." MICH. CONST. art. I § 6.

1850: "Every person has a right to bear arms for the defence of himself and the state." MICH. CONST. OF 1850, art. XVIII, § 7.

People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922) (struck down statute prohibiting possession of a firearm).

1835: "Every person has a right to bear arms for the defence of himself and the State." MICH. CONST. OF 1835, art. I, § 13.

Minnesota: No provision.

Mississippi 1890:

> "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but

the Legislature may regulate or forbid carrying concealed weapons." MISS. CONST. art. III, § 12.

1868: "All persons shall have a right to keep and bear arms for their defence." MISS. CONST. OF 1868, art. I, § 15.

1817: "Every citizen has a right to bear arms in defence of himself and of the State." MISS. CONST. OF 1817, art. I, § 23 ("of" before "the State" added, and comma after "arms" deleted, in 1832).

Missouri 1945:

"That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons." MO. CONST. art. I, § 23.

Taylor v. McNeal, 523 S.W.2d 148 (Mo. Ct. App. 1975) (pistols and ammunition clips are protected by this right).

1875: "That the right of no citizen to keep and bear arms in defence of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons." MO. CONST. OF 1875, art. II, § 17.

State v. Shelby, 90 Mo. 302, 2 S.W. 468, 469 (1886) ("a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution ...").

1865: "That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms in defence of themselves and of the lawful authority of the State cannot be questioned." MO. CONST. OF 1865, art. I, § 8.

1820: "That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned." MO. CONST. OF 1820, art. XIII, § 3.

Montana 1889:

"The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons." MONT. CONST. art. II, § 12.

Nebraska 1988:

"All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof." NEB. CONST. art. I, § 1 (right added to preexisting provision).

Nevada 1982:

"Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." NEV. CONST. art. I, § 11, para. 1.

New Hampshire 1982:

"All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. CONST. part 1, art. 2-a.

Bleiler v. Chief, Dover Police Department, 927 A.2d 1216 (N.H. 2007) (rational basis test rejected; balancing of interests test adopted).

New Jersey: No provision.

New Mexico 1986:

"No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms." N.M. CONST. art. II, § 6

Baca v. New Mexico Department of Public Safety, 47 P.3d 441 (N.M. 2002) (law voided because local government may not regulate an incident of the right to bear arms).

1971: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons." *Id.*

1912: The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons." N.M. CONST. OF 1912, art. II, § 6.

City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (Ct.App. 1971) (struck down gun carrying ordinance as too restrictive).

New York: No provision.

North Carolina 1971:

> "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice." N.C. CONST. art. I, § 30.

1876: "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the legislature from enacting penal statutes against said practice." N.C. CONST. OF 1876, art. I, § 24.

State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921) (struck down pistol carrying license and bond requirement law as too restrictive).

1868: "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power." N.C. CONST. OF 1868, art. I, § 24.

1776: "That the people have a right to bear arms for the defence of the State; and as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by the civil power." N.C. DECLARATION OF RIGHTS § XVII.

State v. Huntly, 25 N.C. (3 Ired.) 418, 422-23, 40 Am.Dec. 416 (1843) (right to "bear arms for the defence of the State" includes liberty to carry gun for any lawful purpose but not for a wicked purpose).

North Dakota 1984:

> "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed." N.D. CONST. art. I, § 1 (right to bear arms added to preexisting provision).

Ohio 1851:

> "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.

In re Reilly, 31 Ohio Dec. 364, 1919 WL 1022 (Com. Pleas 1919) (struck down ordinance forbidding hiring armed guard to protect property).

1802: "That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up,

> and that the military shall be kept under strict subordination to the civil power." OHIO CONST. OF 1802, art. VIII, § 20.

Oklahoma 1907:

> "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons." OKLA. CONST. art. II, § 26.

Oregon 1857:

> "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." OR. CONST. art. I, § 27.

Barnett v. State, 72 Or. App. 585, 695 P.2d 991 (1985) (struck down prohibition of possession of black jack); *State v. Delgado*, 298 Or. 395, 692 P.2d 610 (1984) (struck down prohibition of possession of switchblade knife); *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981) (struck down prohibition of carrying a club); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980) (struck down prohibition of possession of a club).

Pennsylvania 1790:

> "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." PA. CONST. art. 1, § 21 ("the" before "citizens" added in 1838; commas after "arms" and "State" deleted in 1873).

1776: "That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power." PA. DECLARATION OF RIGHTS, cl. XIII.

Rhode Island 1842:

> "The right of the people to keep and bear arms shall not be infringed." R.I. CONST. art. I, § 22.

Mosby v. Devine, 851 A.2d 1031, 1042 (R. I. 2004) ("This implied relationship between the bearing of arms and military service, however, does not undermine the individual right to 'keep' arms in one's home or in his or her place of business. It is the keeping of arms that is the *sine qua non* of the individual right under art. 1, sec. 22.").

South Carolina 1895:

> "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it." S.C. CONST. art. I, § 20.

1868: "The people have a right to keep and bear arms for the common defence. As, in times of peace, armies are dangerous to liberty, they

> ought not to be maintained without the consent of the general assembly. The military power ought always to be held in an exact subordination to the civil authority, and be governed by it." S.C. CONST. OF 1868, art. I, § 28.

In reversing a conviction, the court stated, "[W]e think that the purpose was, as far as may be consistent with the right of the citizen to bear arms, absolutely to prohibit the carrying of [concealed] deadly weapons, with a view to prevent acts of violence and bloodshed ...." *State v. Johnson*, 16 S.C. 187, 191 (1881).

South Dakota 1889:

> "The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. CONST. art. VI, § 24.

Tennessee 1870:

> "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." TENN. CONST. art. I, § 26.

Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928) (struck down pistol carrying ordinance as too restrictive).

Andrews v. State, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871), in striking down pistol carrying statute as too restrictive, held: "The right to keep arms necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair." Andrews also held: "but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier." 50 Tenn. at 182.

Glenn H. Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 Tenn. L. Rev. 647, 666-67 (1994) (guarantee to keep arms for common defense is a personal right and includes self-defense).

1834: "That the free white men of this State have a right to keep and to bear arms for their common defence." TENN. CONST. OF 1834, art. I, § 26.

Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866) (struck down gun confiscation law as infringement on right to arms).

Aymette v. State, 21 Tenn. (2 Hump.) 154, 160 (1840), right to keep arms broader than right to bear arms for common defense: "The citizens have the unqualified right to keep the weapon, it being of the character before described, as being intended by this provision. But the right to bear arms is not of that unqualified character. The citizen may bear them for the common defence; but it does not follow, that they may be borne by an individual, merely to terrify the people, or for purposes of private assassination."

1796: "That the freemen of this State have a right to keep and to bear arms for their common defence." TENN. CONST. OF 1796, art. XI, § 26.

Texas 1876:

> "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." TEX. CONST. art. I, § 23.

Jennings v. State, 5 Tex. App. 298 (1878) (struck down statute requiring forfeiture of pistol after misdemeanor conviction as infringement on right to arms).

1868: "Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the legislature may prescribe." TEX. CONST. OF 1868, art. I, § 13.

1845: "Every citizen shall have the right to keep and bear arms, in the lawful defence of himself or the State." TEX. CONST. of 1845, art. I, § 13 (comma added after "arms" in 1866).

1836: "Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power." REPUB. TEX. CONST. OF 1836, DECLARATION OF RIGHTS, cl. 14.

Utah 1984:

> "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from

defining the lawful use of arms." UTAH CONST. art. I, § 6.

1895: "The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law." UTAH CONST. OF 1895, art. I, § 6.

Vermont 1777:

"That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power." VT. CONST. ch. I, art. 16.

State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903) (struck down pistol carrying ordinance as too restrictive).

Virginia 1971:

"That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power." VA. CONST. art. I, § 13 (right added to preexisting 1776 provision).

There is "the tendency of many of our citizens to keep and bear arms." *Crawford v. United Steelworkers, AFL-CIO*, 230 Va. 217, 239, 335 S.E.2d 828, 841 (1985) (Russell, J., dissenting with Carrico, C.J., and Stephenson, J., joining). Art. I, § 13 "protects all citizens." Va. Atty. Gen. Opinion No. 05-078 (Jan. 4, 2006).

Washington 1889:

> "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." WASH. CONST. art. I, § 24.

State v. Spiers, 79 P.3d 30 (Wash. App. 2003) (struck down that part of statute forbidding ownership of a firearm while free on bond for a serious offense).

West Virginia 1986:

> "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. VA. CONST. art. III, § 22.

State ex rel. City of Princeton v. Buckner, 180 W.Va. 457, 377 S.E.2d 139 (1988) (struck down pistol carrying law as too restrictive).

Wisconsin 1998:

> "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. art. I, § 25.

State v. Hamdan, 665 N.W.2d 785 (Wis. 2003) (pistol concealed carrying statute unconstitutional as applied).

Wyoming 1889:

> "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." WYO. CONST. art. I, § 24.

A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for purposes of defense, would be clearly unconstitutional. *State v. McAdams,* 714 P.2d 1236 (Wy. 1986).

CONCLUSION

The laws under review sweep too broadly.[4] A complete handgun ban is an unconstitutional infringement regardless of the standard of review. The *Parker* decision should be affirmed because it is supported by the do not infringe command of the Second Amendment. It is also supported by the national consensus that the constitution guarantees an individual right to keep arms, and by the national consensus that handguns should not be banned.

---

[4] *State ex rel. City of Princeton v. Buckner,* 180 W.Va. 457, 377 S.E.2d 139 (1988); *State v. Blocker,* 291Or. 255, 630 P.2d 824 (1981); *Junction City v. Mevis,* 226 Kan. 526, 601 P.2d 1145 (1979); *City of Lakewood v. Pillow,* 180 Colo. 20, 501 P.2d 744 (1972).

Respectfully submitted,

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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA AND
MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

◆

BRIEF FOR AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN COLLEGE OF PREVENTIVE MEDICINE, AMERICAN TRAUMA SOCIETY, AND AMERICAN ASSOCIATION OF SUICIDOLOGY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

◆

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BRIEF FOR THE AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN COLLEGE OF PREVENTIVE MEDICINE, AMERICAN TRAUMA SOCIETY, AND AMERICAN ASSOCIATION OF SUICIDOLOGY AS AMICI CURIAE IN SUPPORT OF PETITIONERS DISTRICT OF COLUMBIA AND MAYOR ADRIAN M. FENTY

The American Public Health Association, the American College of Preventive Medicine, the American Trauma Society, and the American Association of Suicidology respectfully submit this brief as amici curiae in support of petitioners.[1]

◆

INTERESTS OF THE AMICI

The American Public Health Association (APHA) is the oldest, largest, and most diverse organization of public health professionals in the world and has been working to improve public health since 1872. The Association aims to protect all Americans and their communities from preventable, serious health threats.

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[1] Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the clerk. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission.

Through its two flagship publications, the peer-reviewed American Journal of Public Health and the award-winning newspaper The Nation's Health, the Association communicates the latest public health science and practice to members, opinion leaders, and the public.

The American College of Preventive Medicine (ACPM) is the national professional society for physicians committed to disease prevention and health promotion. ACPM's 2,000 members are engaged in preventive medicine practice, teaching, and research. Many serve on ACPM committees and task forces and represent preventive medicine in national forums, contributing to the organization's role as a major national resource of expertise in disease prevention and health promotion. ACPM was established in 1954. Its members are specialists in preventive medicine and are uniquely trained in both clinical medicine and public health. They have the skills needed to understand and reduce the risks of disease, disability, and death in individuals and in population groups.

The American Trauma Society (ATS) is a leading spokes-organization for trauma care and trauma prevention in the United States. ATS has been the foremost advocate for trauma victims and their families for the past 30 years and continues to seek optimal care for all trauma victims. Many members of ATS are members of trauma teams in communities across the country. ATS works closely with the U.S. Congress, with various federal agencies, and with the office of the President, supporting legislative and administrative efforts that address the financial and legal issues surrounding trauma. ATS provides critical information on trauma to its members, to policymakers, and to the public. It is also a strong supporter of injury prevention, creating and producing programs and providing those programs to its members.

The American Association of Suicidology (AAS) seeks to understand and prevent suicide. Founded in 1968 by Edwin S. Shneidman, Ph.D., AAS promotes research, public awareness programs, public education, and training for professionals and volunteers. In addition, AAS serves as a national clearinghouse for information on suicide. The membership of AAS includes mental health and public health professionals, researchers, suicide prevention and crisis intervention centers, school districts, crisis center volunteers, survivors of suicide, and a variety of laypersons who have an interest in suicide prevention.

◆

INTRODUCTION AND SUMMARY OF ARGUMENT

Firearms have a profound effect on the public's health in the United States. In 2004 (the latest year for which complete data are available), there were 29,569 firearm-related deaths in the United States, including homicides, suicides, and accidental deaths.

Ctrs. for Disease Control & Prevention, *Web-Based Injury Statistics Query and Reporting System (WISQARS) Injury Mortality Reports, 1999-2004* (July 2007), http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html. In addition, there were more than 70,000 non-fatal shootings serious enough to require a hospital visit in the U.S. in 2006. There were also an estimated 477,040 victims of non-fatal violent crimes committed with a firearm in 2005. Ctrs. for Disease Control & Prevention, *Web-Based Injury Statistics Query and Reporting System (WISQARS) Nonfatal Injury Reports* (Sept. 2007), http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html; Bureau of Justice Statistics, *Firearms and Crime Statistics* (Mar. 2007), http://www.ojp.usdoj.gov/bjs/guns.htm. The total societal cost of this firearm-related violence has been estimated at $100 billion per year. Philip J. Cook & Jens Ludwig, *Gun Violence: The Real Costs* 117 (Oxford Univ. Press 2000).

Scientific evidence is the starting point for the public health approach to problems like gun violence. "The scientific core of public health is epidemiology, which identifies the risk factors, trends, and causes of health problems." David Hemenway, *Private Guns, Public Health* 9 (2004). Because gun violence is a major public health problem that needs to be addressed through a variety of actions, including legislation and regulation, amici respectfully submit the following information to aid the Court's analysis of this controversial issue.

While the numbers of non-fatal shootings are troubling, this brief will focus on the most extreme consequences of improper firearm use – that is, the taking of human life. The studies detailed below show that the risk of suicide, homicide, and accidental gun death is greater in homes with guns, and in communities with a higher prevalence of guns. Numerous studies indicate that people who have guns in their homes are at a substantially increased risk of suicide. Similarly, the presence of a gun at home increases the risk of homicide for the occupants of that home. And handguns, in particular, are responsible for the majority of all firearm homicides and suicides. Ultimately, the evidence below shows that a substantial number of murders, suicides, and unintentional firearm deaths may be prevented by the statutes challenged in this case.

◆

ARGUMENT

I. PUBLIC HEALTH RESEARCH MAY BE RELEVANT TO ASSESSING THE CONSTITUTIONALITY OF THE STATUTES AT ISSUE.

Amici are aware of, but take no position on, the argument that the Second Amendment only protects a right to keep and bear arms for use in a well-regulated militia. *See, e.g., Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2002); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971). Amici are also aware of, but take no position on, the argument that the Second Amendment does not apply to state and local governments (even in the District of Columbia), as it limits only federal power. *See Presser v. Illinois*, 116 U.S. 252, 265 (1886); (Petitioners' Brief at 35, 38.)[2] Amici review here the relevant public health research to assist the Court, should it determine that neither of these arguments decides the constitutionality of the statutes at issue.

Even the most expansive reading of the Second Amendment must acknowledge that the Constitution allows at least some regulation of firearms. As this Court long ago explained, to the extent the Bill of Rights "embod[ies] certain guaranties and immunities" inherited from the English common law, those rights have "from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). As the United States Court of Appeals for the District of Columbia Circuit noted, "[t]he protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir.), *cert. granted*, 128 S. Ct. 645 (2007). Moreover, the text of the Second Amendment itself acknowledges that a militia should be "well-regulated," implying that any right the amendment guarantees is subject to some limitation. U.S. Const. amend. II.

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[2] Many relatively recent circuit court decisions have held that *Presser* remains good law. *See Bach v. Pataki*, 408 F.3d 75, 85-86 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006); *Thomas v. Members of City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995) ("The Second Amendment does not apply to the states."); *Peoples Rights Org. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998) ("The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment does not incorporate the Second Amendment; hence, the restrictions of the Second Amendment operate only upon the Federal Government."); *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) ("The second amendment does not apply to the states."), *cert. denied*, 464 U.S. 863 (1983); *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 731 (9th Cir. 1992) ("The Second Amendment limits only federal action, and we affirm the district court's decision 'that the Second Amendment stays the hand of the National Government only.' ").

It is thus not surprising that the United States has a long history of firearm regulation in the pursuit of public safety. Such regulation includes bans on carrying concealed weapons (*see*, *e.g.*, Act of Mar. 18, 1859, 1859 Ohio Laws 56; Act of Feb. 2, 1838, ch. 101, 1838 Va. Acts at 76; Act of Oct. 19, 1821, ch. 13, 1821 Tenn. Pub. Acts 15; *Day v. State*, 37 Tenn. (5 Sneed) 496, 500 (1858)); bans on possessing certain types of weapons (*United States v. Miller*, 307 U.S. 174 (1939)), and bans on certain individuals possessing weapons at all (*United States v. Darrington*, 351 F.3d 632, 633-34 (5th Cir. 2003) (upholding law prohibiting felons from possessing firearms); Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31 (requiring loyalty oath); Act of Apr. 1, 1778, ch. LXI, §§ 2, 5, 1777-1778 Pa. Laws 127-29 (requiring loyalty oath)). Even a complete ban on handguns is not without precedent.

See, e.g., *Quilici v. Vill. of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (upholding a local ordinance banning handgun possession).

While others address the legal standard that should govern this Court's scrutiny of the statutes at issue, amici submit the following empirical information regarding the effect of firearms, and in particular handguns, on the public's health. *See*, *e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 & n.11 (1952) (empirical evidence informs constitutional analysis).

II. GUNS IN THE HOME INCREASE THE RISK OF SUICIDE, HOMICIDE, AND DEATH FROM ACCIDENTAL SHOOTING.

Every gun death is a unique tragedy, but taken together the approximately 30,000 lives lost each year in the United States to firearms are a public health phenomenon that has attracted serious study. Those studies reveal that where firearms are more common, so, too, are deaths from suicide, homicide, and firearm-related accidents.

A. Suicide risk is greater in homes with guns, and in communities with a higher prevalence of guns.

Suicide is a critically important public health problem, one that the District might reasonably choose to address through legislation. *See Washington v. Glucksberg*, 521 U.S. 702, 732 (1997). The majority of the 32,439 suicides in the United States in 2004 were committed with a firearm. Indeed, there were more suicides committed with a firearm annually than all other methods of suicide *combined*.

Most firearm-related suicides occur in the home. Linda Dahlberg et al., *Guns in the Home and the Risk of Violent Death in the Home: Findings from a National Study*, 160 Am. J. Epidemiology 929 (2004). In particular, numerous studies have demonstrated that occupants of homes with guns are at a substantially increased risk of suicide compared with occupants of homes without guns. The number of studies demonstrating the relationship between firearm ownership and suicide, together with their variety in approach, and consistency in results, is compelling.

Many of these studies use what is called a "case-control" design. In these case-control studies, the cases represent suicide victims (or the homes where a suicide has occurred) – regardless of the method of suicide. The controls are individuals (or households) that did not experience a suicide, generally matched in some way to be an appropriate comparison with the cases. This is the same general methodology used in some studies that helped to establish an increased risk of lung cancer among cigarette smokers.

Case-control studies show that the risk of suicide is greater in homes with guns. According to one such study, firearms were 2.7 times more likely to have been present in the homes of adolescent suicide victims as compared to psychiatric in-patients who had attempted or considered suicide, even after adjusting for other risk factors. David Brent et al., *Risk Factors for Adolescent Suicide: A Comparison of Adolescent Suicide Victims with Suicidal In-patients*, 45 Archives of Gen. Psychiatry 581, 585 (1988). A later study employing a larger sample of cases and controls found that adolescent suicide victims remained more than twice as likely as either suicide attempters or non-suicidal psychiatric patients to have had a gun in their home. David Brent et al., *The Presence and Accessibility of Firearms in the Homes of Adolescent Suicides*, 266 JAMA 2989 (1991). And in another well-known analysis, homes in which a suicide had occurred were found to be 4.8 times more likely to contain a firearm than matched neighborhood control homes that had not experienced a suicide, even after accounting for other risk factors for suicide. Arthur Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 N. Eng. J. Med. 467 (1992).

As one would predict if firearms increased the risk of suicide, living in a home with firearms only increased the risk of suicide by firearms, but was not associated with an increased risk of suicide by other means. In addition, homes where a firearm was stored loaded had an even greater (nine-fold higher) suicide risk. *Id.* at 470. Finally, "homes with one or more *handguns* were associated with a risk of suicide almost twice as high as that in homes containing only long guns." *Id.* (emphasis added).

The findings of these studies, each employing a sample from a selected community, are confirmed by two case-control studies using data from the entire nation. One study of a representative sample of deaths in the United States compared suicide victims with those who had died from non-violent causes. Among persons aged 15 years or older, those living in a home with a gun were at a 5.6-fold increased risk of suicide versus death by other causes. Dahlberg et al., *supra*, at 933. This increased risk was particularly prominent for males. Another study, also using a representative sample of suicides in the U.S., compared suicide victims with a matched group of living control subjects identified through a national health study. Among that group of adults, suicide victims were more than three times as likely (3.44) to have a gun in their home as the control group. This increased risk was restricted to suicide by firearm. Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 Annals of Emergency Med. 771 (2003).

In yet another series of studies, states and regions with higher rates of household firearm ownership were found to have, on average, higher suicide rates. Matthew Miller et al., *Household Firearm Ownership and Suicide Rates in the United States*, 13 Epidemiology 517 (2002). This relationship holds up after controlling for differences among states including rates of poverty, urbanization, unemployment, mental illness, and alcohol or drug abuse. Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 J. TRAUMA® Injury, Infection, & Critical Care 1029 (2007). In fact, states with the highest prevalence of household firearm ownership had suicide rates that were about 60 percent higher than states with the lowest level of firearm ownership. Men, women, and children all have higher suicide rates where household gun ownership rates are higher. Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths, Suicide, and Homicide Among 5-14 Year Olds*, 52 J. TRAUMA® Injury, Infection, & Critical Care 267 (2002); Matthew Miller et al., *Firearm Availability and Suicide, Homicide, and Unintentional Firearm Deaths Among Women*, 79 J. Urb. Health 26 (2002).

The difference may be especially pronounced among children. Thus, for example, a child living in Alabama, Idaho, or another state where guns are more prevalent is more than twice as likely to die from suicide as a child living in Hawaii, New Jersey, or another state where guns are less common. Hemenway, *Private Guns, supra*, at 110. Summarizing much available research in a Consensus Statement on Youth Suicide by Firearms, more than 30 public health, biomedical, and social policy organizations agreed that "[g]uns in the home, particularly loaded guns, are associated with increased risk for suicide by youth . . . " and "[p]ublic policy initiatives that restrict access to guns (*especially handguns*) are associated with a reduction of firearm suicide and suicide overall. . . . " Youth Suicide by Firearms Task Force, *Consensus Statement on Youth Suicide by Firearms*, 4 Archives of Suicide Research 89, 90 (1998) (emphasis added).[3]

In an attempt to minimize the importance of firearm-related suicide, some may argue (incorrectly) that if a firearm is not available, a suicidal person will invariably choose an equally lethal method. This is simply not so. Firearms are among the most lethal methods of suicide. In one study, more than 90 percent of all suicide attempts with a firearm, if serious enough to require at least hospital treatment, result in death. This compares with, for example, a 34 percent fatality rate for suicide attempts by jumping and just two percent for poisoning by drugs. Matthew Miller et al., *The Epidemiology of Case Fatality Rates for Suicide in the Northeast*, 43 Annals of Emergency Med. 723, 726 (2004). Other studies have confirmed the very high lethality of firearm-related suicide attempts compared with many other common methods. Rebecca S. Spicer & Ted R. Miller, *Suicide Acts in 8 States: Incidence and*

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[3] The participants signing on to this Consensus Statement included representatives from the National Shooting Sports Foundation and the American Firearms Association, and organizations such as the American Academy of Pediatrics, the American Psychological Association, the National Association of Social Workers, the National Education Association, and the Society for Adolescent Medicine. *See also* Am. Ass'n of Suicidology, *National Organizations Co-Sign AAS Consensus Statement*, Newslink 23(3) at 5 (1997).

Case Fatality Rates by Demographics and Method, 90 Am. J. Pub. Health 1885 (2000). Because firearms are so lethal, where there are fewer firearms there are fewer completed suicides.

B. Homicide risk is greater in homes with guns, and in communities with a higher prevalence of guns.

Examining the effects on homicide rates of guns in the home may be more challenging than for suicide, because it can be more difficult to control for the many factors that influence homicide rates. Nevertheless, several studies have determined that the presence of a gun in the home increases the homicide risk for occupants of that home. Using a study design similar to their examination of suicides in the home, Arthur Kellermann et al. compared homes in three metropolitan counties in which a homicide had occurred, with matched control homes where no homicide had occurred. After controlling for other known risk factors for violence, homes with guns were 2.7 times more likely to have been the site of a homicide than homes without guns. Arthur Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 N. Eng. J. Med. 1084 (1993).

As with suicide, national case-control studies confirm an increased homicide risk associated with guns in the home, though the magnitude of the enhanced risk is smaller than with Kellermann's regional analysis. Dahlberg et al., *supra*; Wiebe, *Homicide and Suicide Risks, supra.* Taken together, these results are significant because of the strong link they reveal between the availability of firearms and the risk of being killed with a firearm, even after accounting for other demographic and behavioral factors.

Rates of homicide are also greater in states where guns in the home are more common. This is the finding of one study that also controlled for other homicide risk factors. Matthew Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988-1997*, 92 Am. J. Pub. Health 1988 (2002). Another analysis, using a proxy measure of gun ownership, demonstrated that *changes* in state-level homicide rates were associated with changes in gun ownership. In fact, in that study, "a 10% increase in the rate of gun ownership is associated with an approximately 2 percent increase in the homicide rate." Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1096 (2001); *see also* Susan Sorenson & Richard Berk, *Handgun Sales, Beer Sales, and Youth Homicide, California, 1972-1993*, 22 J. Pub. Health Pol'y 182, 189-90 (2001) (finding a connection between handgun sales and homicide).

International comparisons of the United States with its peer group of high-income, well-developed democracies point in the same direction. Looking just at "high-income" nations as defined by the World Bank, "[t]he U.S. rates of death and injuries due to firearms, and the rate of crimes committed with firearms, are far higher than those in any other high-income country. . . . " David Hemenway, *The Public Health Approach to Reducing Firearm Injury and Violence*, 17 Stan. L. & Pol'y Rev. 635 (2006). It is not that Americans are necessarily more violent. Non-fatal violent crime rates in this country are similar to those in most other high-income, developed countries, but "[e]very other high-income country has fewer guns (especially handguns), stronger gun control regulations, and much lower homicide rates." Hemenway, *Private Guns, supra*, at 61.[4]

Despite the magnitude and consistency of the research findings regarding the risks posed by guns in the home, some have claimed that a gun makes the home safer. Gary Kleck – a criminologist whose study results are often used to oppose restricting access to guns – has argued that firearms are used as often as 2.5 million times per year to prevent an actual or threatened criminal attack. This estimate comes from a telephone survey of approximately 5,000 U.S. adults conducted in 1993. Other telephone surveys have yielded similar estimates. Gary Kleck & Marc

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[4] One article reaching different conclusions (Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?: A Review of International and Some Domestic Evidence*, 30 Harv. J.L. & Pub. Pol'y 649, 687-88 (2007)) often compares countries that are politically, economically, culturally, and/or demographically very different from one another, without attempting to statistically control for these differences. This makes reliable comparisons of homicide rates especially problematic.

Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. Crim. L. & Criminology 150 (1995).

Telephone surveys may be, however, an ill-suited methodology for estimating defensive gun use, potentially overstating estimates by orders of magnitude. David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. Crim. L. & Criminology 1430 (1997). Even one research team whose telephone survey estimates were similar to Kleck's concluded that the methodology that produced those estimates was prone to bias that likely exaggerated the number of defensive gun uses. Philip J. Cook & Jens Ludwig, *Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use* 71 (Police Found. 1996). In addition, many so-called "defensive" uses of guns reported in surveys may in fact reflect aggressive or even illegal conduct by the respondent. David Hemenway et al., *Gun Use in the United States: Results from Two National Surveys*, 6 Injury Prevention 263 (2000).

One reason survey-based estimates are likely to greatly overestimate the incidence of defensive gun use is that survey respondents may not be completely objective or accurate in assessing whether their actions with a gun were truly "defensive." *Understanding and Preventing Violence* 266 (Albert J. Reiss & Jeffrey A. Roth eds., National Academy Press 1993). For example, a survey by Harvard researchers asked a nationally representative sample of adults to describe their interpersonal encounters with firearms. The researchers then asked criminal court judges to review the respondents' descriptions of their defensive gun uses. The majority were deemed to have been most likely illegal uses of the guns. Hemenway et al., *Gun Use in the United States*, *supra*.

In addition, survey-based estimates often produce findings that are not consistent with known facts about gun violence. For example, survey respondents' statements about whether they wounded or killed their attacker – if true – would imply more firearm-related deaths and injuries from defensive gun uses *alone* than *all causes* of firearm-related deaths and serious non-fatal injuries in the United States, as identified by commonly-accepted national vital statistics data. Cook & Ludwig, *Guns in America*, *supra*, at 71; Hemenway, *Survey Research and Self-Defense Gun Use*, *supra*, at 1442.

By comparison, the National Crime Victimization Survey (NCVS) is a nationally representative household survey conducted by the U.S. Department of Justice. It now includes 77,000 households and approximately 134,000 persons. Although not designed specifically to address defensive gun use (survey respondents are asked about defensive acts after they report being the victim of a crime), the survey suggests many fewer defensive gun uses per year than violent crimes with guns. For example, one analysis of NCVS data indicated an average of just 64,615 self-defensive uses of guns per year by crime victims from 1987 to 1990, compared with more than

800,000 persons victimized by an offender with a gun in 1990. David McDowall & Brian Wiersema, *The Incidence of Defensive Firearm Use by US Crime Victims, 1987 Through 1990*, 84 Am. J. Pub. Health 1982, 1983 (1994). A later analysis using NCVS data estimated the number of defensive gun uses per year at approximately 108,000 – still far less than the number of gun crimes. Philip J. Cook et al., *The Gun Debate's New Mythical Number: How Many Defensive Uses Per Year?*, 16 J. Pol'y Analysis & Mgmt. 463, 468 (1997). Finally, the FBI reported just 195 "justifiable homicides" by a private citizen nationwide in 2006. Fed. Bureau of Investigation, *Crime in the United States: Expanded Homicide Data Table 14*, http://www.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_14.html (Sept. 2007).

In sum, the more reliable data suggests that a gun is much more likely to be used in a crime than in legitimate self-defense, and that those who live with a gun in the home face a higher risk of homicide, controlling for other factors, than those who do not.

C. The risk of death from accidental shooting is greater in homes with guns, and in communities with a higher prevalence of guns.

Rates of fatal firearm-related accidents are also higher where household gun ownership is greater. Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 33 Accident Analysis

& Prevention 477 (2001). Again, this relationship holds up even after accounting for other factors, including rates of non-lethal violent crime, that differ among states. In fact, in one analysis, the four States with the highest rates of gun ownership had an unintentional firearm death rate among children under age fifteen more than thirteen times greater than that of the four States with the lowest rates of gun ownership. *Id.* at 480-81. In a case-control study of gun deaths using nationally representative mortality data, persons who died from an accidental shooting were more than three times as likely (3.7) to have had a gun in their home compared with the control group drawn from a national health interview study. There was also evidence that having more than one gun in the home made the risk of accidental death even greater. Douglas J. Wiebe, *Firearms in US Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 Accident Analysis & Prevention 711, 713-14 (2003).

III. THE DISTRICT OF COLUMBIA'S LAWS BANNING MOST HANDGUNS AND REQUIRING SAFE STORAGE OF ALL FIREARMS ARE CONSISTENT WITH PUBLIC HEALTH RESEARCH AND DATA DEMONSTRATING THE RISKS ASSOCIATED WITH HANDGUNS AND THE BENEFITS OF THE LAWS THEMSELVES.

A. Banning handguns in Washington D.C. appears to have reduced suicide and homicide rates, as handguns pose a particular public health risk.

Although handguns represent only an estimated forty percent of all firearms owned in the United States, Lisa Hepburn et al., *The U.S. Gun Stock: Results from the 2004 National Firearms Survey*, 13 Injury Prevention 15, 16 (2007), they are responsible for a clear majority of all firearm-related homicides and suicides. In 2004, fully 88 percent of all firearm homicides and 56 percent of all firearm suicides for which the type of firearm was specified were committed with a handgun. Fed. Bureau of Investigation, *Murder Victims by Weapons, 2002-2006* (Sept. 2007), http://www.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_07.html (homicides); Ctrs. for Disease Control & Prevention, *Compressed Mortality, 1999-2004* (Aug. 2007), http://wonder.cdc.gov/cmf-icd10.html (suicides).

In this context, the District of Columbia's decision to focus its firearm regulations on handguns makes public health sense. Indeed, handguns have been regulated in the Nation's capital since at least 1858. *See* Act of Nov. 18, 1858, *Laws of the Corporation of the City of Washington* 418 (William B. Webb ed. 1868) (making it unlawful "to carry or have concealed about their person any dangerous weapon, such as . . . [a] pistol"); Act of July 13, 1892, ch. 159 § 1, 27 Stat. 116. And the most rigorous, comprehensive study of the effects of the District's handgun ban indicates that the law appears to have saved lives.

In 1991, criminologist Dr. Colin Loftin and colleagues published a study in the New England Journal of Medicine evaluating the effects of the District's handgun ban on homicide and suicide. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 N. Eng. J. Med. 1615 (1991). They examined both firearm and non-firearm homicides and suicides in the District from 1968 to 1987 – before and after the District's law took effect in 1976. They compared these findings with homicides and suicides for the same time period in areas of Maryland and Virginia, just outside of District, that had not enacted a similar law. Loftin et al. concluded that the District's law was associated with an abrupt, statistically significant 25 percent decline in homicide by firearm and a 23 percent decline in suicide by firearm. Importantly, they found no change in non-firearm homicide or suicide rates in the District coincident with the law. This makes it less likely that some factor other than the District's law was responsible for the change in death rates. Similarly, they found no significant changes in either firearm or non-firearm homicide and suicide in the nearby jurisdictions without the law.[5]

After 1987 – the last year for which complete data were available at the time that Loftin et al. conducted their study – homicide rates in the District and in most other large U.S. cities rose sharply. The authors speculate that this increase in the District might have been due to the rise of especially violent crack cocaine markets in the District. Nevertheless, for at least the first twelve years (1976 through 1987) after enactment of the District's handgun law, it appears that homicide and suicide rates were lower than they would have been without the law. And even today, suicide rates in the District are less than half of the overall U.S. suicide rate. Ctrs. for Disease Control & Prevention, *Web-based Injury Statistics*

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[5] In a study published in 1996, Britt and colleagues criticized the findings of the Loftin et al. study regarding homicides. For example, Britt et al. argued that Baltimore was a more appropriate comparison jurisdiction. But importantly, Britt et al. did not even address the findings of the Loftin et al. study regarding suicides. Chester L. Britt et al., *A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment*, 30 Law & Soc'y Rev. 361 (1996). In a rejoinder, the authors of the original study ably defended their use of the surrounding Maryland and Virginia communities as a comparison and provided evidence that Baltimore may not have been an appropriate control. *See* David McDowall et al., *Using Quasi-experiments to Evaluate Firearm Laws: Comment on Britt et al.'s Reassessment of the D.C. Gun Law*, 30 Law & Soc'y Rev. 381 (1996).

Query and Reporting System (WISQARS) Injury Mortality Reports, 1999-2004, supra. Indeed, the District of Columbia has a lower suicide rate than that of any State in the United States, with just 33 suicides (a rate of 5.69 per 100,000) in 2004. Just five of these suicides were committed with a firearm. *Id.*

Research from other parts of the country corroborates that this remarkably low suicide rate may be a result of D.C.'s handgun ban. One study found that suicide was the leading cause of death in the first year after handgun purchase in California, and that handgun buyers were at a more than four-fold increased risk of suicide during that time period. Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 N. Eng. J. Med. 1583 (1999). Another study reported that, among members of a large health maintenance organization in Washington State, purchase of a handgun from a licensed gun dealer was associated with an almost two-fold (1.9) increased risk of suicide. Peter Cummings et al., *The Association Between Purchase of a Handgun and Homicide or Suicide*, 87 Am. J. Pub. Health 974 (1997). In each study, the increased risk of suicide persisted for at least five years after the handgun's purchase.

Also relevant to the District's decision to ban handguns are studies linking handgun sales and homicide rates. One study analyzed the effects of a 1990 Maryland law banning the sale of so-called Saturday Night Special handguns. The authors found that the law was associated with an approximately eight percent reduction in firearm homicide rates in Maryland, translating to about 40 lives saved per year. Daniel Webster et al., *Effects of Maryland's Law Banning "Saturday Night Special" Handguns on Homicides*, 155 Am. J. Epidemiology 406 (2002). Another study examined the relationship between handgun sales and homicide rates in California from 1972 to 1993. After controlling for other risk factors, the authors concluded that "4,810 fewer 15- to 34-year-olds would have died of homicide if handgun sales had remained at their [lower] 1972 sales level . . . through 1992. . . . " Sorenson & Berk, *Handgun Sales, supra,* at 189-90.

B. Safe storage practices appear to reduce gun deaths.

D.C.'s safe storage law prescribes that a gun registrant "shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device." D.C. Code § 7-2507.02. Many localities have decided to implement similar safety measures. Massachusetts, for example, prohibited Boston citizens from keeping loaded firearms in their homes more than two hundred years ago. Act of Mar. 1, 1783, ch. XLVI, 1782 Mass. Acts 119-20. Although the research described above demonstrates that the safest choice is not to keep a gun in the home, safe storage regulations are entirely consistent with public health research and do not interfere with legitimate gun use.

A wide variety of experts, including hunting associations, agree that "[i]f a gun is to be kept in the home, . . . it should generally be stored unloaded and locked up, with the ammunition stored separately – whether or not there are children in the household." Hemenway, *Private Guns, supra*, at 83 (citing Police Exec. Research Forum, *Handgun Safety Guidelines* (1990); Am. Acad. of Pediatrics, *Stop Firearm Injury* (1994); Int'l Hunter Educ. Ass'n, *Ten Commandments of Firearm Safety* (1988), *now available at* http://www.dfg.ca.gov/huntered/faq.aspx; Glock Corp., *Basic Firearm Safety Rules* (2002), *now available at* http://www.glock.com/english/index_safety.htm; Remington Arms Co., *The Ten Commandments of Firearms Safety*, *now available at* http://www.remington.com/safety/10_commandments/; Sporting Arms & Ammunition Mfrs.' Inst., *Firearm Safety Depends on You* (2002)).

Such regulations do not materially interfere with legitimate gun uses like hunting, target-shooting, and even self-defense because many of today's compact safes, lockboxes, and trigger locks can be opened or removed with ease and speed. *See, e.g., Selling Modern Safety and Storage: These Must-Sell Products Have Changed To Meet the Demands of Today's Safety-Conscious Consumers*, Cover Story, Shooting Industry, Nov. 1, 2003. One trigger lock can apparently be removed in less than three seconds. Bob Marshall, *SHOT Full of Idea; SHOT Show Overwhelms the*

Senses for Outdoorsmen, Times-Picayune, Jan. 14, 2001, at 12 ("One trend at the show was gun safety, with at least 15 manufacturers displaying gear designed to make household guns child and burglar-proof, from simple trigger locks to palm-activated safes. One of the most sophisticated devices with practical applications for hunters was the Smart Trigger Lock, from Alarm It, Inc. which fits over the trigger guard, locks with a simple combination and then emits a high-pitched, 110-decibel siren when the gun is disturbed. It takes less than three seconds, however, to remove the device and ready the gun. The Smart Trigger Lock retails for around $29.95."). Another manufacturer advertises that its lock can be removed in just one second. Lisa Parsons, *Securing The Firearm – These Budget-Conscious Safety Devices Can Prevent Disasters; Arms and the Woman*, Shooting Industry, July 1994 ("The Gun/Trigger Gard marketed by AMX is a clever, inexpensive device with a built in 'trick' to confound children and uninitiated adults. It locks onto the trigger guard, and its manufacturer claims it can be opened in one second once the operator knows the secret.").

A number of states have child access prevention (CAP) laws requiring the safe storage of firearms in the home to prevent unauthorized access by children and youth. An analysis of the first 12 of these laws to be enacted concluded that the CAP laws were associated with a 23 percent reduction in unintentional (accidental) shootings of children younger than 15 years old. Peter Cummings et al., *State Gun Safe*

Storage Laws and Child Mortality Due to Firearms, 278 JAMA 1084 (1997). A subsequent analysis examining fifteen state CAP laws concluded that the beneficial effects of these laws may be limited to states – notably Florida in this analysis – which impose stiff penalties on violators and in which public awareness of the law is enhanced by news coverage or other means. Daniel Webster & Marc Starnes, *Reexamining the Association Between Child Access Prevention Gun Laws and Unintentional Shootings of Children*, 106 Pediatrics 1466 (2000). Safe storage laws, in other words, are effective only as long as they are followed.

Requiring the safe storage of firearms can also prevent youth suicides. The overwhelming majority of firearm-related youth suicides involve a firearm kept in the victim's home, or the home of a friend or relative. David Grossman et al., *Self-inflicted and Unintentional Firearm Injuries Among Children and Adolescents: The Source of the Firearm*, 153 Archives of Pediatric & Adolescent Med. 875 (1999). A case-control study determined that the guns involved in youth suicides or attempted suicides were much less likely to have been stored unloaded and/or locked than guns in control homes where no suicide (or attempt) had occurred. David Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 JAMA 707 (2005). Not surprisingly, therefore, an analysis examining eighteen CAP laws determined that the laws were associated with an 8.3 percent decrease in suicides among youth aged 14-17. Daniel Webster et al., *Association Between Youth-Focused Firearm Laws and Youth Suicides*, 292 JAMA 594 (2004). Similarly, a Centers for Disease Control study of school shootings found that the majority of firearms used in such shootings between 1992 and 1999 came from the perpetrators', or their friends' or relatives', homes, and emphasized the need for safe storage. Ctrs. for Disease Control & Prevention, *Source of Firearms Used by Students in School-Associated Violent Death – United States 1992-1999*, Morbidity & Mortality Wkly. Rep., 169-72 (Mar. 7, 2003), http://www.cdc.gov/mmwR/preview/mmwrhtml/mm5209a1.htm.[6]

Although clearly beneficial, requiring safe storage alone will not prevent most homicides, suicides, or accidental deaths. Hence the need for additional legislation aimed at reducing the risks associated with firearms, including handguns.

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[6] Just one study of which we are aware has found no beneficial effect of CAP laws. That study was conducted by John Lott (a noted proponent of easing restrictions on gun-carrying). It employs a primary methodology that often produces unreliable results when used with data with substantial variance, resulting in part from small sample sizes such as those used in his study. *See* Daniel Webster et al., *Association Between Youth-Focused Firearm Laws and Youth Suicides*, 292 JAMA 594, 600 (2004) (discussing John R. Lott et al., *Safe-Storage Gun Laws: Accidental Deaths, Suicides, and Crime*, 44 J.L. & Econ. 659 (2001)).

CONCLUSION

As illustrated above, firearm-related homicide, suicide, and fatal accidental shootings are a major public health problem in the United States today. The public health approach seeks to illuminate policy options by examining the environmental, not just individual, causes of violence and injuries. State and local legislators must be able to respond to the science as it develops. We thus urge the Court to take the evidence presented in this brief into consideration as it analyzes these important legal issues.

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, *ET AL.*,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

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No. 07-290

IN THE

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BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The Association of American Physicians and Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943. AAPS has physician members who rely on their freedom to own and carry firearms to guard against criminal activity, which includes attempts to break into their offices to obtain controlled substances or potential attacks by patients on the physicians attempting to help them. AAPS also has members who treat children and psychiatric conditions related to the occasional misuse of firearms.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Moreover, AAPS has long defended the practice of ethical medicine, and firearms serve an essential role against misuse of medicine by tyrannical governments for unethical goals. AAPS has an interest in defending the right to bear arms as a deterrent to tyrannical government, as recognized by many commentators from James Madison to Joseph Story.

AAPS has filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals, and its submissions have been cited in opinions. It files this brief in part to rebut *amici curiae* briefs filed by American Public Health Association and the American Academy of Pediatricians.

Based on the above, *Amicus* has a direct and vital interest in the issues presented to this Court.

SUMMARY OF ARGUMENT

Constitutional law – specifically, the Second Amendment – cannot depend on politicized views of medicine. *Amici curiae* briefs submitted for Petitioners by the American Public Health Association (APHA) and the American Academy of Pediatricians (AAP) (the "Petitioners' Medical *Amici*") insist that medical evidence supports gun control. AAP claims that firearms are a medical "contagion", and that "children cannot be taught gun safety." AAP Brief at

5, 12. In fact, medical professionals have no more qualifications or basis to opine about the Second Amendment than anyone else. The attempt to shroud political gun control arguments in the white coat of physicians and public health officials is utterly baseless, and constitutional law should not be influenced by it.

Medical expertise is not required to recognize the obvious defects in the arguments and studies presented by Petitioners' Medical *Amici.* Undeniable benefits of firearms, which include self-defense and deterrence, are largely omitted and unaddressed in their submissions. The same logic underlying their briefs' approach to gun control could be used to insist on a ban on automobiles or swimming pools, by focusing only on the harm they cause and failing to address their benefits. But the benefits of guns are undeniable: one physician surveyed published studies and estimated that the defensive use of guns saves 25 to 75 lives for every one lost to a gun. Miguel Faria, M.D., "Public Health and Gun Control – A Review (Part I: The Benefits of Firearms)," 6 Medical Sentinel 11 (2001).[2] While the magnitude of that comparative benefit may be debated, there is no denying that there are substantial benefits from gun ownership, and no discussion of the harm is complete without addressing the benefits. Virtually all medical professionals support use of drugs and vaccines that cause serious adverse effects as long as they confer greater benefits, yet that basic analytical approach is missing from Petitioners' Medical *Amici.*

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[2] http://www.jpands.org/hacienda/edcor6.html (viewed 2/6/08).

Gun control leaves a society vulnerable to tyranny, as observed by James Madison and Joseph Story. Their concerns were tragically confirmed in the 20th century, when gun control was repeatedly followed by genocide or dictatorship, or both. To the extent the medical profession has any special insight here, it is to alert this Court to the horrific result of gun control in emasculating a society and rendering it vulnerable to genocide. It is essential that the individual right to bear arms under the Second Amendment remain a vital safeguard against the unintended consequences of gun control. The sweeping D.C. gun control statutes – which prohibit certain gun possession, even in one's own home – cannot stand.

ARGUMENT

I. THE INTERPRETATION OF THE CONSTITUTION CANNOT DEPEND ON POLITICIZED VIEWS OF MEDICINE.

Constitutional law does not vary or "evolve" based upon changing views by some medical professionals about broader social issues, such as the ownership of guns. The amendment process is the only proper mechanism for changing the Constitution if and only if new circumstances, technology or evidence warrants such a change.

In particular, contemporary "medical" studies about the benefits and harms of gun ownership should have no effect on interpreting a provision of a constitution enacted over 200 years ago. Yet the *amici* briefs filed by the medical groups APHA and AAP implicitly argue for interpreting the Constitution in a manner that is subject to the latest claims of one-sided studies deficient in credibility, as discussed below.

Reported studies attempting to support gun control – and a narrow interpretation of the Second Amendment – have been particularly susceptible to bias and even fraud, perhaps due to the highly politicized nature of the topic. The biggest study in support of gun control in the past decade was published by then-Professor Michael Bellesiles, who wrote a book entitled *Arming America, The Origins of a National Gun Culture* (2000). Garry Wills gave it a glowing review in *The New York Times*, but admitted later that "I was took. The book is a fraud." Jonah Goldberg, "Reports of the 2nd Amendment's death have been greatly exaggerated ...," *Pittsburgh Tribune-Review* (Apr. 8, 2007).[3] Bellesiles later resigned from his position as Professor of History at Emory University in Atlanta when an independent committee of scholars examined his work and concluded that "his scholarly integrity is seriously in question." George Mason University's History News Network, "Summary of the Emory Report on Michael Bellesiles" (Oct. 25, 2002).[4]

But citations of flawed studies have undermined the judiciary. Four reported decisions have relied on Bellesiles' work, and the Ninth Circuit felt compelled to amend one of its prior rulings to purge its prior reference to the then-discredited Bellesiles. *See Silveira v. Lockyer*, 2003 U.S. App. LEXIS 1242 (9th Cir. Jan. 27, 2003) (removing reference to Bellesiles's work from *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003)).

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[3] http://www.pittsburghlive.com/x/pittsburghtrib/opinion/columnists/guests/s_501644.html (viewed 2/5/08).

[4] http://hnn.us/articles/1069.html (viewed 2/5/08).

Concerned professors "documented an emotional anti-gun agenda in the treatment of firearms issues in the medical and public health literature" in a thoroughly supported law review article. *See* Don Kates, *et al.*, "Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda," 62 *Tenn. L. Rev.* 513 (1995).[5] They concluded:

> While the anti-gun editorials and articles discussed had the superficial form of academic discourse, the basic tenets of science and scholarship have too often been lacking. We call them "anti-gun health advocacy literature" because they are so biased and contain so many errors of fact, logic, and procedure that we can not regard them as having a legitimate claim to be treated as scholarly or scientific literature.

Id. at 595.

As implicitly allowed by this Court, and explicitly recognized by appellate courts, the Second Amendment does protect an individual right to bear arms. *See Printz v. United States*, 521 U.S. 898 (1997); *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 541 U.S. 1081 (2004).

Policy arguments – particularly those based on "anti-gun health advocacy literature" – should not dilute or distort this fundamental individual right. As observed by Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, "none of this policy-laden decisionmaking is proper. Rather, the Court should confine itself to interpreting the text of the Constitution ...." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 620 (Thomas, J., dissenting). The Second Amendment is not hostage to claims made in the latest study or the results of the latest poll. The individual right to bear arms should be as protected today by the Second Amendment as at "the time the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

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[5] http://www.guncite.com/journals/tennmed.html (viewed 2/4/08).

II. THE PETITIONERS' MEDICAL *AMICI* BRIEFS ARE FATALLY FLAWED IN IGNORING UNDENIABLE BENEFITS OF FIREARMS.

Amici briefs submitted for Petitioners by the American Public Health Association (APHA) and the American Academy of Pediatricians (AAP) (the "Petitioners' Medical *Amici*") rest on a fundamental defect: they ignore the benefits of gun ownership.

Guns are primarily a defensive weapon:

> In contrast to most other weaponry, firearms are preeminently defensive in effect. Combat carried on barehanded or with swords, pikes, clubs and the like, generally results in the weaker, less numerous party surrendering whatever their adversary demands, what Spencer called the 'ceaseless devouring of the weak by the strong.' However, defenders armed with guns can often repulse a numerically stronger aggressor who possess only lesser weapons."

Daniel Polsby and Don Kates, Jr., "Of Holocausts and Gun Control," 75 Wash U. L. Q. 1237, 1241 (1997).[6] The misperception of guns as primarily an offensive weapon can be traced to the influence of the media: an offensive use of a gun that causes violence is startling news, while a defensive use that prevents violence is not. Had someone used a gun to avert the 9/11 massacre, it would not have generated anything near the amount of news that did result.

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[6] http://ls.wustl.edu/WULQ/75-3/753-4.html (viewed 2/5/08).

As explained below, the Petitioner's Medical *Amici*'s arguments omit undeniable benefits of firearms, which include self-defense and crime deterrence. By focusing only on harm resultant from an activity, those submissions falsely conclude that gun ownership is itself harmful. With that approach they would conclude that vaccines, heart surgery, and even bathtubs are harmful and could be profitably banned. But all those products and services – like the ownership of guns – confer benefits that far exceed the attendant harm.

A. The Primary Use of Guns is Defensive, Having a Beneficial Effect.

Gun control, like the D.C. statutes at issue here, robs citizens of the ability to defend themselves. D.C. Code §§ 7-2502.02(a)(4) (banning most pistols), 22-4504(a) (banning the carrying of a "dangerous weapon"), and 7-2507.02 (requiring that guns be "unloaded"). The police are often not present when citizens need defense, as in one's home, and only guns provide meaningful defense against stronger attackers. Statistical evidence demonstrates that armed victims are able to defend themselves far better against assailants than if not armed:

> Gary Kleck's analysis of 1979-85 national data in *Point Blank* shows the following comparative rates of injury: only 12.1-17.4% of gun-armed vic-

> tims resisting robbery or assault were injured; 24.7-27.3% of victims who submitted were nevertheless injured; 40.1-48.9% of those who screamed were injured, as were 24.7-30.7% of those who tried to reason with or threaten the attacker, and 25.5-34.9% of those who resisted.

Frank Vandall, "A Preliminary Consideration of Issues Raised in The Firearms Sellers Immunity Bill," 38 Akron L. Rev. 113, 119 n.36 (2005) (citing Randy Barnett and Don Kates, "Under Fire: The New Consensus on the Second Amendment," 45 Emory L. J. 1259 n.478 (1996)).

The hurtful effects of gun control are felt most greatly by children and the mentally disabled, who often lack the physical and mental capacity to defend themselves at all. Gun control makes citizens, particularly children and mentally disabled people, unprotected targets for crime. The right to bear arms enables these targets to obtain protection.

This past December, Matthew Murray arrived at New Life Church in Colorado Springs with an assault rifle, two handguns, and as many as 1000 rounds of ammunition. In the parking lot he killed two teenage sisters and wounded their father, and then proceeded towards hundreds of people at the church itself. A horrible massacre was averted when churchgoer Jeanne Assam repeatedly shot Murray in a defensive use of her own weapon. Had gun control prevented Assam from carrying her gun, Murray would likely have killed hundreds of people. The police responded within minutes to 911 calls, but that was not quick enough to stop the gunman. Only meaningful self-defense can do that. *See* Carlyn Ray Mitchell and R. Scott Rappold, "Cops Struggled to Keep Order in the

Confusion," The Gazette (Colorado Springs, Colorado) A1 (Jan. 5, 2008).

Guns are frequently used to stop murderers or would-be murderers. Miguel Faria, M.D., described under-publicized examples of defensive and lifesaving uses of guns:

> In Pearl, Mississippi, in 1997, 16-year-old Luke Woodham used a hunting rifle to kill his ex-girlfriend and her close friend and wound 7 other students. It was Assistant Principal Joel Myrick who retrieved his handgun from his automobile and halted Woodham's shooting spree. ... In Edinboro, Pennsylvania, in 1998, a deadly scenario took place when 14-year-old Andrew Wurst killed one teacher and wounded another as well as two other classmates. The shooting rampage here was halted by merchant James Strand who used his shotgun to force the young criminal to halt his firing, drop his gun, and surrender to police. ... [I]n another unreported incident in Santa Clara, California, Richard Gable Stevens, rented a rifle for target practice at the National Shooting Club on July 5, 1999 and then began a shooting rampage, herding three store employees into a nearby alley, and stating he intended to kill them. When Stevens became momentarily distracted, a shooting club employee, who had a .45-caliber handgun concealed under his shirt, drew his weapon and fired.

Miguel Faria, M.D., "Public Health and Gun Control – A Review (Part II: Gun Violence and Constitutional Issues)," 6 Medical Sentinel 14, 15 (2001).[7]

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[7] http://www.jpands.org/hacienda/article51.html (viewed 2/6/08).

Contrary to public perception, violence was worse before the advent of guns:

> [M]urderous brawls and violent deaths at the hands of robbers were everyday occurrences in medieval England. The average annual homicide rates for five rural counties, studied at scattered intervals between 1202 and 1276, [were found to have] ranged from 9 per 100,000 in Norfolk population to 23 in Kent .... Knives, axes, cudgels, and other implements found in every agricultural community were the typical instruments of death.

Ted Robert Gurr, "*Historical Trends in Violent Crime: Europe and the United States*," *in* 1 Violence in America 21, 28 (1989). The average homicide rate in the United States is lower with guns, being only 5.7 per 100,000 in 2004. *See* Jennifer Chacon, "Whose Community Shield?: Examining the Removal of the 'Criminal Street Gang Member,'" 2007 U. Chi. Legal F. 317 (2007). In nearby Latin American countries this rate is much higher, such as 35 per 100,000 in Guatemala.

There was a rapid increase in crime among teenagers in the United States from 1983 to 1992. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics – 1995, 360, tbls. 3.133 & 3.134 (1996). But firearms were less accessible then, not more so. In the two decades following World War II, the crime rates (including murder) were far lower. *See id.* at 324, tbl. 3.109.

B. The AAP *Amici* Brief Relies on Flawed Studies and Unjustified Conclusions.

The American Academy of Pediatricians Brief ("AAP Brief") omits any reference to the benefits of deterrence from gun ownership, and instead relies heavily on the "anti-gun health advocacy literature," Don Kates, *et al., supra,* to argue that "[c]hildren [c]annot be [t]aught [g]un [s]afety" and "the District of Columbia enacted narrow legislation to staunch the contagion." AAP Brief at 5, 11. Both claims are baseless and demonstrably false.

In Switzerland, a country where D.C.-style gun control is rejected, thousands of children have competed in an annual celebration of guns since 1657:

> In Zurich [today], some 5,631 teens – 4,046 boys and 1,585 girls, aged 13-17 – have finished firing the Swiss service rifle, and it's time for the shootoff. ... That rifle is the SIG Strumgeweher (assault rifle) model 1990 (Stgw 90), a selective fire, 5.6 mm rifle with folding skeleton stock, bayonet lug, bipod, and grenade launcher.

Stephen P. Halbrook, "Girl Beats Guys: A Swiss Teen Rifle Festival, Das Zürcher Knabenschiessen," *Schiessen Schweiz,* SSV/FST, Nr. 48/25.11.04, S. 18-19. [English and German].[8] If it were impossible to teach children gun safety, as AAP claims in its brief, then this annual event could not exist.

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[8] http://www.stephenhalbrook.com/articles/swiss_teen_rifle_festival.html (viewed 2/5/08).

A closer look at the studies cited by AAP reveals that they do not support AAP's conclusions. At most, they demonstrate that some approaches to gun safety for children, such as telling children not to touch an unloaded gun that is then left with them, are misguided. For example, AAP relies on one study that showed that sending children to a playroom containing both toy and real guns would result in children playing with both despite being told not to play with the real gun. AAP Brief at 12. That proves nothing more than the obvious fact that children will play with objects left in a playroom, and it hardly requires a peer-reviewed study. Children are curious, and learn best through multisensory hands-on experiences. A better study – absent from AAP's brief – would be to observe how much respect a child develops for guns after having the opportunity to experience the damage a gun can do first hand, such as by firing a gun at a watermelon.

AAP's claim that handguns "[m]ake [s]uicide [m]ore [l]ikely" is likewise fallacious and unsupported by its cited studies. AAP Brief at 16. The use of handguns in suicide in no way proves that an alternative method would not be used if handguns were unavailable. In fact, the evidence is to the contrary. Japan, Hungary, and Scandinavia all have far more restrictive gun control than the United States, and yet they have suicide rates 2 to 3 times higher than the U.S. For example, the suicide rate in Hungary is 35.38 per 100,000, compared to only 12.06 per 100,000 in the United States. *See* "International Violent Death Rates" (May 17, 2003).[9]

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[9] http://www.guncite.com/gun_control_gcgvintl.html (viewed 2/6/08).

The AAP Brief relies on a country-by-country comparison in arguing that the firearm related death rate in the United States was much higher in 1995 in the United States than in Canada, Australia, and England and Wales, all of which have restrictive gun control. AAP Brief at 25. But the data for gun deaths in the United States include guns used in self-defense, as in fending off an assault, robbery or rape, and higher homicide rates in the United States existed long before there was gun control in other countries:

> A study comparing New York and London over 200 years found the New York homicide rate consistently five times the London rate, although for most of that period residents of both cities had unrestricted access to firearms. When guns were available in England they were seldom used in crime. A government study for 1890-1892 found an average of one handgun homicide a year in a population of 30 million.

Joyce Malcolm, "Why Britain Needs More Guns," BBC News (Jan. 15, 2003).[10]

Different societies have different confounding factors, such as crime-inducing drug addiction, single-parent families, promotion of violence in the media, and varying approaches to juvenile delinquency and schooling, all of which inevitably affect crime rates. Those confounding factors are best eliminated by looking at the effect of gun control on the same society, and as shown below, gun control typically results in an increase in overall crime rather than a reduction. Gun control is hardly supported if murders by switchblades increase as death by firearms declines.

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[10] http://news.bbc.co.uk/1/hi/uk_politics/2656875.stm (viewed 2/5/08).

Subsequent to gun control in England in 1997, for example, the following increase in crime occurred:[11]

> From 1997 to 2001, the rate of violent crime more than doubled. Your chances of being mugged in London are now [as of 2002] six times greater than in New York. England's rates of assault, robbery, and burglary are far higher than America's, and 53 percent of English burglaries occur while occupants are at home, compared with 13 percent in the U.S., where burglars admit to fearing armed homeowners more than the police. In a United Nations study of crime in 18 developed nations published in July, England and Wales led the Western world's crime league, with nearly 55 crimes per 100 people.

Joyce Lee Malcolm, "Gun Control's Twisted Outcome: Restricting firearms has helped make England more crime-ridden than the U.S.," BBC News (Nov. 2002).[12]

AAP's emphasis on the death of children from firearms is also misleading. One study not cited by AAP found that 71% of the children and adolescents who were injured in drive-by shootings were, in fact, "documented members of violent street gangs." H. Range Hutson, *et al.*, *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, 330 New Eng. J. Med. 324, 325 (1994). Studies used by the AAP which confuse deaths of criminals from firearms with deaths of innocent victims are misleading and unreliable.

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[11] http://www.reason.com/news/show/28582.html (viewed 2/5/08).

[12] http://news.bbc.co.uk/1/hi/uk_politics/2656875.stm (viewed 2/5/08).

Surely the death of any child is a tragedy. But studies have shown that children are 14.5 times more likely to die from car accidents, 5 times more likely to die from fire or drowning, and 3 times more likely to die even from bicycle mishaps than they are to die from gun accidents. *See* John Lott, Jr. *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (1998). Firearm accident rates for children in the United States have generally declined for a hundred years, with sharper declines in the last several decades since 1975. By 1986 the accidental firearm death rate had fallen to about 6 per million, and by 1993 dropped further to only 5 per million. Don Kates, *et al.*, *supra*, at 557 n.178 (citing National Safety Council, "Accident Facts 1993"). That is comparable to the rate of serious injury from vaccination, a risk widely accepted within the medical profession and even the public at large.

While the AAP Brief purports to defend the interests of children, in fact the gun is the best protector for the weak and vulnerable in society, as it removes any advantage held by a stronger aggressor. Victims who resist crime with a gun are only half as likely to be injured as those who put up no defense, and one-fourth as likely to be injured as those resisting by other means.[13] For centuries, the gun has been a family's best defense against criminal attack, and the Second Amendment enshrines that essential safeguard in the Constitution. It is worth observing that "about half of all American homes contain a gun" and thus "burglars tend to avoid all occupied American homes." David Kopel, "Lawyers, Guns, and Burglars," 43 Ariz. L. Rev. 345, 361 (Summer 2001). The sweeping D.C. statutes are not narrowly tailored to a sensible protection of children.

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[13] http://www.haciendapub.com/gunpage5.html (viewed 2/5/08).

C. The APHA *Amici* Brief Ignores the Greater Benefits of Gun Ownership.

The *amici brief* submitted by the American Public Health Association, et al. (the "AHPA Brief") cites 30,000 deaths and 70,000 injuries from firearms, but does not say how many resulted from use of illegal rather than lawful guns and how many were in self-defense against illegal activity. The misperception, based on Hollywood and newspaper bias, is that virtually all uses of guns are offensive rather than defensive. In fact, guns are mostly a defensive weapon. Polsby and Kates, *supra*, at 1241. The data cited by AHPA is meaningless unless coupled with an assessment of the benefits deriving from defensive uses of guns.

The AHPA brief claims that the risk of firearm-related death is greater in homes with guns than homes without, but again, such data are defective for failure to specify who fired the gun and whether the gun in the home was the one fired. There is much reason to expect that most of their deaths were by criminal assailants and the presence of the gun in the home had nothing to do with the death. One study not cited in the AHPA brief, for example, found that 71% of the victims were killed by an assailant who did not live in the home, presumably using a gun that was not kept in the victim's home. Don Kates, *et al.*, *supra*, at 586-87.

The unreliability of the Kellerman study about home use of guns – a central issue in this case – is illustrative. AHPA Brief at 14 (citing Arthur L. Kellermann, *et al.*, *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993)). In fact, the Kellerman data do:

> not show that even one homicide victim was killed with a gun ordinarily kept in that household. Indeed, the indirect evidence indicates that most of the homicide victims in the study were killed using guns not kept in the victim's home: 70.9% of the homicide victims were killed by people whose relationship to the victim indicates that the killer did not live in the victim's household, and thus presumably used a gun not kept in the victim's household.

Kates, *et al.*, *supra*, at 586-87. Moreover, Kellerman's conclusions depend on a maximum of 20% higher gun ownership concealed by false denials of having guns. The study by Kates, *et al.*, suggests the rate of false denials is higher, thereby invalidating Kellerman's conclusions. *Id.* at 593-94.

Guns are not pathogens, and the loss of lives from guns is not a public health phenomenon in any meaningful sense. Vaccines could be taken as a public health analogy for guns. Vaccines are widely recommended or even mandated with the support of the APHA and AAP despite the fact that many are killed or injured by them, and their effectiveness is imperfect. But the APHA's and AAP's logic could be applied to vaccines with the false conclusion that all vaccination programs are harmful because all vaccines have some side effects. The benefits of vaccines and guns are both indirect, but the benefits are very real in both cases, and it is essential to address those benefits in any argument attempting to ban the product.

III. THE RIGHT TO BEAR ARMS HAS AN ESSENTIAL ROLE IN DETERRING TYRANNY, TERRORISM AND GENOCIDE.

Unarmed, defenseless societies are vulnerable to tyranny, terrorism and genocide:

> [A] society's weapons policy might be one of the institutional arrangements that contributes to the probability of its government engaging in some of the more extreme varieties of outrage. ... [I]t is [] an arresting reality that not one of the principal genocides of the twentieth century, and there have been dozens, has been inflicted on a population that was armed.

Daniel Polsby and Don Kates, Jr., *supra*, at 1238. Without the right to bear arms, an emasculated citizenry becomes vulnerable to tyranny, terrorism and genocide.

Other commentators have likewise observed that "gun control is an essential precondition for genocide." Jay Simkin, Aaron Zelman, and Alan M. Rice, Lethal Laws 9-12 (Jews for the Preservation of Firearms Ownership: 1995). Children are as much the victims of genocide as adults, and a right to bear arms protects both against that horrendous evil. Armed citizens are less likely to submit to removal and murder of their children, and their dictators are less likely to try. Anne Frank, a tragic victim of the Holocaust, was only 13 years old. "A connection exists between the restrictiveness of a country's civilian weapons policy and its liability to commit genocide upon its own people." Polsby and Kates, *supra*, at 1237.

While the Founding Fathers may not have anticipated genocide, they certainly did anticipate tyranny and added the Second Amendment to safeguard against it. James Madison observed "the advantage of being armed, which the Americans possess over the people of almost every other nation" and noted how this was an important check and balance on the power of government. The Federalist No. 46. The very purpose of the Bill of Rights was to set forth *individual* rights to limit tendencies of government to usurp *individual* liberties. In 1787 Thomas Jefferson wrote, "What country can preserve its liberties if its rulers are not warned from time to time that their people preserve the spirit of resistance? *Let them take arms.*" Letter from Thomas Jefferson to William Stephens Smith, 1787, *The Works of Thomas Jefferson,* Federal Edition, Vol. 5 (1904-5) (emphasis added). The right to bear arms is analogous in the Bill of Rights to the right to trial by jury, as both establish well-recognized limits on government power.

Supreme Court Justice Joseph Story considered the Second Amendment to be the most important individual right of all:

> The right of the citizens to keep and bear arms has justly been considered the palladium of the liberties of a republic; since it offers a strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Joseph Story, "Commentaries on the Constitution of the United States" (1830), *quoted in* Les Adams, "The Second Amendment Primer" (1996).

Self-defense with firearms also protects against threats to liberty other than tyranny, such as terrorism. The disarming of pilots and passengers rendered airplanes easy prey for the 9/11 terrorists who, likewise unarmed with guns, took control and flew the planes into the World Trade Center and the Pentagon. Israel, long experienced in defending against terrorism, rejects gun control and promotes an armed citizenry as self-defense. Israeli anti-terrorism expert David Schiller attributed terrorist attacks against children to the immense publicity given to it by the media:

> Schools/kindergartens make for very attractive targets for the deranged gunman as well as for the profit-oriented hostage gangsters or terrorist groups. [I]f you crave media attention, as for instance the PLO did [in Israel] in the '70s, nothing will catch the headlines better than an attack on a school full of kids."

David Schiller, "Israel's answer to eliminating school terrorism" The Libertarian Enterprise, No. 45 (May 1, 1999). Gun control merely exposes the population to greater exploitation by media-seeking terrorists.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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IN THE

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DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PROFESSORS OF LINGUISTICS AND ENGLISH DENNIS E. BARON, Ph.D., RICHARD W. BAILEY, Ph.D. AND JEFFREY P. KAPLAN, Ph.D. IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 07-290

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PROFESSORS OF LINGUISTICS AND ENGLISH DENNIS E. BARON, Ph.D., RICHARD W. BAILEY, Ph.D. AND JEFFREY P. KAPLAN, Ph.D. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

With the written consent of the parties, Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D., and Jeffrey P. Kaplan, Ph.D., submit this brief as *amici curiae* pursuant to Rule 37 of the Rules of the Supreme Court of the United States.[1]

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[1] Both parties have consented to the filing of *amicus* briefs in support of a party in this case and copies of their letters have been filed with this Court. Counsel of record for all parties received timely notice of the intention of *amici curiae* to file this

Amici curiae are scholars who teach, write and speak about English, linguistics and the principles of grammar. Dennis Baron is a Professor of English and Linguistics at the University of Illinois. Professor Baron has expertise in the history of the English language and has written extensively about language and grammar. Richard W. Bailey is the Fred Newton Scott Collegiate Professor of English Language and Literature at the University of Michigan. Professor Bailey has written extensively on the history and origins of English in America. Jeffrey P. Kaplan is a Professor of Linguistics and serves as Chair of the Department of Linguistics and Asian/Middle Eastern Languages at San Diego State University. Professor Kaplan studies grammar as it relates to discourse and has written on the application of linguistics in legal contexts.

Amici curiae file this brief on behalf of themselves as individuals, not as representatives of institutions, in an effort to assist the Court in understanding eighteenth century grammar and the historical meaning of the language used in the Second Amendment.

SUMMARY OF ARGUMENT

1. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Under longstanding linguistic principles that were well understood and recognized at the time the Second Amendment was

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brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

adopted, the "well regulated Militia" clause necessarily adds meaning to the "keep and bear Arms" clause by furnishing the reason for the latter's existence. The first clause is what linguists call an "absolute construction" or "absolute clause." It functions by melding the sentence "A well regulated Militia is necessary to the security of a free State" together with the sentence "The right of the people to keep and bear Arms shall not be infringed" to express this thought: "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." On its face, the language of the Amendment tells us that the reason why the right of the people to keep and bear arms shall not be infringed is because a well regulated militia is necessary to the security of a free State. The purpose of the Second Amendment, therefore, is to perpetuate "a well regulated Militia."

2. The unmistakably military language employed throughout the Amendment informs us of two things: (i) that the right that is protected is the right of the people to serve in the military and keep military weaponry for such service (the meanings of the words "keep" and "arms" and of the idiom "bear Arms" in the second clause tell us that), and (ii) that the kind of military service that is protected is that which is in a "well regulated" militia (the modifier "well regulated" in the first clause tells us that).

Unlike the Constitution's reference to "the militia" in Article I, Section 8, the Second Amendment refers to "a well regulated Militia." The addition of the modifier "well regulated" informs the reader that the intent was to refer to a militia with particular attributes. The court of appeals held that the phrase "well regulated Militia" in the Second Amendment meant citizens who were armed and "*subject* to organization by the states (as distinct from actually organized)." *Parker v. District of Columbia*, 478 F.3d 370, 389 (D.C. Cir. 2007) (emphasis in original). As established below, however, usage at the time was different: the term was used to refer to militia units that not only were subject to organization under the law, but also had achieved military competencies through regular training and discipline. If the intent had been to identify citizens who were "subject to" organization (as distinct from also being actually organized), then one would have expected the Amendment to refer to "a regulable" militia, or simply "the militia," as the state militias at the time were "subject to" organization under state law.

The term "bear arms" is an idiom that means to serve as a soldier, do military service, fight. To "bear arms against" means "to be engaged in hostilities with." The word "arms" itself has an overwhelmingly military meaning, referring to weapons of offense or armor of defense. In every instance we have found where the term "bear arms" (or "bearing arms" or "bear arms against") is employed, without any additional modifying language attached, the term unquestionably is used in its idiomatic military sense. It is only where additional language is tacked on, either to bend the idiom by specifying a particular type of fighting or to break the idiom by adding incompatible language, that the meaning of "bear arms" deviates. In the Second Amendment, the term is employed in its natural, unadorned state and, therefore, one must conclude, was used idiomatically to refer to military service. The court of appeals, however, defined the words "bear" and "arms" separately, then reconstituted them into a new, ahistorical, expression meaning "the carrying of arms for private purposes such as self-defense [and hunting]." It did so based on instances in which the term "bear arms" was used with additional qualifying language such as: "bear arms for the defense of themselves and the state," "bear arms for the defense of himself and the state," and, in one instance, "bear arms . . . for the purpose of killing game."

Considering the purpose of the Amendment as expressly articulated by the absolute clause, the reference in the absolute clause to a "well regulated Militia," and the use in the second clause of the idiom "bear Arms," it is evident that the Framers drafted an Amendment in two symmetrical halves that, together, protect the right of the people to serve in a well regulated militia and keep arms for such service.

ARGUMENT

I. THE SECOND AMENDMENT'S ABSOLUTE CONSTRUCTION FUNCTIONS AS A SENTENCE MODIFIER.

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend II. The Amendment's first and third commas signal a pause for breath and can be omitted without affecting the meaning.[2] The second comma, however, marks the customary separation of an adverbial clause (in this case, the phrase "A well regulated Militia, being necessary to the security of a free State") from a main clause ("the right of the people to keep and bear Arms, shall not be infringed").

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[2] In the eighteenth century, punctuation was not an important part of writing instruction, with some rules being specified but much left to the individual tastes of writers. Robert Lowth, *A Short Introduction to English Grammar* 155, 158 (1762) ("The doctrine of punctuation must needs be very imperfect: few precise rules can be given, which will hold without exception in all cases; but much must be left to the judgment and taste of the

In technical grammar parlance, the first clause is an "absolute construction" or "absolute clause." It functions to modify the main clause the way an adverbial clause does. In traditional grammar, absolute constructions are considered grammatically independent from the main clause,[3] but they add meaning

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writer."); *see also* Lindley Murray, *English Grammar, Adapted to the Different Classes of Learners* (1795) (to same effect). The rules that did exist allowed for commas to be inserted as deemed appropriate for breathing. For example, Article III, Section 1 of the Constitution provides: "The judicial power of the United States, shall be vested in one Supreme court." The comma in that sentence marks a pause for breath. The Constitution has other punctuation practices we would mark today as irregular. For example, Article I, Section 10 uses a possessive "it's" while modern practice would require "its": "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing *it's* inspection laws." Even twentieth-century constitutional amendments show irregular comma use. The Twenty-Sixth Amendment employs commas to set off what must be read as a restrictive relative clause (marked in italics), even though today such commas normally are used to set off nonrestrictive clauses: "The right of citizens of the United States, *who are 18 years of age or older*, to vote, shall not be denied or abridged by the United States or any state on account of age." U.S. Const. amend. XXVI, § 1. So does the even more recent Twenty-Seventh Amendment: "No law, *varying the compensation for the services of the Senators and Representatives*, shall take effect, until an election of Representatives shall have intervened." U.S. Const. amend. XXVII.

[3] *See* Noah Webster, *Rudiments of English Grammar; Being an Introduction to the Second Part of the Grammatical Institute*

to the entire sentence. To explain how absolute constructions add meaning, or perform a modifying function, we start with their mechanics: absolute constructions effectively contract two sentences into one.[4] In the sentence, "Mr. Jones being absent,

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of the English Language 84 (1790). Grammatical dependence is the formal connection established between words, groups of words, or parts of sentences. For example, in English, prepositions "govern" the noun or pronoun following them in a prepositional phrase, and while this does not have much impact on modern English nouns, a pronoun following a preposition is typically in the object case: "Do not ask for *whom* the bell tolls." The pronoun "whom" is said to be in the object or objective case (in Latin, as in older forms of English, this would be the dative, the case of the indirect object). An absolute phrase can be said to be grammatically independent of the sentence's main clause because no word in the absolute phrase is marked as bearing a relation to any word in the main clause. Without such marking, there is no express indication that the absolute is *grammatically* dependent on or subordinate to the main clause. Historically, the nouns in absolute constructions appeared in the dative case in English or the ablative in Latin, on which the English absolute was modeled. Those cases overtly marked the absolute phrase as subordinate to the main clause of the sentence. George O. Curme, 3 *A Grammar of the English Language* 152-53 (1931).

[4] *See* Webster, *Rudiments of English Grammar* at 84 (giving as examples of absolute constructions: "*The sun being risen*, it will be warm" and "*They all consenting*, the vote was passed," and stating, "Note, this form of expression is a mere ellipsis; for *the sun being risen* is only a contraction of *when* or *after the sun was risen.*"); William Ward, 1 *A Grammar of the English Language (in Two Treatises)* 145-46 (1767) (explaining that the absolute construction implies "a whole Sentence" that has a logical relationship—if-then or cause-and-effect—to the rest of the utterance: "the most common Kind of absolute Construction . . . appears when a Series of Words, containing a *Participle in dependence on a Substantive in the Nominative Case*, is made equivalent to a whole Sentence depending on Conjunction or Relative Adverb"); Alexander Adam, *The Principles of Latin and*

nothing can be done," the absolute construction "Mr. Jones being absent" serves to compress the sentence "Mr. Jones is absent" together with the sentence "Because of that, nothing can be done" to express, "Because Mr. Jones is absent, nothing can be done." It is apparent that one way absolute constructions add meaning is by establishing the cause or reason for the thing expressed in the main clause. In the "Mr. Jones" sentence above, the absolute construction "Mr. Jones being absent" establishes the cause for the fact that "nothing could be done."

Absolute constructions also can establish relationships other than causation. For example, they sometimes establish the timing of events. In the sentence "The ship having arrived, we all embarked," the absolute construction *the ship having arrived* is equivalent to the prepositional phrase *on the arrival of the ship* and defines the time of the action

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English Grammar 213 (4th ed. 1793) (stating in connection with the Latin ablative, from which the English absolute construction derives: "The ablative called absolute is governed by some preposition understood; as, *a*, *ab*, *cum*, *sub* or *in*."). As one modern text explains:

> Absolute constructions consist of a noun and some kind of modifier, the most common being a participle. Because they often come at the beginning of a sentence, they are easily confused with dangling participles. But an absolute construction modifies the rest of the sentence, not the subject of the sentence (as a participial phrase does). You can use absolute constructions to compress two sentences into one and to vary sentence structure as a means of holding a reader's interest.

American Heritage Book of English Usage 1 (1996); *see also* Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* 354 (1957) (discussing the fact that absolute phrases have "the force of a condensed clause").

expressed by the verb *embarked.*[5] Typically, absolute constructions that use verbs ending in "-ing" (be*ing*, reach*ing*) show either causation or time. If the "-ing" verb is stative (e.g., *being*), it usually denotes causation; if the "-ing" verb is dynamic (e.g., *reaching*), it usually shows time. Quirk & Greenbaum et al., *A Comprehensive Grammar of the English Language* at 1124.

Absolute constructions that show causation also can be identified through a test in which one tries to deny the causal connection without contradicting oneself (or at least not sounding foolish). For example, it is contradictory to say "The sun being up, it was warm; but the fact that the sun was up was not the reason it was warm." This contradiction does not occur when one tries to deny causation for an absolute construction that shows some other relationship to the main clause, such as an attendant circumstance. Thus, this sentence is not contradictory: "Autumn leaves flying around them, the children rushed through the woods; but the fact that autumn leaves were flying around them is not the reason the children rushed through the woods."

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[5] This illustration and explanation was taken from George L. Kittredge & Frank Farley, *A Concise English Grammar with Exercises* 140 (1918). Absolute phrases also can establish the existence of a necessary condition. For example, in the sentence "We shall sail on Tuesday, weather permitting," the absolute construction *weather permitting* is equivalent to the conditional clause *if the weather permits*. *Id.* Absolute clauses also can show a circumstance that attends the main clause. For example, in the sentence "He entered upon a new enterprise cautiously, his eyes wide open," the absolute phrase *his eyes wide open* is equivalent to *with his eyes wide open*. Curme, 3 *A Grammar of the English Language* at 156. For more on absolute clauses, *see, e.g.*, Murray, *English Grammar, Adapted to the Different Classes of Learners* at 162-63 (making clear cause-and-effect nature of absolute phrase with example: "His father dying, he succeeded to the estate."); Webster, *Rudiments of English Grammar* at 84 (discussing time); Solomon Lowe, *A Grammar of the Latin Tongue* 33 (1726) ("Absolute sentences are put in the Ablative. The common signs are *-ing*, being, having: paraphras'd by when, while, if, as, etc."); Evans & Evans, *A Dictionary of Contemporary American Usage* at 354 (giving examples); Curme, 3 *A Grammar of the English Language* at 154-57 (same); Randolph Quirk, Sidney Greenbaum, et al., *A Comprehensive Grammar of the English Language* 1123 (1985) (same).

The Second Amendment's absolute construction expresses the cause for the main clause's prohibition, as it is contradictory (and foolish sounding) to say, "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed; but the fact that a well regulated Militia is necessary to the security of a free State is not the reason that the right of the people to keep and bear Arms shall not be infringed."[6]

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[6] Professor Lund argues that, because the Second Amendment's absolute clause is grammatically independent, it does not and cannot qualify any word in the second clause, particularly since the second clause is "a command." Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, __ Geo. Mason U. Civ. Rts. L.J. __ (forthcoming 2008) *available at* http://ssrn.com/abstract_id=1021356 (*see* pp. 12-13). In fact, he argues, because it is a command, "the Second Amendment has exactly the same meaning that it would have had if the preamble had been omitted, or indeed if the preamble is demonstrably false." *Id.* at 13. Professor Lund's position is at odds with the basic and long accepted linguistic principles we have discussed in the text and footnotes above. While it is true that absolute phrases are grammatically independent, it is and has been beyond debate for more than 200 years that absolute constructions function as adverbial phrases modifying the main clause. In the case of the Second Amendment, we have shown that the absolute clause affirmatively states the cause or reason

Absolute constructions have been used with declining frequency over the last two centuries, but they still occur naturally in English, and some are familiar: "that being the case," "all things being equal," "weather permitting," "present company excluded."

Eighteenth-century writers and speakers of English certainly were familiar with absolute phrases. Most grammar texts of Latin and of English during the period discussed the absolute construction,[7] and from that we conclude that educated Americans such as the Framers were exposed to one or more lessons in absolute phrases, and perhaps even tested on them. Anyone studying Latin or English grammar in the eighteenth century would have understood how an absolute phrase works. And since the absolute phrase already had become a normal, naturalized English construction by then, any competent English writer at the time would have been able to use the absolute construction without having taken any formal grammar lessons.

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for the Second Amendment's existence. That significantly affects the meaning of the main clause, for it gives us every reason to think that this Amendment never would have been adopted but for the fact that the Framers believed the absolute clause's statement that a well regulated militia is necessary to the security of a free state. And if we know why a provision is adopted, we surely know something about the intended scope of that provision. The Second Amendment's absolute construction was adopted as an integral part of the Amendment, and it cannot be "omitted" or wished away by trying to show that it no longer is true.

[7] *E.g.*, Adam, *The Principles of Latin and English Grammar* at 211-12 ("A substantive and a participle are put in the ablative when their case depends on no other word [and] [t]his ablative is called *Absolute*, because it does not depend upon any other word in the sentence."); Ward, 1 *A Grammar of the English Language* at 145-46; *see supra* notes 4-6.

Absolute constructions were present in eighteenth-century documents and writings, and James Madison, a key architect of the Second Amendment,[8] certainly was a user of them: "*The right of suffrage being of vital importance*, and approving an extension of it to House keepers & heads of families, I will suggest few considerations which govern my judgment on the subject." *Proceedings and Debates of the Virginia State Convention of 1829-30* (Richmond 1830) (emphasis added).[9] They appear in the writings of others too. *See, e.g.*, Letter from John Hancock to Philip Schuyler (Feb. 6, 1777), *in* 6 *Letters of Delegates to Congress, Jan. 1, 1777-April 30, 1777*, at 227 (Paul H. Smith et al. eds., 1976-2000) ("*The enclosed Resolves of Congress being necessary for your Information, & Direction, & relative to the Department immediately under your Command*, I do myself the Honor of transmitting the same") (emphasis added).[10]

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[8] *E.g.*, Saul Cornell, *A Well Regulated Militia* 58-62 (2006).

[9] Other examples from Madison include: "*The conversation being at an end,* he took his leave with a cold formality, and I did not see him afterwards." Memorandum as to Robert Smith (April, 1811), *in* 8 *The Writings of James Madison* 137 (Gaillard Hunt ed.), *available at* http://memory.loc.gov/cgi-bin/query/?ammem/mjmtext:@FIELD(DOCID+@lit(jm080054)) (emphasis added); "*The Constitution of the U. S. being established by a Competent authority, by that of the sovereign people of the several States who were the parties to it*, it remains only to inquire what the Constitution is; and here it speaks for itself." Letter from James Madison to Daniel Webster (March 15, 1833), *transcribed in* Notes on Nullification (December, 1834), *in* 9 *The Writings of James Madison* (Gaillard Hunt ed.), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090163)) (emphasis added); "*The original draught being in possession of his family and their property,* I have considered any publicity of it as lying with them." Letter from James Madison to W. A. Duer (June 5, 1835), *in* 9 *The Writings of James Madison* 557 (Gaillard Hunt ed.), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090159)) (emphasis added); "The acquaintance then made with him was very slight; *the distance between our ages being considerable, and other distances much more so.*" Letter from James Madison to Margaret H. Smith (Sept. 21, 1830), *in* 9 *The Writings of James Madison* 404 (Gaillard Hunt ed.), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090115)) (emphasis added); "*The four Comrs. being equally divided;* the lot for the 5th.,

Madison's original draft of the Second Amendment used a formulation of the "well regulated Militia" absolute construction similar to the one passed by Congress: "The right of the people to keep and bear arms shall not be infringed; *a well armed and well regulated militia being the best security of a free country:* but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." 1 *Annals of Cong.* 451 (Joseph Gales ed., 1790) (emphasis added). Madison's absolute phrase saw several wording changes and its

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provided by the Treaty for such a contingency, fell on Mr Trumbull whose casting vote obtained for the American sufferers the large indemnity at stake." Letter from James Madison to Edward Everett (Feb. 18, 1823), *in* 9 *The Writings of James Madison* 120 (Gaillard Hunt ed.), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090038)) (emphasis added); "I send you a copy as you request of what was published, and is in my possession, of the Debates in the Pennsylvania Convention. *These being on one side only*, it may be proper to search for the cotemporary publications on the other." Letter from James Madison to Jonathan Elliot (Feb. 14, 1827), *in* 9 *The Writings of James Madison* 271 (Gaillard Hunt ed.), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/mjmtext:@FIELD(DOCID+@lit(jm090086)) (emphasis added).

[10] This is available at http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(dg006212)).

position moved from the middle of the sentence to the front (where absolute constructions, especially causal ones, appear more frequently), but none of these changes was material to the meaning of the absolute clause.

In the end, the final version of the Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Most American readers in the federal period, including those without formal grammar study, would have had no trouble understanding that the Second Amendment's absolute construction functioned to make the Amendment effectively read: because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

The question, then, is what does the specific language used in the Amendment mean? Meaning comes from the words of a text and, importantly, *how* they are used. As established below, the unmistakably military language used in the Second Amendment makes clear that what is protected is the right of the people to serve in a well regulated militia and keep arms for such service.

II. THE AMENDMENT'S UNMISTAKABLY MILITARY LANGUAGE PROTECTS THE RIGHT OF THE PEOPLE TO SERVE IN A WELL REGULATED MILITIA AND KEEP ARMS FOR SUCH SERVICE.

The "well regulated Militia" clause sets forth the cause-and-effect relationship between the Amendment's two halves: *Because X is necessary, Y shall not be infringed.* Because we need a well regulated militia, the right of the people to keep and bear arms shall not be infringed. It is obvious from the way the Amendment is structured that *Y* is key to the existence of *X*. The purpose of the Amendment, therefore, is to preserve or perpetuate "a well regulated Militia."[11]

A. Because a Well Regulated Militia Is Necessary . . . .

The phrase "well regulated Militia" is overtly military. It is preceded in the Constitution by the commander-in-chief clause of Article II, which places "the Militia of the several States, when called into the actual Service of the United States" under the President's command, and by the Militia Clauses of Article I, which grant Congress the power to "provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States," and for "calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions." U.S. Const. art. II, § 2, cl. 1; art. I, § 8, cls. 15, 16.

The difference between the militia referenced in the original Constitution and the militia referenced in the Amendment is the participial adjective "well regulated." The use of the past participle "regulat*ed*" in that modifier suggests a militia that not only is "subject to" regulation under the militia laws, but also is in possession of the qualities that flow from participation in regular military exercises—orderliness, discipline, proficiency with arms, knowledge about maneuvers and so on. By contrast, "the militia" alone, without the "well regulated" modifier, appears to denote the military forces described in the

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[11] *See United States v. Miller*, 307 U.S. 174, 178 (1939).

Militia Clauses of Article I, Section 8, which are subject to regulation by Congress and the states.

Considering how the modifier was used at the time, its appearance in the Second Amendment looks to have been intentionally meaningful, as a "well regulated" militia was said not to have attributes clearly differentiated from and clearly superior to those of a militia that was not said to be well regulated. Alexander Hamilton, for example, spoke of "the degree of perfection" through regular "military exercises" that militia members had to achieve before they could earn "the character of a well regulated militia." *See The Federalist No. 29* 184 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The language of the Amendment, therefore, tells us that the right of the people to keep and bear arms was protected not merely to safeguard the militia, but to safeguard a *well regulated* militia.

The court of appeals read the phrase "well regulated Militia" to mean citizens who were armed and "*subject* to organization by the states (as distinct from actually organized)." *Parker*, 478 F.3d at 389. It did so, it said, because "the existence of the militia preceded its organization by Congress" in the Second Militia Act in 1792, and because its existence preceded the states' implementation of Congress's organizing plan in that Act. *Id.* at 388-89 (citing Act of May 8, 1792, ch. XXXIII, 1 Stat. 271 ("Second Militia Act")).

Given the usage of the day, however, the court's conclusion appears not to follow. If the intent had been to refer merely to citizens *subject to* organization, as the court posited, then one would expect the drafters to have employed other language, such as "a regulable militia."[12] Without regular training and discipline, the militias were not regarded as "well regulated":

> You'l hear of the Dunmore Militia's behaviour when Order'd to Camp. Pray do not suffer them to Escape Reprehension, or their Example may be fatal to our Militia. They say they could not be provided on the Road. I enquir'd at Frederick town as I came down and their pretence is without any kind of foundation. A *well Regulated Militia* may be our Salvation and Officers who are not Attentive to their duty ought to be broke like Glass and certain I am the Dunmore Field Officers were not, two of whom are Delegates for that County.

Letter from John Harvie to Thomas Jefferson (October 18, 1777) *in* 8 *Letters of Delegates to Congress, Sept. 19, 1777-Jan. 31, 1778*, at 140 (Paul H. Smith et al. eds., 1976-2000) (emphasis added).[13] At the time, Virginia had in place a law subjecting militia members to organization. *See* An Act of Regulating and Disciplining the Militia (May 5, 1777), Va. Stat. at Large, 9 Hening 267-68 (1821); *see also* An Ordinance for Raising and Embodying a Sufficient Force, for the Defence and Protection of this Colony (July 17, 1775), Va. Stat. at Large, 9

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[12] One might even expect the Framers to have used "a militia," as the militias of the states at the time apparently already were *subject to* organization under state law. *See* Brief for Petitioners at 13-14.

[13] This is available at http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(dg008125)). John Harvie was a Virginia delegate to the Continental Congress in 1777 and 1778. Dunmore County is now known as Shenandoah County.

Hening 10 (1821).[14] Interpreting the phrase "a well regulated Militia" to refer to citizens who were merely enrolled in a militia and therefore "*subject* to organization by the states (as distinct from actually organized)" is inconsistent with the usage of the period.

B. . . . The Right of the People To Keep and Bear Arms Shall Not Be Infringed.

The term "bear arms" is an idiomatic expression that means "to serve as a soldier, do military service, fight." *Oxford English Dictionary* (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (hereinafter *OED*) (arm, *n.*2, I.4.) *available at* http://dictionary.oed.com; *see also id.* (bear, *v.*1) ("6. To carry about with or upon one, as material equipment or ornament. a. To carry about with one, or wear, ensigns of office, weapons of offence or defence. *to bear arms against*: to be engaged in hostilities with").[15] Examples of historical usage include, in 1609, "He bure armes, and made weir against the King"[16] and, in 1769, "An ample . . . pardon to all who had born arms against him."[17]

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[14] These are available at http://vagenweb.org/hening/vol09-13.htm, and http://vagenweb.org/hening/vol09-01.htm, respectively.

[15] Its idiomatic usage has continued into modern times. *See, e.g.*, Thomas H. Benton, *Theodore Roosevelt* 37 (1897) (quoting Roosevelt: "No man who is not willing to *bear arms* and to fight for his rights can give a good reason why he should be entitled to the privilege of living in a free community.") (emphasis added); John F. Kennedy, 1 *The Public Papers of the Presidents of the United States: John F. Kennedy 1961, 1962, 1963* (GPO 1st ed. 1964) (Inaugural Address, Jan. 20, 1961) ("Now the trumpet summons us again—not as a call to *bear arms*, though arms we need—not as a call to battle, though embattled we are—but a call to bear the burden of a long twilight struggle, year in and year out, 'rejoicing in hope, patient in tribulation'—a struggle against the common enemies of man: tyranny, poverty, disease and war itself.") (emphasis added); John R. Green, *History of the English People, Attempt on the Five Members: Preparations for War* (1887), *reprinted in* 12 *Library of the*

Since bearing arms inherently involves the use of weapons, it is not surprising that the term originates from the Latin *arma ferre*, which literally translates as "to bear [*ferre*] war equipment [*arma*]." At the time of the Second Amendment's adoption, the word "arms" had an overwhelmingly military meaning. For example, Samuel Johnson's eighteenth century dictionary defines "arms" as: "1. weapons of offence, or armour of defence. . . . 2. A state of hostility. . . . 3. War in general. . . . 4. Action; the act of taking arms. . . . 5. The ensigns armorial of a family." Samuel Johnson, 1 *A Dictionary of the English*

World's Best Literature Ancient and Modern 6682 (Charles D. Warner ed., 1902) (teachers' edition) ("Previous to the innovations introduced by the Tudors, and which had been already questioned by the Commons in a debate on pressing soldiers, the King in himself had no power of calling on his subjects generally to *bear arms*, save for purposes of restoring order or meeting foreign invasion.") (emphasis added). In modern times, "bear arms" additionally has been defined to mean "to carry or possess arms." *Compare Merriam-Webster's Second New International Dictionary* 238 (1934) (defining "bear arms" as "To serve as a soldier") *with Merriam-Webster's Third New International Dictionary* 191 (1961) ("bear arms 1: to carry or possess arms <the right of the people to keep and *bear arms—U.S. Constitution*> 2: to serve as a soldier"). The *OED* defines the expression "to carry arms" as meaning "to wage war." *OED* (arm, *n*2, II.6.).

[16] Sir John Skene, *Regiam Majestatem, the Auld Lawes and Constitutions of Scotland Faithfullie Collected* (1609), *cited in OED* (bear, *v*.1, I.6.a.).

[17] William Robertson, *The History of the Reign of the Emperor Charles V* (1769), *cited in OED* (bear, *v*.1, I.6.a).

Language (1755) (arms, *v.*). This definition was universal at the time.[18] A linguistic authority at the time provided further refinements: "By *arms*, we understand those instruments of offence generally made use of in war; such as firearms, swords, etc. By *weapons*, we more particularly mean instruments of other kinds (exclusive of fire-arms), made use of as offensive on special occasions." John Trusler, 1 *The Distinction Between Words Esteemed Synonymous in the English Language* 37 (1794) (emphasis in original).

Examples of the idiomatic usage of "bear arms" during the time of the founding abound. In each instance where "bear arms" (or "bearing arms" or "bear arms against") is used without additional language modifying the phrase, it is unquestionably used in its ordinary idiomatic sense. It is only in usages where additional specifying language is added, such as "bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game," that any intent to bend, even change (in the case of killing game), the idiom is apparent.

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[18] *See* Nathan Bailey, *Dictionarium Britannicum (or A More Compleat Universal Etymological English Dictionary Than Any Extant)* (1730) (arms) ("all manner of Weapons made use of by Men either for defending themselves, or for attacking others"); Thomas A. Sheridan, *A Complete Dictionary of the English Language, Both With Regard to Sound and Meaning* (2d ed. 1789) (arms) ("Weapons of offence, or armour of defence; a state of hostility; war in general; the action of taking arms; the ensigns armorial of a family"); Noah Webster, *An American Dictionary of the English Language* (1828) (arms) ("1. Weapons of offense, or armor for defense and protection of the body. 2. War; hostility. . . . 3. The ensigns armorial of a family; consisting of figures and colors borne in shields, banners &c. . . . 4. In law, arms are any thing which a man takes in his hand in anger, to strike or assault another. . . ."); Samuel Johnson & John Walker, *A Dictionary of the English Language* 44 (1828) (arms) ("Weapons of offence or defence. In heraldry, The ensigns armorial of a family."); *OED* (arms, *n*2, I. *pl.*) ("Defensive and offensive outfit for war, things used in fighting. 1. Defensive covering or appendages for the body; armour, mail. Now only *poet.* . . . 2. a. Instruments of offence used in war; weapons. . . .").

For example, the Declaration of Independence denounces the British monarch for "constrain[ing] our fellow Citizens taken Captive on the high Seas to *bear Arms against* their Country." The Declaration of Independence para. 28 (emphasis added). No one doubts that "bear Arms against" in that passage means "to be engaged in hostilities with." In a later echo, Thomas Jefferson, as Secretary of State, wrote in dissent from advice by Alexander Hamilton and Henry Knox to President Washington to establish a military battery on the Delaware River to prevent the brigantine *Little Sarah* from departing under French authority: "[A]nd if the suggestion be true (& as yet it is but suggestion) that there are 15. or 20. Americans on board the *Little Sarah*, who have gone with their own consent, it is equally true that more than ten times that number of Americans are at this moment on board English ships of war, who have been taken forcibly from our merchant vessels, at sea or in port wherever met with, & compelled to *bear arms against* the friends of their country." Cabinet Opinion on *Little Sarah*, *in* 7 *The Works of Thomas Jefferson* 437 (Paul Leicester Ford ed., 1904) (emphasis added).[19]

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[19] This is available at http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj070184)). Jefferson's usage is notable because he generally favored broad protection of arms rights. During the debates over Virginia's Declaration of Rights, for example, Jefferson proposed language stating that "no free man shall be debarred the use of arms" and later that "no free

There is no question that the phrase there was used idiomatically. America's Chargé d'Affaires in Paris wrote in 1791 of the fleeing French nobility during the French Revolution: "In many of the provinces not a man of the nobility able to *bear arms* remains & many of them carry their whole families with them . . . to join the Princes [for] the counter revolution . . . ." Letter from William Short to Thomas Jefferson (Oct. 22, 1791), *in Thomas Jefferson & William Short Correspondence* (Gerard W. Gawalt ed.) (emphasis added), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(ws01145)) (emphasis added). Again, the usage was idiomatic.

In another example, the Maryland Convention to ratify the U.S. Constitution considered a number of amendments. One would have precluded the militia from being subject to martial law, except in time of war, invasion or rebellion. The reason for the proposed amendment was that "all other [constitutional] provisions in favour of the rights of men, would be vain and nugatory, if the power of subjecting all men able to *bear arms* to martial law at any moment, should remain vested in congress." William Paca, et al., *To the people of Maryland: The following facts, disclosing the conduct of the late Convention of Maryland, is submitted to the serious consideration of the citizens of the state* ¶ 13 (Annapolis, Frederick Green, 1788) (broadside pamphlet) (emphasis added).[20] The Maryland Convention also considered this proposed amendment: "That no person, conscientiously

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man shall be debarred the use of arms [within his own lands or tenements]." 1 *The Papers of Thomas Jefferson* 344 (Julian P. Boyd ed., 1950).

[20] This is available at http://memory.loc.gov/cgi-bin/query/r?ammem/hdsdocc:@field(DOCID+@lit(hdsdocc1101))

scrupulous of *bearing arms* in any case, shall be compelled personally to serve as a soldier." *Id.* ¶ 10 (second) (emphasis added). Both usages are plainly idiomatic.

Madison's original draft of the Second Amendment included a religious scruples clause that employed the term "bearing arms" as follows: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: *but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.*" 1 *Annals of Cong.* at 451 (emphasis added). There is no doubt that "bearing arms" in the scruples clause means anything other than "to serve as a soldier, do military service, fight." While that clause ultimately was deleted, there is nothing in the text of the Amendment or its history to suggest that the term "bear arms" in the "keep and bear arms" clause somehow was used differently, either before or after the deletion. The only reasonable conclusion, therefore, is that "bear arms" in the Second Amendment means "to serve as a soldier, do military service, fight."

As Petitioners point out, the term "bear arms" or "bearing arms" appears 30 times in the Library of Congress database containing all of the official records of debates in the Continental Congress and U.S. Congress between 1774 and 1821. *See* Brief for Petitioners at 16 (citing David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 618 (2000)). In each instance the usage was unquestionably the military usage. *Id.* Taking that research a step further, the historian Saul Cornell surveyed the use of the term "bear arms" (with and without qualifying language) in books, pamphlets, broadsides and newspapers from the period between the Declaration of Independence and the adoption of the Second Amendment. He found 115 texts employing the term, all but five of which were used in the military sense. Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstone Critique*, 67 Md. L. Rev. __ (forthcoming 2008). We have reviewed the "bear arms" language in the texts identified by Professor Cornell and concluded that in four of the five instances of non-military use, the use was expressly qualified by further language indicating a different meaning (e.g., "bear arms in times of peace" or "bear arms . . . for the purpose of killing game"). Of the 110 that were used in a clearly military context, 99 employed the idiom in its ordinary, unadorned state, "bear arms" or "bear arms against," without any additional specifying language. The remaining 11 all used additional specifying language (e.g., "for the purposes of"). We otherwise have been unable to find unidiomatic uses of the phrase "bear arms" or "bearing arms" or "bear arms against" from the founding era in the United States. But even if one were to produce a few instances of actual non-idiomatic uses, that would not affect the meaning of the idiom in the Second Amendment.

Contrast the foregoing examples with the usages relied upon by the court of appeals. The majority believed it "evident from a survey of late eighteenth- and early nineteenth-century state constitutional [and declaration of rights] provisions that the public understanding of 'bear Arms' also encompassed the carrying of arms for private purposes such as self-defense." *Parker*, 478 F.3d at 384 (citing *United States v. Emerson*, 270 F.3d 203, 230 n.29 (5th Cir. 2001)). But in each of the 11 relied-upon instances, the provision in question employs additional language after "bear Arms" that restricts, or in one case stretches, the meaning of the idiom.

For example, seven of the cited provisions protect the right of the people "to bear arms for the defence of themselves and the state"; in the other four instances, the protection is for the right "to bear arms for the defense of himself and the state." *Emerson*, 270 F.3d at 230 n.29.[21] The "for the defense of . . . the state" formulation is simply a bending of the idiom to specify a particular kind of fighting or military service: that which is undertaken to *defend* the state. Likewise, adding the "for the defense of themselves" language serves to bend the idiom to protect fighting to *defend* the community (e.g., from Indian attacks). Whether the "for the defense of themselves" formulation refers exclusively to collective self-defense or also to individual self-defense is unclear.

Pennsylvania's constitution was adopted in 1776 and is among those noted above employing the phrase "for the defense of themselves" in its declaration of rights. Just over a decade later, a group of dissenting delegates to the Pennsylvania convention to ratify the U.S. Constitution used the same turn of phrase, "for the defense of themselves," as part of a proposal to amend the Constitution to provide that "the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game." *Parker*, 478 F.3d at 385. The proposal was defeated, but proponents of a non-idiomatic reading of "bear Arms," like the court of appeals, have pointed to the dissenters' use of the phrase "for the defense of themselves" as evidence that "bear arms" generally was understood to encompass personal uses of firearms, as when defending oneself. Of course the only way to arrive at such a conclusion is to assume that "bear arms for the defense of themselves" is the same as "bear Arms," an assumption that is at odds with the actual usage at the time. Moreover, new scholarship indicates that, at least as used in Pennsylvania then, the "defense of themselves" language reflected a desire to ensure a means of collective self-defense. Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 39 Rutgers L.J. 1041 (forthcoming 2008).[22]

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[21] Some of the provisions use the formulation "in defense of" rather than "for the defense of." This difference is immaterial to the meaning.

Adding the "in defense of himself" language bends the idiom even further to cover fighting in defense of oneself, individually.[23] And adding, as did the Pennsylvania dissenters, the "for the purpose of killing game" language bends the idiom so far that it no longer is recognizable. It is decidedly *un*idiomatic. As Garry Wills aptly has put it, one does not bear arms against a rabbit. *See* Garry Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995, at 63. The statement by the court below that "it would hardly have been unusual for a writer at the time (or now) to have said that, after an attack on a house by thieves, the men set out to find them 'bearing arms'" appears equally unidiomatic. *See Parker*, 478 F.3d at 384. Not only would it have been unusual, it would have been awkward and idiosyncratic.

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[22] Professor Kozuskanich suggests in the same article that the same collective self-defense concerns were foremost on the minds of citizens and colonists in at least some other states as well.

[23] Moreover, it is important to note that the four instances relied upon by the court of appeals all occurred in the Jacksonian era, well after the time the Second Amendment was adopted. *See Emerson*, 270 F.3d at 230 n.29.

The verb "to keep" means "to hold; to retain in one's power or possession" and "to have in custody for security or preservation." Webster, *An American Dictionary of the English Language* (keep, *v.*). One certainly can "keep" "arms" by retaining personal possession of them at home, as the drafters of the Second Amendment apparently had in mind with respect to most small arms, since the Second Militia Act and state militia acts required militia members to possess and bring specified arms with them when called to muster. *See* Second Militia Act; An Act to Amend and Reduce Into One Act the Several Laws for Regulating and Disciplining the Militia and Guarding Against Invasions and Insurrections 2 (Oct. 17, 1785). But arms also can be kept publicly, for example in the "public stores" that the Articles of Confederation specified for holding "field pieces" (cannons) and other equipment. Articles of Confederation art. VI. Given the Second Amendment's purpose and use of the idiom "bear Arms," the natural meaning of the adjacent word "keep," when used in reference to "arms," is the personal possession or public control of arms (weapons of offence, or armour of defense) for service in a well regulated militia.

C. Perpetuation of a "Well Regulated" Militia Is *the* Purpose of the Amendment.

The court of appeals read the two halves of the Second Amendment so that they became asymmetrical. It began with the term "bear Arms" in the second clause, which it construed (contrary to its idiomatic usage at the time) to provide for a right to own and use guns for private purposes, including personal self-defense and hunting. *See supra* Section II.B; ***Parker***, 478 F.3d at 384-85, 390 (finding that the Amendment protects a right of "ownership and use of weaponry beyond that needed to preserve the state militias"). The court then considered the Amendment's first clause and read the language "well regulated Militia" to refer broadly to citizens who are armed and "*subject* to organization by the states (as distinct from actually organized)." *Id.* at 389. This construction had the effect of reading the modifier "well regulated" out of the Amendment, thereby expanding the scope of the Amendment's purpose to protect not "a well regulated Militia" but rather all citizens subject to organization by the states. *See supra* Section II.A.[24]

This reading results in a lopsided text, one in which the right construed far exceeds the purpose indicated by the Amendment's express language, even after taking into account the extent to which the purpose is expanded when the words "well regulated" are read out. The court acknowledged the asymmetry but stated that "[i]t was quite common" in state constitutional provisons "for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it." *Id.* at 389 (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev.

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[24] *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect.").

793, 801-07 (1998)).[25] The Second Amendment, the court held, articulates only *a* purpose, not its "exclusive" purpose, *Parker*, 478 F.3d at 386, 389, and the purpose actually articulated in the Amendment is only the Amendment's "most salient political benefit," which the court described as being the preservation of "the militia." *Id.* at 390.

There is, of course, a much more natural reading of the Amendment, one that avoids the imbalance created by the court's construction and avoids rendering the first clause (or a critical portion of it) superfluous. By simply (i) giving the idiom "bear Arms" the meaning it had at the time (to serve as a soldier, do military service, fight), (ii) reading the term "well regulated Militia" as it was used at the time (to refer to a militia that not only is subject to regulation under the militia laws, but also well functioning and disciplined), and (iii) looking to the absolute clause's statement of causation (the right to "bear Arms" is protected to perpetuate "a well regulated Militia") to determine the scope of military service covered by the right (that which is in a well regulated Militia), one finds a balanced text that protects the right of the people to serve in a well regulated militia and keep arms for such service.[26]

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[25] One of the fundamental problems with the article relied upon by the court is that it assumes without analysis an unidiomatic meaning of the phrase "bear Arms." Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. at 803-04. Professor Lund does the same. Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms* __ Geo. Mason U. Civ. Rts. L.J. __.

[26] It is evident to us that "the people" at the time exercised their right "to keep and bear Arms" through the men of their country who served, just as "the People" at the time chose their

CONCLUSION

For all of the foregoing reasons, judgment of the court of appeals should be reversed.

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January 11, 2008

Representatives in the House through the men who voted. *See* U.S. Const. art. I, § 2, cl. 1.

AMICUS CURIAE BRIEF

No. 07-290

In the
Supreme Court of the United States

◆

DISTRICT OF COLUMBIA, et al.,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

◆

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

◆

BRIEF OF ACADEMICS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

◆

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST

Amici curiae, academics representing a variety of fields of expertise including history, law, economics, business, political science and philosophy, submit this brief in support of the Respondent and assert that the empirical evidence concerning the murder rate in the District of Columbia, compared to other places, demonstrates convincingly that the District's handgun ban experiment was a failure.[1] The *amici* are:

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[1] No counsel for any party to this case authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than the *Amici Curiae* or their counsel made such a monetary contribution. This brief is filed with the written consent of all parties.

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Summary of Argument

The District of Columbia's gun ban was promoted as an effective method to lower violent crime, especially murder. If so, the policy has had ample time in the thirty years since 1977 to demonstrate its beneficial effects. However, looking at the data, there is no evidence that the District of Columbia's gun ban, which became effective in February 1977, reduced murder rates.[2] Indeed, there is only one year after the ban started that the murder rate is below what it was in 1976.

The District's murder rate has risen relative other cities, the neighboring states of Virginia and Maryland, or the rest of the country. In 1976, the District's murder rate was 15th among America's 50 most populous cities. Far from the ban lowering the District's murder rate, in only one of the year after the ban (1985) did the District rank as low as 15th. In 15 years of the next 29 years after the ban, the District's murder rate was 1st or 2nd; in another four years it was 4th. Similarly, the District's murder rate rose relative to the average murder rate.[3]

---

[2] The District of Columbia's brief and various amici point to murder as the violent crime category that was reduced after the District of Columbia handgun ban that went into effect during February 1977. No other violent crime rate is pointed to.

[3] These results are not particularly surprising given other research (see e.g., John R. Lott, Jr., More Guns, Less Crime: Understanding Crime and Gun Control, Chicago, Illinois: University of Chicago Press (2000, second edition) at 113-114).

ARGUMENT

I.
COMPARING THE DISTRICT"S MURDER RATE TO MURDER RATES IN OTHER JURISDICTIONS

There are three obvious sets of comparisons: the District's murder rate relative to other large cities, the District's murder rate relative to neighboring Maryland and Virginia, and the District's murder rate relative to the rest of the United States. A study by Loftin *et. al.* (1991)[4] compared the mean homicide rates before and after the ban. They looked at the period from 1968 through 1987. Murders and homicides really took off in the District relative to the rest of the country in 1988, so excluding data after 1987 understates how much the District's murder rate rose after the ban. But because of their study we will look at the both the period from 1968 to 1987 as well as data after that point in time.[5] While this brief will discuss homicide data, its primary focus will be on murders since homicides include justifiable killings by police and civilians.

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[4] Loftin, Colin, David McDowall, Brian Wiersema, & Talbert J. Cottey, "Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia," 325 New England Journal of Medicine 1615 (1991).

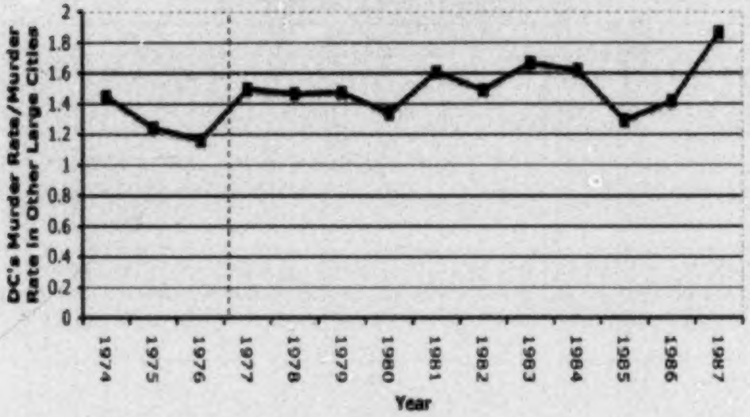
[5] Loftin et al's study also examined the number of homicides and not the rate. Given the large drop in the District's population during this period, it is important to examine changes in rates so as not to falsely attribute part of any change in murders to the decline in the number of people living in the District.

A.
The Fifty Largest Cities.

Figure 1 (below) shows how the District's murder rate has changed over time relative to the other 49 largest cities. In 1976, the last year before the ban, the District's murder rate was 16 percent greater than the average murder rate for the other large cities. A vertical line is drawn in the diagram to show that when the ban went into effect at the beginning of 1997.

After the ban, the District's murder rate between 1977 and 1987 averaged 55 percent greater than the average for these other cities, immediately rising to 50 percent above the average and getting as low as 29.4 percent greater in 1985. City level data from the FBI is only readily available from 1974 on so that is the period we start with. During the three years from 1974 to 1976, the District's murder rate averaged 28.5 percent more than the other cities, so there is not one single year after the ban where the ratio of the District's murder rate to the average for other cities fell below the pre-ban ratio.

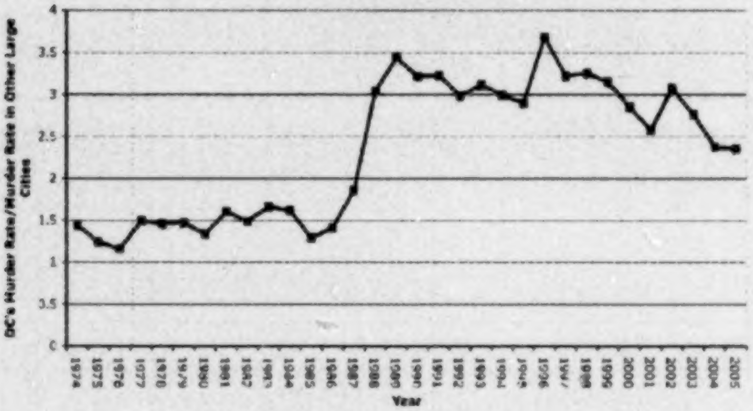
Figure 1: Changes in DC's Murder Rate Relative to the Other 49 Largest Cities



Source: FBI Uniform Crime Reports. The District's rates are easily available at http://www.disastercenter.com/crime/dccrime.htm

Extending the sample out past 1987 shows how the District's murder rate explodes above the rate in the rest of the cities (Figure 2). After the ban from 1977 to 2005, the District's murder rate averaged 144 percent greater than the other cities. A rate 5 times greater than it was in the pre-ban period.

Figure 2: Changes in DC's Murder Rate Relative to the Other 49 Largest Cities



Looking at these simple averages, there is no evidence in comparing the District's murder rate to the murder rate in other cities that the ban lowered murder rates. If anything, the ban appears to have been associated with an increase in murder rates.

The brief by Fox and McDowall argues that:

> The Respondent has argued that the rise in violent crimes in the District from 1980 to 1997 establishes that the DC Gun Control Law was ineffective. Brief in Response to Petition for Certiorari 27-28. However, the entire nation experienced an increase in violent crimes during this period because of the emergence of the crack cocaine market and related gang activity.

Brief of Professors of Criminal Justice as Amici Curiae in Support of Petitioner at 14.

Yet, the District's murder rate increased relative to other cities ***before*** crack cocaine became an issue in the last half of the 1980s. In addition, crack cocaine affected cities nationwide and after 1987 the District's murder rate still increased dramatically relative to the murder rate in other cities. While the crack cocaine epidemic clearly increased the District's murder rate, it is hard to see how cocaine can explain the District's relative increase in murder rates either anytime from 1977 to 1987 or afterwards. Nor can it explain why the District's murder rate was still almost 2.5 times that of the average of other large cities as late as 2005.

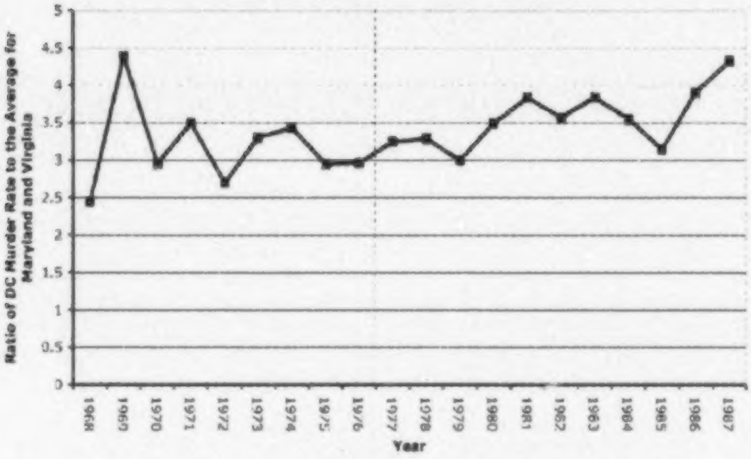
Not only are Fox and McDowall incorrect in their brief about the changes in the District's murder rates relative to other jurisdictions being due to the crack cocaine epidemic, but they are incorrect that past work on concealed handgun laws has not accounted for the impact of cocaine on crime rates. In fact, the work that they are discussing dealt extensively with the cocaine/crack issue. For example, see page 24, fn. 50 in the paper that they cite as the "Lott Study" (John R. Lott, Jr. and David Mustard, "Crime, Deterrence, and Right-to-Carry Concealed Handguns," 26 J. Legal Studies. 24 (1997). For a more extensive discussion on this see More Guns, Less Crime, John R. Lott, Jr., University of Chicago Press (2000, second edition) at 213-215.

B.

Comparison of the District to Maryland and Virginia.

Another obvious comparison is between the District and the two states that surround it, Maryland and Virginia. Figure 3 examines the period from 1968 through 1987. In the last year before the ban the District's murder rate was 197 percent greater than the average murder rate in Maryland and Virginia and the average during the period that the ban was in effect from 1977 to 1987 the District's murder rate was 257 percent greater than the average for these two states. Indeed, there was not one year after the ban was in place where the ratio was as low as it was in 1976. The average ratio from 1968 to 1976 was 219 percent compared to the average rate of 257 percent from 1977 to 1987.

Figure 3: Ratio of DC Murder Rate to the Average for Maryland and Virginia from 1968 to 1987

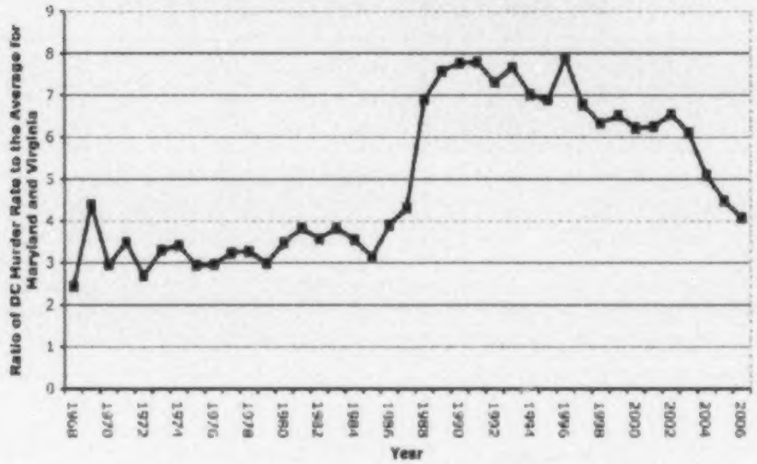


Source: FBI Uniform Crime Reports. The District's rates are easily available at http://www.disastercenter.com/crime/dccrime.htm. Maryland's data is available at http://www.disastercenter.com/crime/mdcrime.htm and Virginia's at http://www.disastercenter.com/crime/vacrime.htm.

Including data past 1987 shows a dramatic increase in the District's murder rate relative to Maryland and Virginia. The District's murder rate averaged 450 percent more than Maryland and Virginia's from 1977 to 2006, over twice the District to Maryland and Virginia ratio from 1968 to 1976.

Again, comparing the District to Maryland and Virginia provides no evidence that the ban reduced the District's murder rate. If anything, the District's murder rate increased after the ban.

Figure 4: Ratio of DC Murder Rate to the Average for Maryland and Virginia from 1968 to 2006

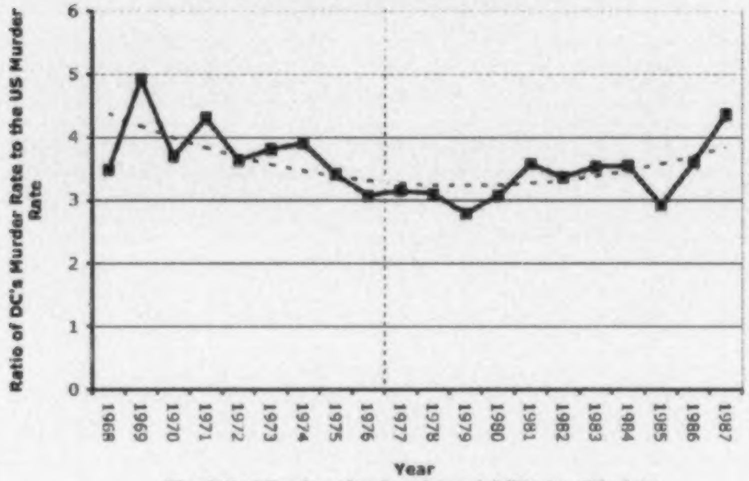


C.

Comparing the District's Murder Rate to that for the United States.

Examining the District's murder rate relative to the US's from 1968 to 1987 shows that the District's murder rate was declining before the ban and rising afterwards (Figure 5). The ban seems to be associated with this adverse change in the District's murder rate relative to the rest of the country. By 1976, the District's murder had fallen to being 3.08 times greater than the US's. There is only two years after that (1979 and 1985) when the ratio of the District's to the US's murder rate fell below what it was in 1976. Expanding the data to include the period after 1987 continues to show the increase in the District's murder rate relative to the US's that we observed in Figures 2 and 4. Again, whether one is looking at the period from 1968 to 1987 or including the later period, there is no evidence that the gun ban reduced the District's murder rates.

Figure 5: Ratio of DC's Murder Rate to the US Murder Rate from 1968 to 1987

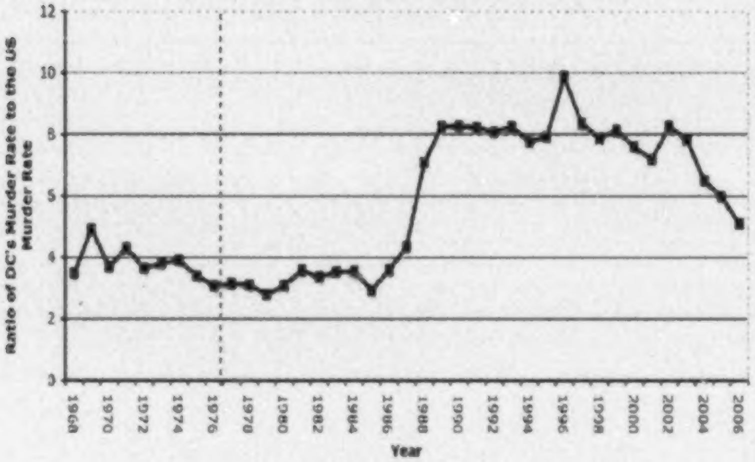


The dotted line is a simple polynomial fitted to this data.

Source: FBI Uniform Crime Reports. The District's rates are easily available at http://www.disastercenter.com/crime/dccrime.htm. The United States data is available at http://www.disastercenter.com/crime/uscrime.htm.

Expanding the data past 1987 (Figure 6) shows the same large increase in the District's murder rate relative to the US murder rate that we saw in Figures 2 and 4.

Figure 6: Ratio of DC's Murder Rate to the US Murder Rate from 1968 to 2006



Thus, whether looking at the period from 1968 to 1987, or including the later period, there is no evidence that the District handgun ban reduced the District's murder rate.

D.
The District's Homicide Rate.

Finally, we compare the District's homicide rate to the US's for the years from 1968 to 1987. Murder rates seem like the more appropriate comparison because the difference between murder and homicides primarily involves the use and ownership of guns by police, something that is not being questioned by the District's gun ban. In addition, if criminals were previously being killed to stop them from doing some bad act, such as a victim stopping her rapist, a reduction in justifiable homicides could be viewed as a bad outcome.

In any case, while the District's homicide rate was declining relative to the US's after the ban went into effect, it was also declining before the ban. Indeed, it is very difficult to see even the slightest change in the rate of this decline as a result of the ban. It is hard to see any impact of the relative homicide rates as a result of the ban. Homicides surely did not fall "substantially and abruptly."[6] Continuing the data past 1987 shows the same increase in the District's relative homicide rate that we observed in Figures 2, 4, and 6.

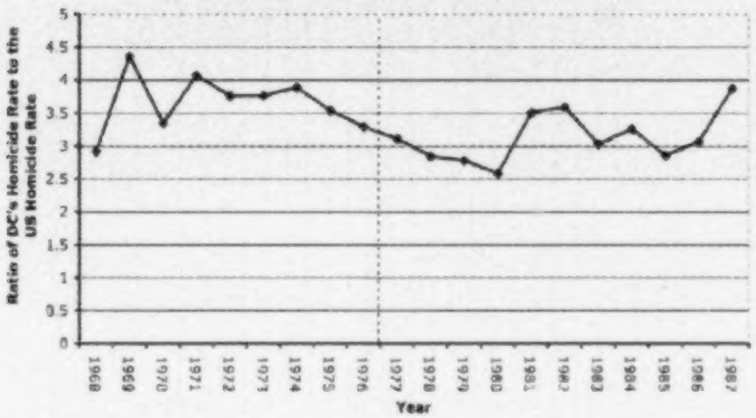


Figure 7: Comparing DC's Homicide Rate to the US's Homicide Rate for the Years from 1968 to 1987

National Health Center, Vital Statistics of the United States, Vol. 2, various years.

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[6] Loftin *et. al.* make this claim at 1620, but they provide no statistical evidence of an abrupt change, only a comparison of the before and after ban homicide rates for two broad periods of time. No attempt was made to account for a pre-existing downward trend in homicide rates.

Whether one examines the District's murder rates relative to other large US cities, the neighboring states of Maryland and Virginia, or relative to the US as a whole there is no evidence that the ban reduced the District's relative murder rate. Indeed, if anything, the evidence points to the opposite conclusion. The District's rising murder rate cannot be explained as a result of the crack cocaine epidemic during the late 1980s because this increase started occurring right after the ban was instituted, long before crack cocaine became an issue.

Everyone wants to disarm criminals. However, the problem with bans is who is most likely to obey them. If the ban primarily disarms law-abiding citizens and not criminals, the ban can have the opposite effect of what was intended.

II.
NOTES ON OTHER CLAIMS

Fox and McDowall are incorrect when they write:

> If one extends Lott's statistical model by five years, for example, and applies it to the period in the mid-1990s when high crime rates reversed, 'suddenly shall-issue laws are associated with uniform increases in crime.

Brief of Professors of Criminal Justice as Amici Curiae in Support of Petitioner at 10-11.

Lott (2000, pp. 167-202) extends the data up through "the mid-1990s" (1996) and shows that the results are strengthened (John R. Lott, Jr., More Guns, Less Crime, Chicago, Illinois: University of Chicago Press (2000, second edition)).

Fox and McDowall further err when they note that:

> shall-issue states, which were mostly less populated states with limited urban areas, as compared to the states without shall-issue laws, which were mostly heavily populated states with large urban areas . . . . . The crack cocaine market had a greater impact on poor, urban areas, which are primarily located in states that do not have shall-issue laws.

Brief of Professors of Criminal Justice as Amici Curiae in Support of Petitioner at 10.

For the original "Lott study," the data was county level data and a large number of urban counties were in states with right-to-carry laws by 1992: such as Philadelphia, Miami, Atlanta, Seattle, Portland, Indianapolis, Pittsburgh. Indeed, all the states that passed right-to-carry laws had urban and rural areas. Over time more states adopted right to carry laws. The 2000 edition of More Guns, Less Crime studied additional large cities that were in states with right-to-carry laws such as Houston, Dallas, and Phoenix.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,
v.

DICK ANTHONY HELLER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR BRADY CENTER TO PREVENT GUN VIOLENCE, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, MAJOR CITIES CHIEFS, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES, HISPANIC AMERICAN POLICE COMMAND OFFICERS ASSOCIATION, NATIONAL BLACK POLICE ASSOCIATION, NATIONAL LATINO PEACE OFFICERS ASSOCIATION, SCHOOL SAFETY ADVOCACY COUNCIL, AND POLICE EXECUTIVE RESEARCH FORUM AS AMICI CURIAE SUPPORTING PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The **Brady Center to Prevent Gun Violence** is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that the Second Amendment is not misinterpreted as a barrier to strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs amicus curiae in cases involving the constitutionality of gun laws. A sixty-page critique of the D.C. Circuit's decision has been published at www.bradycenter.org.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

The law enforcement amici listed here have a compelling interest in ensuring that the Second Amendment does not stand as an obstacle to gun laws that help the police protect the public from gun crime and violence.

The **International Association of Chiefs of Police** is the largest organization of police executives and line officers in the world, representing more than 20,000 members in 112 countries.

The **Major Cities Chiefs** is composed of police executives heading the fifty-six largest police departments in the United States, protecting roughly forty percent of America's population.

The **International Brotherhood of Police Officers** is the largest police union in the AFL-CIO, representing more than 50,000 members.

The **National Organization of Black Law Enforcement Executives** represents 3,500 members nationwide, primarily police chiefs, command-level officers, and criminal justice educators.

The **Hispanic American Police Command Officers Association** represents 1,500 command law enforcement officers and affiliates from municipal police departments, county sheriffs' offices, and state and federal agencies.

The **National Black Police Association** represents approximately 35,000 individual members and more than 140 chapters.

The **National Latino Peace Officers Association** is the largest Latino law enforcement organization in the United States, with a membership including chiefs of police, sheriffs, police officers, parole agents, and federal officers.

The **School Safety Advocacy Council**, a national organization with expertise on school-based policing, trains law enforcement and school officials to address issues of child safety at school and in the community.

The **Police Executive Research Forum** is a national membership organization of progressive police executives dedicated to improving policing through research and involvement in public policy debate.

SUMMARY OF ARGUMENT

I. In holding that the Second Amendment protects ownership of handguns for private purposes such as hunting and self-defense, the lower court read out of the Amendment its first thirteen words, thus violating the fundamental rule that the Constitution must be interpreted to give meaning to all of its words. The lower court's conclusion is also contrary to *United States* v. *Miller*, 307 U.S. 174, 178 (1939), which held that the "declaration and guarantee" of the Second Amendment "must be interpreted and applied" in accord with its "obvious purpose" to "assure the continuation and render possible the effectiveness" of the militia.

The lower court's account of the "well regulated Militia" as a collection of unorganized individuals is contrary to the nature and function of the founding-era militia. The militia was a system of compulsory military service imposed on much of the adult, male population. As made plain in the Second Militia Act of 1792, militiamen were governed by strict rules of discipline and training. Far from being "well regulated," as was the militia known to the Framers, the militia posited by the court below is not regulated at all.

Contrary to the lower court, the Framers did not envision the guarantee of a right to possess guns for private purposes as the means of arming the militia. The arming of the militia was a matter of government command, not individual choice, and was regulated by statute. The lower court's dangerous claim that the right of persons in the "unorganized militia" to be armed for "self-defense" extends to armed resistance to a government perceived as "tyrannical" is contradicted by the Second Amendment's own expressed objective of ensuring "the security of a free State," and by the Militia Clauses of Article I, which give Congress the power to call out the militia to "suppress Insurrections."

As the Amendment's legislative history shows, "keep and bear Arms" is a military phrase that matches the Amendment's militia-related purpose. Madison's initial proposal to the First Congress contained a conscientious objector clause allowing persons "religiously scrupulous of bearing arms" to be exempt from compelled military service, thus establishing that the term "bear Arms" refers exclusively to military service. The debates in the First Congress confirm that Congress understood the Amendment as addressing possession of arms solely in connection with militia service. "Keep and bear Arms" denoted that militiamen were required by law to acquire and "keep" militia guns at home, as well as to "bear" them in militia service.

Contrary to the lower court's view, guaranteeing a right to keep and bear arms to "the people" does not imply that the right extends to private purposes unrelated to militia service. The issue is not to whom the right extends, but rather the nature and scope of the right guaranteed.

II. Two hundred years of constitutional tradition support interpreting the Second Amendment to guarantee a limited right to be armed in service to an organized militia, while allowing elected legislatures, without judicial interference, to regulate private possession of guns. Legislatures are far better suited than courts to decide the difficult and hotly contested policy issues raised by the continuing tragedy of gun violence in our society. This Court should not grant the judiciary the unprecedented power to interfere with the life-and-death decisions of the people's elected representatives in the control of deadly weaponry.

ARGUMENT

I. THE SECOND AMENDMENT GUARANTEES NO RIGHT TO POSSESS FIREARMS UNLESS IN CONNECTION WITH SERVICE IN A STATE-REGULATED MILITIA

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

The Second Amendment guarantees individuals the right to be armed only as participants in an organized militia that serves the security needs of the States.

The lower court's contrary conclusion is inconsistent with fundamental principles of constitutional interpretation, prior rulings of this Court, and the Amendment's legislative history.

A. Read To Give Meaning To All Its Words, The Amendment Connects The Right Guaranteed To The Well Regulated Militia

This Court has described as "the first principle of constitutional interpretation" the rule that the Constitution must be interpreted to give meaning to each of its words, and that constructions which would render some of its words "mere surplusage" must be avoided. *Wright* v. *United States*, 302 U.S. 583, 588 (1938); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Because the D.C. Circuit's reading of the Second Amendment renders its first thirteen words of no legal effect, that reading cannot be squared with this fundamental principle.

In *Marbury*, this Court applied this principle in rejecting an interpretation that would have permitted Congress to grant original jurisdiction to the Court in categories of cases other than those enumerated in the Constitution. Such a reading, the Court explained, would have rendered without effect the Constitution's provision that "[i]n *all* other cases [those in which the Court does not have original jurisdiction], the supreme court shall have appellate jurisdiction." *Marbury*, 5 U.S. at 174 (emphasis added). This Court has often reiterated the principle. *See, e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 490-491 (1965) (invoking the canon in refusing to adopt an interpretation of the Ninth Amendment that would have "give[n] it no effect whatsoever"); *Myers* v. *United States*, 272 U.S. 52, 151-152 (1926) (invoking "the usual canon of interpretation of [the Constitution], which requires that real effect should be given to all the words it uses"). This rule is grounded in the great care with which the Constitution was written. "Every word appears to have been weighed with the utmost deliberation, and its full force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning." *Holmes* v. *Jennison*, 39 U.S. 540, 571 (1840).

The decision below violates this "first principle" by rendering of no "force and effect" the Second Amendment's first thirteen words. The lower court concluded that the Amendment's assertion that a "well regulated Militia" is necessary to the "security of a free State" conveys merely a "principle of good government," Pet. App. 34a, that is narrower than the right guaranteed. It held that the right extends to persons who have not even an "intermittent" connection to a militia, and who use guns for activities unrelated to militia service, such as "hunting and self-defense." *Id.* at 44a. While the court below acknowledged that militia service could be *one* of the purposes for gun use protected by the Amendment, its interpretation still renders the Amendment's opening clause of no legal "force and effect" because the constitutional validity or invalidity of any gun law challenged under the Amendment would be the same if the opening clause were disregarded.

The lower court's sole source was a law review article that claims it was a common drafting technique in founding-era state constitutions to include such introductory clauses, whose content allegedly does not affect the meaning of the provisions in which they appear. Pet. App. 34a (citing Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998)).

The lower court's argument suffers from two fundamental flaws. First, unlike the state constitutions cited by Professor Volokh, the Bill of Rights features no such superfluous "principles of good government." Given that "principles of good government" also were served by other provisions of the Bill of Rights, why would the First Congress confine their expression to the Second Amendment? The lower court cited not a single additional example in the entire Constitution of a clause that is merely "prefatory" and of no legal effect. On the contrary, in interpreting the one other constitutional provision that includes a statement of purpose, the Copyright and Patent Clause,[2] this Court has held that statement of purpose to be limiting and binding on Congress. *Graham* v. *John Deere Co.*, 383 U.S. 1, 5-6 (1966) (Congress "may not overreach the restraints imposed by the stated constitutional purpose" which is "[t]o promote the Progress of Science and useful Arts"); *see also Eldred* v. *Ashcroft*, 537 U.S. 186 (2003) (recognizing the "'constitutional command' ... that Congress, to the extent it enacts copyright laws at all, [must] create a 'system' that promote[s] the Progress of Science.'"). *Graham*'s holding stands in stark contrast to the lower court's view that the first half of the Second Amendment is meaningless. Pet. App. 34a-36a.

Second, unlike the Second Amendment, most of the clauses collected by Professor Volokh have general statements of purpose that would be incapable of defining any specific, enforceable limitation on the right conferred.[3] Moreover, neither the court below, nor Professor Volokh, cites a single case holding that any of the statements of purpose in early constitutional provisions was in fact merely "prefatory" and did not impose a substantive limitation. The lower court's assertion that the first half of the Second Amendment may safely be ignored therefore stands utterly devoid of support.

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[2] The Copyright and Patent Clause provides: "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8.

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[3] For example, the article cites the New Hampshire Ex Post Facto Article, which provides:

> Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.

N.H. Const. pt. I, art XXIII (1784); Volokh, 73 N.Y.U. L. Rev. at 805. Of the thirty-seven clauses listed by Professor Volokh, twenty-five simply state the desirability of the right conferred, without reference to other values or purposes. *See, e.g.*, N.C. Const. Decl. of Rights art. XV (1776) ("[T]he freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained."). The Second Amendment's opening clause is different from these clauses because it sets forth an independent reason for the right to keep and bear arms. Another seven of the listed clauses are themselves statements of individual rights that encompass the specific individual right conferred by the provision. *See, e.g.*, Pa. Const. Decl. of Rights art. X (1776) ("[T]he people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations ... are contrary to that right."); Volokh, 73 N.Y.U. L. Rev. at 817, n.85. The Second Amendment does not switch between levels of generality: the right to keep and bear arms is not presented as subsidiary to some broader individual right. Finally, five more clauses are irrelevant because they set forth the purpose of an administrative rule, not an individual right.

With respect to all of the clauses, Professor Volokh simply provides no reason to believe that the statements of purpose would be irrelevant to the interpretation of the clauses. *See also* Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People To Keep and Bear Arms,"* 22 Law & Hist. Rev. 119, 153-156 (2004) (documenting tradition of examining preamble of a statute to help construe it).

When the Framers wanted to guarantee an unambiguously broad right, they knew how to do so, as the First Amendment plainly shows. *See* U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech."). The Framers could have adopted a similar formulation in the Second Amendment. They did not do so.

Indeed, the Framers could have adopted the language proposed by one of the contemporaneous, albeit "marginal voices call[ing] out for a private right to arms" unconnected to militia service. Uviller & Merkel, *The Militia and the Right to Arms* 82 (Duke 2002). They could have adopted, for example, the proposed amendment offered by the New Hampshire ratifying convention, which made no reference to the militia, and provided: "Congress shall never disarm any Citizen unless such are or have been in Actual Rebellion." *The Complete Bill of Rights: The Drafts, Debates, Sources and Origins* 181 (Cogan ed. 1997) ("*Debates*").

Alternatively, had the Framers intended an armed militia to be only one of several "salutary" purposes of the right to keep and bear arms, as the lower court imagined, they could have adopted language expressing those multiple purposes. For instance, the dissenting delegates from the Pennsylvania ratifying convention proposed in their *Reasons of Dissent* pamphlet: "That the people have a right to bear arms for the defense of themselves and their own State, or the United States, *or for the purpose of killing game*; and no law shall be passed for disarming the people or any of them, unless for crimes committed." *Debates* 182 (emphasis added). That language was not even adopted by the Pennsylvania ratifying convention. Uviller & Merkel, *supra*, at 83.

The lower court thought it "passing strange" that the drafters would have chosen the language of the Second Amendment if the right guaranteed were limited to "the protection of state militias," instead of choosing a "more direct locution." Pet. App. 14a, 34a. What is truly "passing strange" is the lower court's conclusion that, of the various "locutions" they had to choose from, the Framers sought to guarantee a non-militia right by choosing language emphasizing the importance of a militia, while avoiding other available "locutions" making no reference to the militia at all.

B. *United States* v. *Miller* Establishes That The Amendment's Expressed Militia Purpose Limits The Scope Of The Right Guaranteed

In its most extensive discussion of the Second Amendment, this Court implicitly applied the *Marbury* principle in holding that the "declaration *and* guarantee" of the Second Amendment "*must* be interpreted and applied" in accord with its "obvious purpose" "to assure the continuation and render possible the effectiveness" of the militia. *United States* v. *Miller*, 307 U.S. 174, 178 (1939) (emphasis added).

In *Miller*, this Court considered whether the National Firearms Act's prohibition on transporting unregistered short-barreled shotguns in interstate commerce violated the defendants' Second Amendment rights. The Court concluded that because there was no evidence that the possession or use of a short-barreled shotgun "has some reasonable relationship to the preservation or efficiency of a well regulated militia," the defendants' conduct was not protected by the Second Amendment. 307 U.S. at 178.

The lower court misconstrued *Miller* by suggesting it held that the first half of the Second Amendment modified only the term "Arms" in its second half. *See* Pet. App. 36a. It thus concluded that *Miller* was concerned only with the type of weapon at issue. *Id.* at 40a-42a. This reading of *Miller* is flawed in three respects.

First, the lower court's argument cannot withstand *Miller*'s clear instruction that the entire Amendment—its "declaration and guarantee" and not simply the term "Arms"—"must be interpreted and applied" with the militia "end in view." *Miller*, 307 U.S. at 178. Second, if, as the lower court insisted, the right to be armed extends to private purposes like hunting and self-defense, then why doesn't the *Miller* Court's allegedly "weapons-based" focus consider the suitability of short-barreled shotguns for such purposes? Third, the lower court's reading suggests that the defendants' possession and use of firearms would have been constitutionally protected if only their weapons had been employable in military service. This would imply the absurd result that the Amendment protects a constitutional right to possess military weapons such as machine guns or grenade launchers, even by persons with no connection to a lawfully-sanctioned military force.

Given the absence of support for such a view in the *Miller* opinion itself, the lower court purported to find it in the government's brief. *See* Pet. App. 40a-42a. The court cited no support for its methodology of ascertaining the meaning of a judicial opinion in the briefs considered by the court. Moreover, neither the government's brief nor the *Aymette* decision on which the government and the *Miller* Court relied, argued that evidence of a weapon's military suitability would be sufficient to trigger Second Amendment protection. *See* Appellants' Br. 4-5, *Miller*, 307 U.S. 174; *Aymette* v. *State*, 21 Tenn. 154, 1840 WL 1554, at *5 (1840). Both the brief and *Aymette* made clear that the requirement that the arms involved be militia-suitable is independent of the requirement that the right be exercised in the context of militia service. The government argued, first, that the Second Amendment "right has reference only to the keeping and bearing of arms by the people *as members of the state militia or other similar military organization provided for by law.*" Appellants' Br. 4-5, *Miller*, 307 U.S. 174 (emphasis added). Only then did it contend that "[t]he 'arms' referred to in the Second Amendment are, *moreover*, those which ordinarily are used for military or public defense purposes." *Id.* at 5 (emphasis added). In *Aymette*, the Tennessee Supreme Court similarly created a dual requirement: "[a]s the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." *Id.* (emphasis in original).

Consistent with the government's argument and the *Aymette* ruling, the *Miller* Court held that the military utility of a gun is a necessary condition for constitutional protection, but not a sufficient condition in the hands of someone with no connection to a militia. The lower court's ruling that the right to be armed can be "interpreted and applied" in light of private purposes like hunting and self-defense is contrary to *Miller*.

C. The "Well Regulated Militia" Is An Organized Military Force, Not An Unorganized Collection Of Individuals

Implicitly recognizing that the reference to a "well regulated Militia" in the Second Amendment cannot be ignored altogether, the lower court struggled to show that a right to own guns for private purposes is nonetheless consistent with the Amendment's language. According to the lower court, the founding-era militia was "the raw material from which an organized fighting force was to be created" for which there was "no organizational condition precedent." Pet. App. 30a. It was, therefore, merely a collection of individuals "*subject* to organization by the states (as distinct from actually organized)." *Id.* at 33a (emphasis in original). The lower court's account of the militia is both self-contradictory and a distortion of the nature and function of the militia.

Even the lower court acknowledged that membership in the founding-era militia involved "enrolling" by "providing one's name and whereabouts to a local militia officer." Pet. App. 30a. However, because enrollment, by this definition, presupposes the existence of an organization with which individuals must formally affiliate themselves, the lower court's recognition of that requirement contradicts the court's own assertion that the militia had no "organizational condition precedent." *Id.* Moreover, nothing in the record remotely suggests that plaintiff Heller provided his "name and whereabouts to a local militia officer." Thus, even under the lower court's account, Heller has no affiliation with a militia.

Contrary to the lower court, the militia of the founding era was a system of compulsory military service imposed on much of the free, adult, male population, for which "enrollment" was only the beginning of the individual's military obligation to the government. The Second Militia Act of 1792, cited by the lower court in support of its account of the militia, in fact undermines it. In addition to requiring that citizens enroll in the militia, the Act provides that officers will "cause the militia to be exercised and trained" in accordance with specified "rules of discipline" and contemplates that militia members will be "called out on company days" to train. Second Militia Act of 1792, ch. xxxiii, 1 Stat. 271, 273; *see also* Webster, *American Dictionary of the English Language* (1828 ed.) ("The militia of a country are the able bodied men organized into companies, regiments and brigades ... and required by law to attend military exercises[.]"), *available at* http://1828.mshaffer.com.[4] In *Perpich* v. *Department of Defense*, 496 U.S. 334, 348 (1990), this Court described the "traditional understanding of the militia as a part-time, nonprofessional *fighting force*," consisting of 'a body of citizens *trained to military duty*.' " (quoting *Dunne* v. *People*, 94 Ill. 120 (1879)) (emphasis added). This concept is a far cry from the lower court's "raw material from which an organized fighting force was to be created." Pet. App. 30a.

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[4] Another early statute dealing with the militia gives the President the power, "whenever the United States shall be invaded, or be in imminent danger of invasion[,] . . . to call forth . . . the militia of the . . . states." Act of Feb. 28, 1795, ch. xxxvi, 1 Stat 424. The founding-era militia thus had to be ready to go into combat at a moment's notice. The untrained collection of individuals contemplated by the lower court would have been worse than useless in response to an imminent, much less an actual, invasion.

Even if it were possible for a militia to consist only of the "raw material" of some future fighting force, the lower court's description cannot account for the Second Amendment's reference to a "well regulated" militia. The phrase "well regulated" resolves any doubt that the militia of the Second Amendment is an organized body governed by a set of rules.[5]

Significantly, the lower court conceded that the term "well regulated" implies that "the militia was a collective body designed to act in concert," but then argued that the term does not convert the "popular militia" of the founding era into "a 'select' militia that consisted of semi-professional soldiers like our current National Guard." Pet. App. 32a. The court of appeals incorrectly assumed that a "popular militia"—in which large segments of the population are "enrolled"—cannot also be organized and regulated. The founding-era militia was both. In contrast, the lower court's account posits a "well regulated Militia" that is not regulated at all.

The lower court argued that guaranteeing a right to keep weapons for private purposes such as hunting and self-defense was "the best way to ensure that the militia could serve when called." Pet. App. 33a. This assertion defies common sense and is, once again, historically inaccurate. Guaranteeing a right to possess guns for private purposes is neither necessary nor sufficient as a means for arming state militias. It is not necessary, since the Constitution gave Congress the power to require the possession of guns for militia purposes, nor is it sufficient, because it makes the effective arming of the militia dependent on the uncertain choices of private citizens about whether to arm themselves and what arms to possess. Rather than leave the arming of the militia to the whims of individual gun owners, the founding-era Congress chose to regulate gun ownership for militia purposes. Pursuant to its Article I power "[t]o provide for ... arming ... the Militia," U.S. Const. art. I, § 8, Congress spelled out in detail the exact arms, ammunition, and gear that militia members, as well as officers, were required to possess. *See* Act of May 8, 1792, 1 Stat. 271-272. The Second Militia Act of 1792, enacted one year after ratification of the Bill of Rights, *required* that each militiaman "within six months" after enrollment "provide himself with a good musket or firelock." *Id.* at 271. Militia members were even required to keep their weapons "exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes," thus recognizing that the government's continuing interest in militia weapons deprived them of some of the attributes of private property. *Id.* at 273. This legislation would have been superfluous if the framers had contemplated that a right to own arms for private purposes would be the primary method of arming the militia. The arming of the militia was a matter of government command, not individual choice.[6]

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[5] The Oxford English Dictionary defines "regulated" as: "[g]overned by rule, properly controlled or directed," or "of troops: Properly disciplined." *The Oxford English Dictionary* 524 (2d ed. 1989).

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[6] It was true, as noted by the lower court, Pet. App. 21a, that guns acquired for militia purposes could also be used for private

The *reductio ad absurdum* of the lower court's treatment of the militia is its suggestion that the right of the people in an unorganized militia to possess guns for "self-defense" also entails the right to use those guns "to resist and throw off a tyrannical government." Pet. App. 21a, 44a (embracing private use of arms for resistance to the "depredations of a tyrannical government"). This insurrectionist view of the "well regulated Militia" puts the Second Amendment at odds with itself, and with the rest of the Constitution. First, it is contradicted by the Amendment's own words, which describe the necessity of the militia to "the security of a free State." By these words, the Second Amendment itself establishes that the militia served the security

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purposes. But this says nothing about whether guns having no connection with militia service, possessed and used for purposes not mentioned in the Second Amendment, are constitutionally protected. The lower court's further observation that the reference to "*the* right ... to keep and bear Arms" suggests that the right "preexisted the Constitution," Pet. App. 20a (emphasis in original), also says nothing about whether the right is independent of the militia. The militia system also predated the Constitution, as the Articles of Confederation had provided that "every State shall always keep a well-regulated and disciplined militia, sufficiently armed and accoutered." Articles of Confederation art. VI. Indeed, the militia system in England dated to the Assize of Arms in 1181. *See* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 130, 133 (1975). The lower court cited the English Bill of Rights of 1689 as a source of this preexisting right, but misinterpreted it to guarantee a private right to possess guns, when it rather "laid down the right of a class of citizens, Protestants, to take part in the military affairs of the realm. Nowhere was an individual's right to arm in self-defense guaranteed." Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22, 26 (1984). *Accord* Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chicago-Kent L. Rev. 27, 59 (2000).

interest of the States,[7] not the interest of individuals in taking up arms against the government should they decide it has become a tyranny. Second, the Constitution expressly gives Congress power to call out the militia "to execute the Laws of the Union ... [and] suppress Insurrections." U.S. Const. art. I, § 8. The militia was regarded not as an instrument of rebellion, but as a bulwark against it.

To the extent that the Framers saw the militia as deterring government tyranny, it was as a state-organized military force serving as a deterrent to the tyrannical threat of a federal standing army consisting of professional soldiers, as distinct from the part-time citizen soldiers of the militia. Thus, Madison's Federalist No. 46, often misrepresented to endorse an insurrectionist vision of the Second Amendment, speaks of the potential for a threatening "regular army" to be repelled by "*the State governments* with the people on their side," and of the militia composed of "citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and *united and conducted by governments* possessing their affections and confidence." (emphasis added).

The lower court's insurrectionist view of the militia and the Second Amendment has disturbing implications for public safety and the rule of law. *See generally* Henigan, *Arms, Anarchy and the Second Amendment*,

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[7] The lower court's suggestion that the term "a free State" refers to "a hypothetical polity" rather than "an actual political unit of the United States, such as New York," cannot survive a reading of the remainder of the Constitution, which throughout uses the term "State" or "States" to refer to the States of the Union. *See generally* Pet. App. 60a-63a (Henderson, J., dissenting).

26 Valparaiso L. Rev. 107, 122-129 (1991). The danger of individuals and groups purporting to exercise their right of armed resistance against perceived government tyranny has been illustrated throughout our history—from Shays' Rebellion to the paramilitary activity of the Ku Klux Klan[8] to the Oklahoma City bombing. Members of the amici law enforcement groups have first-hand experience with the tragic consequences of political violence. The lower court's insurrectionist reading of the Second Amendment may well limit the government's power to punish political violence after the fact, and surely would curb the government's power to prevent the stockpiling of weapons, the organization and training of private armies, and other activities exposing government officials to an ever-present threat of violent dissent. In contrast, this Court has "reject[ed] any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy." *Dennis* v.. *United States*, 341 U.S. 494, 501 (1951).

D. The Phrase "Keep And Bear Arms" Has An Exclusively Military Meaning

The lower court's approach to interpreting the phrase "keep and bear Arms" is to separate the phrase "bear Arms" from "keep Arms," and then to take both phrases out of their context in the Second Amendment in order to discover possible meanings unconnected with militia service. The issue, however, is not whether there are contexts in which "bear Arms" and "keep Arms" could have such non-militia meanings. The question is the meaning of the phrase "keep and bear Arms" as used by the framers and ratifiers of the Second Amendment.

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[8] *See Vietnamese Fishermen's Ass'n* v. *Knights of Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982) (rejecting argument that an injunction against the military training activities of the Ku Klux Klan violated the Second Amendment).

The debates surrounding adoption of the Second Amendment, and in particular Madison's initial proposal to the First Congress, make clear that the framers understood the right to "keep and bear Arms" to refer only to military purposes. The word "keep" does not inject a private purpose into the Second Amendment, but rather merely refers to the practice of keeping at home the arms that were to be used in militia service.

1. The Second Amendment was drafted to respond to Anti-Federalist fears that Congress would fail to arm the militia

During the debates over ratification of the Constitution, Anti-Federalists expressed the fear that Congress's newly-granted power to "provide for organizing, arming and disciplining, the Militia" might be interpreted to deprive the States of the power to organize and arm their militias should Congress fail to do so. In the key Virginia ratification debates, George Mason argued that Congress's new power would allow Congress to destroy the militia by "rendering them useless—by disarming them ... Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them." 3 Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 379 (2d ed. 1941). Patrick Henry echoed this concern, in a passage often misleadingly excerpted. Henry announced that: "The great object is, that every man be armed.... Every one who is able may have a gun." *Id.* at 386. His next sentences, often omitted by advocates for the "private rights" view, show he was referring to the need to arm the militia and the danger that Congress may fail to do so: "But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress ... how will your militia be armed?" *Id.* The Federalists responded by asserting that the Constitution did not bar the States from arming their own militias, with John Marshall observing: "If Congress neglect our militia, we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militia-men?" *Id.* at 421. The Anti-Federalists were unpersuaded. Mason asked for "an express declaration that the state governments might arm and discipline" state militias. *Id.* at 380. The debates make clear that the continued viability of the militia was at the core of the Framers' concerns when they discussed a right to be armed.

The Virginia debates, ignored by the lower court, have not a word about the need to guarantee a right to be armed for hunting or self-defense, or to resist a tyrannical government. *See* Cornell, *A Well-Regulated Militia* 55 (2006). Moreover, they show that Anti-Federalists and Federalists alike took it for granted that arming of the militia was a governmental function, not a matter left to the choice of individual citizens. The issue was whether the Constitution adequately protected the people's right to be armed in a state-organized militia. That concern gave rise to Madison's initial proposal to the First Congress.

2. Madison's initial proposal treated "bearing arms" as synonymous with "rendering military service"

The lower court's error in interpreting "bear Arms" is made plain by examining the text of Madison's initial proposal to the First Congress, which, as even the lower court conceded, used the phrase "'bearing arms' in a strictly military sense." Pet. App. 23a-24a. While similar to the ratified version, the proposal included a conscientious objector clause:

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

Debates 169.

The conscientious objector clause treated "bearing arms" as synonymous with "render[ing] military service"—that is, participating in a well regulated militia. If the right was to own and use guns for private purposes, there would have been no need for such a provision. After all, private gun possession and use, in contrast to militia use, was a matter of choice. Moreover, there is no evidence or interpretive principle that would support giving "bearing arms" a military meaning in the conscientious objector clause, while giving "bear Arms" a different meaning when referring to the right. As the debate engendered by his proposal shows, the First Congress also understood the term "bear Arms" in this way. Indeed, that debate was premised upon the understanding that the subject matter of the Second Amendment was service in an armed militia.

3. The debates in the First Congress reflect the Framers' view that the Second Amendment related only to militia use

Every speaker who participated in the debates about the Second Amendment in the First Congress treated "bear[ing] Arms" as referring to participation in the militia. *Debates* 186-190. If anyone believed that the Second Amendment protected a right to be armed for private purposes, those views were kept hidden. *See* Uviller & Merkel, *supra*, at 103.

Indeed, the debates, which focused on the conscientious objector clause, are incomprehensible if a right to use arms for private purposes were at issue. The only objections to the clause related to its effect on the militia. *See* Uviller & Merkel, *supra*, at 98-100. For example, Rep. Elbridge Gerry argued that the clause would enable the government to "declare who are those religiously scrupulous, and prevent them from bearing arms. What, sir, is the use of the militia? It is to prevent the establishment of a standing army, the bane of liberty." *Debates* 186. Rep. Thomas Scott argued that if those religiously scrupulous could not be "called upon for their services," "a militia can never be depended upon." The lack of an effective militia, he explained, "would lead to the violation of another article in the Constitution, which secures to the people the right of keeping arms." *Id.* at 189. That right could only relate to militia use, for Scott argued that if it were violated, "recourse must be had to a standing army." *Id.* at 189-190. Moreover, if Scott were referring to a right to keep arms for private purposes, "it is difficult to see how that right could be violated by exempting Quakers and other professing pacifist sectarians from the right and obligation of militia service," as provided by the conscientious objector clause. Uviller & Merkel, *supra*, at 101-102.

The conscientious objector clause eventually was dropped, presumably because of the expressed fear that it would be used to weaken the militia by exempting large numbers of individuals from service. There is no evidence to suggest that by striking the clause for these reasons the right was transformed to encompass a private right to arms unrelated to militias. On the contrary, the fact that the militia clause was retained—and was even moved to be the first words of the Amendment—suggests that the right retained its necessary connection to the militia.

Thus, the lower court's search for other contexts in which "bear Arms" could have a non-military meaning is simply irrelevant, in light of the direct evidence that Madison and the First Congress understood the phrase, in the context of the Second Amendment, to have an exclusively military meaning.

4. The phrase "keep and bear Arms" refers to possession and use of weapons for military purposes

While the lower court thought it self-evident that the word "keep" injects a private, non-militia purpose into the Amendment, there is no historical or textual basis to believe that while the right to "bear Arms" is military, the right to "keep and bear Arms" is not. There are, of course, multiple contexts in which "keep" has an "obvious individual and private meaning[]." Pet. App. 27a. It does not, however, have that meaning as part of the phrase "keep and bear Arms" in a constitutional provision referencing the importance of a "well regulated Militia."

To the Framers, "keep and bear Arms" was a military phrase. For example, Article XVII of the Massachusetts Bill of Rights provided that "[t]he people have a right to keep and bear arms for the common defense," while warning of the dangers of peacetime armies, and urging strict civilian control of the military. Uviller & Merkel, *supra*, at 82. Similarly, as the Tennessee Supreme Court recognized in its 1840 *Aymette* decision, in guaranteeing the right of the people to "keep and bear Arms," "[n]o private defence was contemplated." *Aymette*, 1840 WL 1554, at *2.

Understood in its context, the word "keep" in the phrase "keep and bear Arms" refers to the common practice of that era, codified in the Second Militia Act of 1792, for militiamen to acquire their militia arms, as prescribed by law, and keep them at home. To provide for an effective militia, the Framers ensured that the people would have the right to "keep and bear Arms," as militiamen could be called on to "keep" their militia arms, so as to be prepared to "bear Arms" in military service.

E. The Guarantee Of The Right To "The People" Is Entirely Consistent With The "Militia Purpose" Interpretation

The lower court held that the Second Amendment's use of the term "the people" implies a right to gun ownership for private purposes. Pet. App. 17a-18a. The court noted that "the people" appears in the First, Second, Fourth, Ninth, and Tenth Amendments, which "were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation." *Id.* at 18a (emphasis in original). Citing to dicta from *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), the court held that "the people" has a common definition across the Constitution, and that the Second Amendment therefore also protects an individual right, by granting a right to ownership and use of guns for private purposes. Pet. App. 18a-19a.

This conclusion contains an unwarranted deductive leap from a statement about "who" has the right to "what" that right involves. Neither the term "the people" itself nor *Verdugo-Urquidez* describes the substantive contours of the right to keep and bear arms. There is no question that the right protected by the Second Amendment extends to "the people"; the question is how that right is defined: "[T]o keep and bear arms for what?" *Aymette*, 1840 WL 1554, at *3. Under the "militia purpose" view, the Second Amendment guarantees an individual's right to keep and bear arms to the extent the person is engaged, or seeks to be engaged, in the conduct sanctioned by the text, *i.e.*, possessing and using arms as part of a well regulated militia.[9] There is nothing about the use of the term "the people" in the Second Amendment that contradicts this interpretation.

Verdugo-Urquidez is perfectly consistent with this view. In that case, the Court held that the defendant, a citizen and resident of Mexico, lacked standing to challenge the search of his house in Mexico under the Fourth Amendment. "The people" protected by the

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[9] This account of the Second Amendment right does not involve the claim that the right belongs to "the States" instead of to "the people," a straw man that the lower court eagerly knocked down. Pet. App. 18a. As the text makes clear, the interest served by the Second Amendment is the security of the States as political entities, but the right to be armed in a well regulated militia is nevertheless a "right of the people."

Fourth Amendment and other constitutional provisions, the Court held, are "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265. The Court held that the defendant was not a part of this protected class. *Verdugo-Urquidez* says nothing about the substance of the Fourth Amendment—let alone the substance of the Second Amendment. "The people" defines the class of persons who are entitled to claim the benefit of the constitutional right, not the nature of the right itself.[10]

Looking at *whom* an amendment protects to determine *what* right it guarantees has no analogue in other constitutional doctrines. The lower court complicated the issue by creating a false dichotomy between "individual" and "collective" rights. Pet. App. 19a. Other constitutional provisions employing the term "the people" demonstrate that the "individual" versus "collective" question has no bearing on the substance of the right. In the First Amendment, for example, "the right of the people peaceably to assemble" guarantees individuals the right to engage in constitutionally protected conduct that necessarily involves the participation of others. Yet no one reads the First Amendment as protecting only the "small subset" of people who tend to assemble with each other. The Second Amendment, like the Assembly Clause, is written to protect a category of conduct, not a category of people.

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[10] *Verdugo-Urquidez* hardly stands for the proposition that "the people" cannot connote a "subset" of all individuals, as the lower court suggested. Pet. App. 18a-19a. This Court's own definition of "the people" creates a subset: "*a class* of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265 (emphasis added).

II. THE COURT SHOULD CONTINUE TO ENTRUST GUN REGULATION TO ELECTED LEGISLATIVE BODIES AS IT HAS FOR MORE THAN TWO HUNDRED YEARS

The constitutional issues raised by this case must be considered in light of an extraordinary fact of constitutional history: never before in the more than two hundred years of our Republic has a gun law been struck down by the federal courts as a violation of the Second Amendment. This acknowledgment of the authority of States, municipalities, and the federal government to enact regulations limiting the private ownership and use of firearms is not just a jurisprudential curiosity; it is itself an important aspect of the Second Amendment's history. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."). Given the long tradition of vesting the elected representatives of the people with the authority to decide the complex and hotly contested questions at the heart of the gun debate, this Court should not grant courts the unprecedented power to second-guess legislative decisions on the control of deadly weaponry.

A. Federal, State, And Local Legislatures Have Regulated Gun Ownership In The Interest Of Public Safety Since The Founding

The regulation of gun ownership in America is not a modern invention; it was a practice accepted by the founding generation. Firearms were commonly subject to police-power regulation in the States. *See* Cornell & DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 505 (2004). Early gun regulation even extended to free white male citizens, who generally enjoyed the full panoply of political rights. A 1783 Massachusetts statute, for example, prohibited keeping a loaded firearm in "any Dwelling-House, Stable, Barn, Out-house, Warehouse, Store, Shop or other Building" in the "Town of Boston." *Id.* at 512 (internal quotation marks omitted). The punishment was a fine and forfeiture. Pennsylvania, through the Test Acts of 1776, disarmed those who refused to take a loyalty oath. *Id.* at 506-509. The guns used in state militias were also subject to regulation: militiamen were required to bring their firearms and present them for inspection when "mustering" for service. *Id.* at 510.

The tradition of broad legislative authority over gun possession and use has continued to this day, with demonstrable public safety benefits. The evidence shows that gun laws, crafted with the guidance and support of the law enforcement community, help to keep guns out of the hands of dangerous people. For example, since the Brady Law went into effect in 1994, background checks have prevented over 1.4 million felons and other legally prohibited buyers from purchasing guns.[11] The percentage of violent, nonfatal crimes committed with guns declined 45 percent in the decade after the law was enacted[12]—a percentage that had been increasing in the five years prior to enactment.[13] Between 1994 and 2004, the total number of gun homicides dropped 35 percent,[14] and the number of nonlethal violent gun crimes dropped 74 percent.[15]

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[11] U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Background Checks for Firearms Transfers, 2005* (Nov. 2006).

[12] U.S. Dep't of Justice, Bureau of Justice Statistics, *Key Facts at a Glance, Nonfatal Firearm-Related Violent Crimes,*

State gun laws also have helped to keep guns out of the hands of those likely to misuse them. Strong state laws requiring safe home storage of guns have substantially reduced the number of children killed by gunfire,[16] and gun registration and licensing systems have had an impact on criminals' access to guns.[17] Other state laws have curbed the exporting of guns from States with weaker gun laws. Virginia's restriction on multiple handgun purchases, for example, has sharply reduced Virginia's relative contribution to the gun problem in the Northeast.[18] These successes argue

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1993-2005, available at http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfataltab.htm (last visited Jan. 10, 2008).

[13] U.S. Dep't of Justice, Bureau of Justice Statistics, *Key Facts at a Glance, Crimes committed with firearms, 1973-2005, available at* http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm (last visited Jan. 10, 2008).

[14] *Id.*

[15] *Nonfatal Firearm-Related Violent Crimes, supra* n.12.

[16] Webster et al., *Association Between Youth-Focused Firearms Laws and Youth Suicides,* 292 JAMA 594 (2004) (state child access prevention laws associated with 8% decline in youth suicide rates).

[17] Webster, Vernick & Hepburn, *Relationship between licensing, registration, and other gun sales laws and the source state of crime guns,* 7 Injury Prevention 184-189 (2001).

[18] Weil & Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms,* 275 JAMA 1759 (1996).

strongly for continuing to give legislators wide-ranging authority to protect their constituents from gun violence.

B. This Court Should Exercise Caution Before Giving The Judiciary Unprecedented Authority Over Issues Like Gun Control Historically Addressed By Legislatures

Legislatures, not courts, are best positioned to respond to the will and moral values of the people. The Constitution accordingly grants legislatures significant leeway to determine the public interest in complex and intensely contested policy matters.

This Court has exercised caution in fields historically handled by legislatures, which are superior arbiters of the public interest. In takings challenges, for example, judicial review is limited because, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). In this context, "empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 242-243 (1984).

Legislatures are "far better equipped" than courts "to amass and evaluate the vast amounts of data bearing upon an issue." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 665 (1994) (citation and internal quotation marks omitted). Thus, under their traditional powers, state legislatures have "great latitude" to enact regulations "protect[ing] the lives, limbs, health, comfort, and quiet of all persons." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted). Legislatures' superior capacity "to amass the stuff of actual experience and cull conclusions from it," *United States* v. *Gainey*, 380 U.S. 63, 67 (1965), counsels against judicial intervention in an area long the province of popular regulation.

Because gun policy must reconcile widely divergent visions of the public interest and answer hotly contested empirical questions, legislatures must have leeway to regulate in this field, which lies at the core of the police powers. Gun regulation, undeniably, is a matter of life and death. Eighty Americans die from gunshots every day, on average.[19] Members of the police amici face gun-wielding criminals on a daily basis. From 1997 through 2006, there were almost 20,000 firearm assaults on law enforcement officers,[20] taking the lives of 562 officers.[21] Gunshot wounds account for 92% of police deaths from felonious assaults.[22] Well aware of these statistics, legislatures are developing effective ways to prevent gun violence, drawing from the fierce political and empirical debates raging in the background. This Court's long-standing constitutional tradition counsels judicial restraint to "permit[] this debate to continue, as it should in a democratic society." *Washington* v. *Glucksberg*, 521 U.S. 702, 735 (1997).

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[19] National Center for Injury Prevention and Control, Centers for Disease Control, WISQARS, *Injury Mortality Reports* (2004 data).

[20] Federal Bureau of Investigation, Uniform Crime Reports, Table 68, Law Enforcement Officers Assaulted.

[21] Federal Bureau of Investigation, Uniform Crime Reports, Table 27, Law Enforcement Officers Feloniously Killed, Type of Weapon, 1997-2006.

[22] *Id.*

The Framers' careful drafting of the Second Amendment to guarantee a limited right to be armed in service to organized state militias, while allowing the people's elected representatives to take the action they deem necessary to protect the public from gun violence, should be respected and enforced.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA, *ET AL.*,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

◆

BRIEF OF BUCKEYE FIREARMS FOUNDATION LLC, NATIONAL COUNCIL FOR INVESTIGATION AND SECURITY SERVICES, OHIO ASSOCIATION OF PRIVATE DETECTIVE AGENCIES, INC., DBA OHIO ASSOCIATION OF SECURITY AND INVESTIGATION SERVICES (OASIS), MICHIGAN COUNCIL OF PRIVATE INVESTIGATORS, INDIANA ASSOCIATION OF PROFESSIONAL INVESTIGATORS, AND KENTUCKY PROFESSIONAL INVESTIGATORS ASSOCIATION, AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Buckeye Firearms Foundation is a non-profit organization dedicated to defending and advancing human and civil rights secured by law, specifically the rights of Ohio citizens to own and use firearms for all legal activities including, but not limited to, self-defense. Buckeye Firearms Foundation acts primarily through education and legal advocacy. Buckeye Firearms Foundation has a substantial interest in ensuring that the Second Amendment of the U.S. Constitution is interpreted to secure and guarantee the human and civil right of freedom from criminal acts and intimidation, without regard to the political whims of any particular government branch or administration.

National Council for Investigation and Security Services (NCISS) is the sole nationwide organization in the United States dedicated to advancing and protecting the interests of the contract private security industry and professional private investigators. The business interests of NCISS members encompass the employment of more than 600,000 private security personnel, including security officers, private investigators, "private police" and other private-sector protection professionals. NCISS is the voice of the industry in Washington, D.C.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk. Counsel of record for all parties received written notice in January of intent to file this brief.

Ohio Association of Security and Investigation Services (OASIS) is the sole statewide professional trade organization dedicated to advancing and protecting the interests of the contract private security industry and licensed private investigators in Ohio. It was established in 1947 as the Ohio Association of Private Detective Agencies, a not-for-profit educational organization dedicated to advancing professionalism in an industry employing more than 20,000 Ohioans.

Michigan Council of Private Investigators is the largest state professional organization dedicated to advancing and protecting the interests of licensed private investigators in the state of Michigan and sets ethical standards for those in the industry.

Indiana Association of Professional Investigators is a state professional organization dedicated to advancing and protecting the interests of licensed private investigators in the state of Indiana. It sets ethical standards and includes government, law enforcement, fire service and special investigators as members.

Kentucky Professional Investigators Association is a statewide professional association dedicated to advancing and protecting the interests of licensed private investigators in the commonwealth of Kentucky.

Private security officers and licensed private investigators are often called upon to provide protection when police services are unavailable or unsatisfactory. Private security personnel have a substantial interest in ensuring that the Second Amendment is interpreted to specifically allow private investigators and licensed, armed security officers, such as Respondent Dick Anthony Heller, broad firearm rights in their capacity as private citizens and private employees. Private security personnel are often plaintiffs in gun rights cases, or defendants in criminal prosecutions, as they clash with the patchwork of local gun control laws that invariably result in the government gaining a *de facto* monopoly over providing armed security and investigation services to often defenseless and helpless citizens.

SUMMARY OF ARGUMENT

I. The District of Columbia Metropolitan Police Department[2] has failed to provide adequate police services to the District of Columbia's[3] citizens. The District is consistently a national leader in various crime categories while simultaneously demonstrating inability to adapt or change under the crippling bureaucracy endemic to the District. Compounding this deadly combination of high crime and inflexibility are constant examples of corruption, incompetence and outright misfeasance in the operation of the department.[4] To compound the problem, the MPD is statutorily responsible for regulating their private sector competition, the private security industry, a duty executed poorly enough so as to embarrass an industry focused on constantly improving its professionalism.

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[2] District of Columbia Metropolitan Police Department [hereinafter *MPD*].

[3] District of Columbia [hereinafter *the District*].

Unfortunately, this is not a mere phase or temporary problem for the District. Since the 30-plus year old implementation of what amounts to a complete ban on owning, carrying or using firearms for self-defense,[5] the MPD has cycled through new chiefs and precinct commanders with depressing frequency. The only constant within the department has been the incompetence, corruption, cronyism and failure to perform the most basic duty of a police department—to protect and serve.

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[4] *Amici* wish to state that this criticism is not intended to reflect on the majority of the rank-and-file police officers serving honorably in the District of Columbia Metropolitan Police Department. In point of fact, there are thousands of current, former and/or honorably retired peace officers serving in *amici's* constituent organizations, including dozens of D.C. MPD veterans.

[5] D.C. CODE §§7-2502.02 (2007) [hereinafter *D.C. Gun Ban*].

The jaded citizens of the District have essentially given up on the police and the administration, resigning themselves to living as victims—or as outlaws, for those who choose to defend themselves despite the D.C. Gun Ban. The unavoidable result of the D.C. Gun Ban is that it is the victims, not the criminals, who are disarmed and rendered helpless. Not only are the police failing to protect district residents but the District government is burdening proven private sector solutions.

II. Compounding the impact of the failures of the MPD are the numerous court cases which have exonerated and granted immunity to the police for their collective failure to adequately protect the public they disarmed. Rather than holding the police responsible for their failures, the courts have empowered the police department's incompetence, nonfeasance and misfeasance.

No matter the degree, police incompetence typically is not actionable; thus, there is no legal incentive to rectify the incompetence. The MPD has been sued several times over this incompetence. The fact patterns in these cases leave people of ordinary sensibilities outraged; outrage magnified by the failure of the courts to impose any liability for the misfeasance.

These court decisions serve to empower the incompetence rather than remediate the department's shortcomings. The essence of the court decisions is that the police must assume a special relationship or duty to a citizen, or a police officer must cross over the line into overt misconduct towards a citizen, prior to liability existing. Under this legal environment, the MPD's incentive is to remain negligent and incompetent, thus evading liability for even gross negligence, rather than venture forth with a sense of mission and responsibility for their failures with the attendant liability for failing to protect the citizenry.

III. As examined in Argument I, the MPD has failed to protect the citizens of the District. At the same time, as examined in Argument II, courts have exonerated and immunized the MPD for its incompetence and misfeasance. Within the context of a police department failing in the most basic duty owed to the citizens, to protect and serve, and courts declining to hold police departments accountable for even the most egregious of these failures, the Second Amendment must be interpreted as an individual right to keep and bear firearms for defense of self and others. To hold otherwise would be to hold that well-meaning but misguided governments and courts across America may render citizens defenseless victims without citizens having any meaningful recourse or alternatives.

Even in a jurisdiction that is effective at providing police services, the police will never be able to provide completely thorough protection from criminal attack; they cannot be everywhere at once. Courts have consistently recognized and endorsed this premise in the cases immunizing the police for failing to protect the public. The only way to avoid this framework from having the singularly unconscionable result of the government creating a powerless victim class is for this court to interpret the Second Amendment as guaranteeing the fundamental, individual right to keep and bear firearms.

For those citizens who choose to be self-reliant and self-sufficient, this holding would empower citizens to defend themselves where the police cannot. For those citizens who choose not to be victimized by the failures of the police but who are still not comfortable with arming themselves, this holding would empower competent private armed protection personnel to function as an alternative to the government provided police force.

ARGUMENT

I. THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT HAS FAILED TO ADEQUATELY PROTECT THE CITIZENS OF WASHINGTON, D.C.

"To Protect and Serve." That is the mission statement often found on the sides of police cruisers across the country. It embodies everything a citizen would expect from their police department. Nothing more. Nothing less. Pity that for the citizens of Washington, D.C. the MPD has failed, repeatedly, in this, their most basic mission.

A. Washington, D.C. has a significant crime problem.

Washington, D.C. is widely believed to have the highest per capita concentration of sworn law enforcement officers in America.[6] By the time the various "general jurisdiction" federal police departments headquartered in the District[7] are added to the federal entities located in the District that have sworn officers native to their organic structure,[8] it would be a heroic effort to completely detail the variety of badges walking around the city. Despite this extremely dense concentration of sworn law enforcement, the District's criminals seemingly have the run of the city.

The difficulty in examining the District's crime situation is not in documenting the problem but rather in deciding where to start. As other *Amici* are expected to exhaustively cover the various crime statistics relating to the District this brief will only examine a few highlights. No summary of the District's crime problem would be complete without the story of Benedict Fitzgerald Jr., who had his pocket picked *at the police station while waiting in line to register his handguns* under the, then new, D.C. Gun Ban.[9]

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[6] "Counting federal agents, DC has more police and security officers per capita than any other city in the republic." Daniel St. Albin Greene, *The Case for Owning a Gun*, Washingtonian, Mar. 1985, at 154, available at http://www.buckeyefirearms.org/privatefiles/heller/_0204133631_001.pdf (visited 2/4/08.) Even excluding the federal agents, D.C. has the most police officers per capita of any force in the nation. Sari Horwitz, Michael Powell & Cheryl W. Thompson, *Problems in D.C. Police Dept. Festered for Decades*, Wash. Post, Oct. 12, 1997, at A01.

[7] For instance, the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives.

[8] For instance, the United States Park Police and the U.S. Capitol Police.

According to the 2004 Uniform Crime Report,[10] on a per capita basis the District ranked first in Murder, Violent Crime, Robbery, Aggravated Assault and Motor Vehicle Theft. D.C. ranked second in Property Crime, 16th in Forcible Rape, 21st in Burglary and 22nd in Larceny-theft. The numbers are not much better for 2005: first in Murder, Violent Crime, Robbery, Aggravated Assault, and Motor Vehicle Theft, fourth in Property Crime, 14th in Larceny-theft, 26th in Burglary and 30th in Forcible Rape. The year 2007 brought a 7 percent increase in homicides.[11]

Compounding the high per capita rate is the low rate at which the MPD solves crimes. In 1998, 50 federal agents and city detectives formed a taskforce to investigate 107 unsolved murders dating to 1991. While "cold cases" are difficult to close, this taskforce solved only seven cases, with apparently no arrests, at a total cost of about $180,000—or about $25,700 per solved case.[12] For the first half of 1997 the Washington Post revealed that 49 of the detectives in the MPD Homicide Unit failed to close even one of the three-or-fewer files in their caseload during that period.[13] The article further noted the unit's overall rate of closure was 34 percent compared to a national average of 65 percent.

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[9] Jaqueline Bolder, *Gun Registry Goes Slowly in District*, Wash. Star, Nov. 16, 1976, at B01, available at http://www.buckeyefirearms.org/privatefiles/heller/_0204133631_001.pdf (visited 2/4/08.)

[10] See *U.S. States Crime 2004-2005 Crimes per 100,000 and Ranking (Includes District of Columbia and Puerto Rico,)* available at http://www.disastercenter.com/crime/US_States_Rate_Ranking.html (visited 01/18/2008.)

[11] Allison Klein, *Killings Up In D.C. After Long Dip*, Wash. Post, Jan. 1, 2008, at A01.

Performance in closing burglary cases was similarly abysmal. In 1996, FBI statistics showed the MPD closed about 5% of burglary cases. This rate was approximately one-fifth of the closure rate for neighboring Fairfax and Montgomery counties.[14]

There is perhaps no more concise an example of the gun crime problem in the District and the failure of the MPD to combat violent crime than that of the "ShotSpotter." Despite the *de facto* total ban on citizens legally using firearms, the District's gun crime problem is so out of control that the District has resorted to a network of permanent gunshot sensors to aid police.[15] This network was spurred, at least in part, by jaded District residents being so accustomed to gunfire that they are no longer calling the police to report it. Twenty-year-old Martin Castro reported he heard the gun shots that ended a neighbor's life, the third night in a row he heard gunfire, but that he no longer calls 911.[16] Merchants report that it is not worth calling the police, with 40 percent not bothering to file complaints with the MPD anymore.[17]

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[12] Jim Keary, *Homicide task force flops; only 7 of 107 cases listed as closed*, Wash. Times, Feb. 2, 1998, at C3.

[13] Avis Thomas-Lester & Bill Miller, *49 in D.C. Homicide Unit Failed to Solve any '97 cases, Official says*, Wash. Post, Sept. 19, 1997, at A01.

[14] Cheryl W. Thompson, *D.C. Police Solve Few Burglaries; Closure Rate Half of National Average*, Wash. Post, Nov. 8, 1998, at A01.

B. The MPD has a significant problem hiring and retaining qualified police officers.

The recent history of the MPD's hiring and recruiting is a study in governmental inflexibility. The department has lurched from hiring freeze to hiring binge with depressing frequency, and the result of both the feast and the famine has been that highly qualified officers are not recruited or are not retained.

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[15] The Federal Bureau of Investigation actually paid for the system as part of a pilot program. Allison Klein, *Gunshot Sensors Are Giving D.C. Police Jump on Suspects*, Wash. Post, Oct. 22, 2006, at A01.

[16] Serge F. Kovaleski, *Homicides in D.C. Top 1992 Mark*, Wash. Post, Dec. 18, 1993, at A01.

[17] Phillip P. Pan, Criminal, *D.C. Police Frustrate Merchants*, Wash. Post, Aug. 29, 1999, at C01.

In 1980, shortly after the D.C. Gun Ban took effect, the Washington Post noted that budget woes had shrunk the MPD's force from 5,100 officers in the early 1970s to 3,654 in 1980.[18] Noting the accompanying rise in crime, particularly murder, the House D.C. Appropriations subcommittee directed the District to increase police officer hiring to reach 3,880 officers. The MPD reached 3,695 sworn officers in that time, and MPD Union Representative Gary Hankin lamented that the additional 180 officers could not be hired without "abandoning" all hiring standards.[19] One Congressman on the House subcommittee responded that the District was only in this position because they had been "dillydallying" in hiring new officers.[20]

Partially in response to the need to hire new officers and partially in response to challenges to the racial composition of the force, Mayor Marion Barry abandoned any pretense of "quality over quantity" and ordered sweeping changes to the academy entrance process: the passing score on the police entrance exam was lowered to 35 out of 80; rather than filling the academy class roster according to who scored highest on the entrance exam, the roster would now be filled by lottery, without regard to exam scores.[21] In describing Mayor Barry's and Human Rights Director Anita Shelton's hiring of police officers, the Washington Post editorialized, "They are confused and making bad decisions."[22]

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[18] Alfred E. Lewis, *Police, on Overtime, to Man Extra Units to Battle Crime*, Wash. Post, Nov. 20, 1980, at A7.

[19] Alfred E. Lewis & Judith Valente, *Police Union Official Hits Hiring Plan*, Wash. Post, Aug. 25, 1981, at C01.

[20] Lewis, *Police Union Official*, *id.*

These bad decisions were compounded over the next decade. Noting that police recruits scored poorly in reading comprehension, the police academy instituted a remedial reading class to rehabilitate the recruits. Mayor Barry ordered the class terminated, fearing it reflected badly upon the District's school system.[23] English language classes for non-native English speaking recruits were terminated.[24] The MPD leadership opposed national accreditation standards for their department.[25] Classes on Constitutional and legal principals were taught not by a lawyer but by a police officer who had not been in a courtroom in a decade.[26] Hours of instruction were cut, and an academy designed to process 300 recruits per year processed 1,500 in two years.[27] Driving instruction was cut in half or eliminated altogether.[28]

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[21] Eugene Robinson, *Police Hiring Still Clouded*, Wash. Post, Aug. 25, 1981, at C01.

[22] Editorial, *Bad Hiring Decisions*, Wash. Post, Aug. 28, 1981, at A26.

[23] Mary Pat Flaherty & Keith A. Harriston, *Cutting Corners at Police Academy; Training was Reduced, Standards Eased in Rush to Expand D.C. Force*, Wash. Post, Aug. 29, 1994, at B01.

[24] Flaherty, *Cutting Corners*, *id.*

[25] Flaherty, *Cutting Corners*, *id.*

[26] Flaherty, *Cutting Corners*, *id.*

In the mid 1990s, MPD Chief Fred Thomas found himself inheriting a department facing the problems wrought during 1980s. Thomas pledged to revamp failed hiring practices and eliminate the bad apples. "We need to raise the standards for the persons we hire ... If you don't hire good product, there is no way you are going to ... make sure they are not corrupt and do not have criminal tendencies."[29]

Chief Thomas went on to implement a "quiet revolution" to weed out "an inordinate number" of corrupt and inexperienced officers, announcing new restrictions on the hiring and recruiting of officers.[30] This "revolution" and "dawn of a new era" was in response, in part, to the fact that 70 young officers hired during the binge in the 1980s faced criminal charges after being hired.[31]

Thomas' optimism quickly waned, and on July 7, 1995 Thomas resigned. Thomas is credited with the 200 member recruiting class brought on board during his tenure as being the best qualified "in memory."[32] While Thomas had his critics, he was universally acknowledged with increasing recruiting standards and with slowing the rate of violent crime.[33] Despite the high quality of the recruiting class under his tenure, Thomas lamented about the 400 veteran officers who left the force[34] during his tenure. Thus, despite his revolutionary recruiting efforts, reformer Thomas actually oversaw a net decrease in veteran/qualified officers serving the MPD.

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[27] Flaherty, *Cutting Corners, id.*

[28] Flaherty, *Cutting Corners, id.*

[29] Brian Reilly, *Chief Hopes to Improve Police with Higher Hiring Standards*, Wash. Times, Jan. 28, 1993, at A01.

[30] Brian Reilly, *Chief Announces Police Department Overhaul*, Wash. Times, May 28, 1993, at B01.

[31] Reilly, *Chief Announces, id.*

If the citizens of the District believed that the MPD would learn from the mistakes of the 1980s and early 1990s, that trust was misplaced. The department found itself in the same quandary: The mantra was once again quantity over quality. Within three years the newspapers were again reporting that the MPD was hiring unqualified officers and accepting falsified employment applications.[35] Department policy did not disqualify applicants convicted of violent crimes, including murder, as juveniles.[36] Within a year of Thomas' departure the MPD instituted a contingent hiring process, hiring recruits before background checks were completed. In one instance this resulted in 22 of 113 officers hired later being fired once the background checks were completed.[37] This rush to hire quantity over quality occurred despite the department only having half the instructors necessary to properly train the already unqualified recruits.[38]

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[32] Ruben Castaneda & Bill Miller, *D.C. Police Chief Leaving Behind Accomplishments, Resentments*, Wash. Post, Jun. 26, 1995, at B01.

[33] Ruben Castaneda, *D.C. Police Chief to Resign in July*, Wash. Post, Jun. 13, 1995, at A01.

[34] Castaneda, *D.C. Police Chief to Resign, id.*

[35] Cheryl W. Thompson, *Probe Reveals 65 Cases of D.C. Police Misdeeds*, Wash. Post, Oct. 7, 1997, at A01.

[36] Thompson, *Probe Reveals, id.*

As Law Enforcement Alliance of America Board of Directors member and Second Vice-President Carl Rowan Jr. summarized:

> During the Barry years, the (MPD) became home to an array of thugs, slackers and scam artists. Now it has, by my unofficial counts, about 900 first-rate officers. About 1,400 other officers perform at a satisfactory to poor level but could and would do a better job if they were properly trained and supervised. That leaves about 1,200 below-par officers and officials who are sucking the life out of the department. They range from young street officers to veteran assistant chiefs, and they come in all colors and both sexes. These bad officers cause good officers to leave the force, and they are the main contributors to citizens feeling unsafe on the streets of Washington. Some of these bad officers—through their apathy, misconduct and

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[37] Thompson, *Probe Reveals, id.*

[38] Thompson, *Probe Reveals, id.*

malfeasance—actively endanger the public safety and the safety of their fellow officers.[39]

C. The MPD has a significant history of mismanagement.

Although the MPD has suffered significantly as a result of fluctuations in the staffing level and the quality of the recruits, ultimate responsibility rests with the political leadership of the MPD. Recruiting and staffing problems, as outlined above, are 100 percent the responsibility of political leadership. Leadership sets the qualifications, the goals and the priorities of the hiring process. For far too long this has focused on patronage and bureaucratic inertia over quality of policing. The following section examines corruption as a separate topic in greater detail, but separate from corruption is the problem of patronage-based hiring. "Once recognized as a national model of fine policing, the force has endured two decades of political interference by Mayor Marion Barry (D) and the D.C. Council, a persistent lack of fiscal controls, bad hiring practices and poor management."[40]

Cronyism, thy name is Marion Barry. Starting at the top, Mayor Barry has almost exclusively handpicked the chiefs of police for the MPD for two decades or more. Chief Larry Soulsby is but one example. Soulsby was widely believed to have been named chief because Mayor Barry could control Soulsby and therefore the MPD. Dwight Cropp, a professor at George Washington University and former aide to Barry, said, "Soulsby was more than willing to carry water for Barry and an essentially corrupt department."[41] This included hiring and firing at the direction of Barry and, later, the D.C. Financial Control Board.[42] Barry also directed Soulsby to withdraw cooperation with federal law enforcement.[43] Soulsby resigned as "embattled chief" two hours prior to the commander of his Special Investigations Section, also his apartment roommate, appearing in court to be arraigned on extortion charges.[44]

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[39] Carl Rowan Jr., Op-Ed., *Time to Police His Own Department*, Wash. Post, Aug. 15, 1999, at B08.

[40] Horwitz, *Problems in D.C.*, *supra* note 6.

Barry himself directly appointed the people serving at the rank above captain and had a heavy hand in rank-and-file hiring and assignment details.[45] Barry wanted Detective Ulysses Walltower on his security detail and Soulsby made the assignment, even though Walltower was being investigated for witness tampering[46] involving an allegation of campaign finance irregularities against Mayor Barry's wife. Walltower eventually resigned from the MPD rather than contest the department's ultimate decision to fire him.

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[41] Michael Powell & Doug Struck, *By Denying and Disavowing Troubles, Soulsby Brought Himself Down*, Wash. Post, Nov. 26, 1997, at A08.

[42] Powell, *By Denying*, *id.*

[43] Carl T. Rowan Jr., *Who's Policing D.C. Cops? Cronyism and Misconduct Endanger our Lives*, Wash. Post, Oct. 8, 1995, at C01.

[44] Sari Horwitz & Cheryl W. Thompson, *Embattled D.C. Police Chief Resigns*, Wash. Post, Nov. 26, 1997, at A01.

[45] Powell, *By Denying*, *supra* note 41.

Structurally, the MPD lacked institutional safeguards. A Civilian Complaint Review Board was established and disbanded after amassing a backlog of 800 cases, some more than five years old.[47] A financial control board was established in 1995 by Congress "to eliminate ... management inefficiencies in the government of the District of Columbia."[48] This board was already being called ineffective by 1997[49] and terminated by operation of law September 30, 2001.[50] Charles C. Maddox became the fourth Inspector General in a 42-month span as he replaced Elijah Barrett Prettyman Jr. who replaced Robert L. Thomas who replaced Angela L. Avant as Temporary Inspector General.[51] It is notable that during this period it was revealed that over half of the MPD's officers were not certified to use their duty firearms.[52]

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[46] Powell, *By Denying*, *id.*

[47] Mary Jane DeFrank, *Why Citizens Need to Police the Police*, Wash. Post, Aug. 2, 1998, at C08.

[48] *D.C. Financial Responsibility and Management Assistance Act of 1995,* Pub. L. No. 104-8, 109 Stat. 97.

[49] Katharine Q. Seelye, *Despair Grows Over Problems of Governing U.S. Capitol*, N. Y. Times, Nov. 27, 1997, at A26.

[50] *D.C. Management Restoration Act of 1999,* Pub. L. No. 106-1, 113 Stat. 3.

[51] Vincent S. Morris, *Won't Pull Punches; Temporary D.C. Inspector General to Tackle Abuse, Corruption Charges,* Wash. Times, Dec. 31, 1997, at A01.

Even when bad cops were identified, institutional hurdles and management mistakes prevented the department from taking corrective actions. Published reports show that a total of 256 officers identified for firing between 1991 and 1994 were reinstated simply because police management took too long to get through the process of firing them.[53] Chief Fred Thomas tried to reassure citizens that these officers were not out on the street in contact with the public; most were reassigned as armed desk clerks. "I put them in places where they have little direct contact with the public."[54] One officer's new job was passing out radios at the beginning of the shift and collecting them at the end of the shift, otherwise he just "kill(ed) time."[55]

While Chief Thomas was paying full salary to sworn officers he dared not place on the street but could not fire due to mismanagement, his warrant squad could not work warrants because they could not afford paper to print out warrant lists.[56] As summarized in the New York Times the MPD was, "... a department awash in scandal over unsolved killings, hapless criminal investigations, lost evidence and excessive overtime and was facing renewed charges of structural flaws in the city's management."[57]

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[52] Cheryl W. Thompson, *Half of Officers Lack Firearm Certification*, Wash. Post, Mar. 28, 1998, at B01.

[53] Mary Pat Flaherty & Keith Harriston, *Delays Defeat Police Efforts to Clean House*, Wash. Post, Aug. 31, 1994, at A01.

[54] Flaherty, *Delays Defeat*, *id.*

[55] Flaherty, *Delays Defeat*, *id.*

[56] Castaneda, *D.C. Police Chief to Resign*, *supra* note 32.

It is tempting to lay the MPD's problems upon the altar of budget shortage; however, much of the budgetary challenge faced by the MPD is self-inflicted. As examined above, the MPD was carrying 256 officers on the payroll simply because the leadership of the MPD was too incompetent to properly fire them. Even prior to this, a Police Executive Research Forum report said the MPD was carrying more officers than it could competently manage. Even if the MPD cut 1,000 officers, D.C. would still have the nation's largest per-capita police force and would have $330 million left over. None of the recommendations of the study was adopted.[58]

Most damning was a report that the MPD failed to spend $11 million worth of grant money and other funds collected with this failure laid squarely at the feet of MPD management.[59] "(It shouldn't) take a control board or an oversight committee to make the police department work as it should. The answer is to put top-flight management in place to get the job done—and fast. The department doesn't have anything like that now."[60]

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[57] Seelye, *Despair Grows*, *supra* note 49.

[58] Horwitz, *Problems in D.C.*, *supra* note 6.

[59] Avis Thomas-Lester, *D.C. Police Fail to use $11 Million in Funds; Officers Still Lack Needed Equipment*, Wash. Post, Mar. 24, 1998, at B01.

D. The District's "911 System is a Joke."[61]

The D.C. Gun Ban has created a community of disarmed citizens/victims with a high dependence upon the police for protection. Unfortunately, this artificially created dependence exists simultaneously with an amazingly incompetent 911 emergency dispatch system. As recently as December 2007, D.C. council members confirmed constituents were reporting that dispatchers were rude and phones are never answered. "People constantly say they call 911 and an officer either doesn't respond or an officer responds late," said Ward 2 Councilman Jack Evans. "Somewhere the system is still not working even after all the money we've put into this."[62]

In 2003 the *Washington Post* editorialized, "Since (1998), violent crime in the District has increased.

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[60] Editorial, *Help Wanted: A Police Manager*, Wash. Post, Mar. 25, 1998, at A20.

[61] Editorial, *Time to Police the Chief*, Wash. Post, Jun. 1, 2003, at B08.

[62] Michael Neibauer & Daniel Catania, *Councilman Claims He Was Badgered During 911 Call*, (Dec. 15, 2007), http://www.examiner.com/a-1106755~Councilman_claims_he_was_badgered_during_911_call.html (visited 2/4/08.)

Murders are up, too, and the 911 system is a joke."[63] One reporter observing the 911 center at this time reported "a pair of dispatchers 6 feet away who—despite the fact that a newspaper reporter is observing the operation center for the day—are looking at a newspaper instead of their computer screens."[64] Unfortunately, the failing 911 system was not unique to 2003.

The *Washington Times* examined the 911 system in 1998 and found that almost 90,000 citizens calling 911 had to wait at least 90 seconds for their call to be answered by a rude operator.[65] Additionally, 32,000 citizens calling 911 hung up in frustration before reaching a dispatcher.[66] The 911 system was understaffed and the department did little to curb absenteeism by dispatchers who accumulated six hours of leave every two weeks.[67] Even when the calls were answered often times the police were slow to respond to the call or never showed up at the crime scene at all.[68] Unfortunately, the incompetent 911 system wasn't even unique to 1998.

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[63] Editorial, *Time to Police*, *supra* note 61.

[64] Robert Davis, *Why Quality of Care Varies: A Telling Tale of Two Cities*, USA Today, Jul. 28, 2003, at 5D.

[65] Jim Keary, *Need Police? Call 911 and Wait; Sick-leave Abuse Retards Responses*, Wash. Times, Jun. 24, 1998, at A01.

[66] Keary, *Need Police?*, *id.*

[67] Keary, *Need Police?*, *id.*

[68] Jennifer Lee & Martin Weil, *Slow Response, Abuse of Leave Cited at D.C. 911*, Wash. Post, Jun. 24, 1998, at B01.

A 1997 story described neighbors calling 911 as a car thief broke into a nearby auto body shop. During the leisurely crime the thief took a car battery out of one car and installed it into the car he wanted to steal. Twenty minutes later the criminal left the shop in the stolen car with police still nowhere to be found. The victim, an auto body shop owner, had previously complained to the police, as he had been robbed seven times in three weeks. He was told by the police to get a vicious guard dog.[69] Yet the 911 problems are even more deep-rooted.

Nadine Winter, a D.C. council member who originally supported D.C.'s Gun Ban, was mugged in 1985. In a scene that has been played out countless times in the district she was going to her car when a mugger beat her and stole her Gucci bag. Neighbors called 911 but got no answer. Winter tried to call 911 from her own car phone but could not get an answer. A neighbor actually rushed down and caught Mayor Barry leaving the district building. The Mayor himself finally managed to contact the MPD, who then responded to the mugging of the councilwoman some twenty minutes after the calls began.[70]

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[69] Michael Powell, *D.C. Police Changes Should Start at the Top*, Wash. Post, Oct. 21, 1997, at B01.

[70] Greene, *The Case*, *supra* note 6.

E. The MPD has a significant history of corruption.

As previously discussed, Mayor Barry controlled the promotion of officers beyond the rank of captain.[71] Additionally, Barry had final say on outside contracts and purchases by the MPD.[72] By 1982, MPD officers who crossed the mayor, including those investigating his alleged drug use, found their careers suffering.[73] Officers headed to captain knew that getting advanced training would not help their careers as much as knowing someone who had the ear of the mayor.[74] "There was virtually no one let go because of a lack of performance. People were not rewarded by what they did. It was who you knew that counted."[75]

What was Mayor Barry doing with this handpicked force? In one instance in 1996, two Washington Post reporters saw Mayor Barry campaigning for Eddie Whittington, anointed successor to Barry as Ward 8 councilmember. The reporters observed Barry use a loudspeaker mounted on a Whittington campaign van to urge two voters to get into an unmarked police car and go vote for Whittington. The reporters previously observed the unmarked car, driven by members of Barry's security detail, shuttle two voters to and from their polling place.[76]

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[71] Cheryl W. Thompson, *Detailing Failings of D.C. Police Department; Report Cites 'Chronic' Problems of Agency Working at 'Minimum Level,'* Wash. Post, Apr. 9, 1997, at B01.

[72] Thompson, *Detailing Failings*, *id.*

[73] Horwitz, *Problems in D.C.*, *supra* note 6.

[74] Horwitz, *Problems in D.C.*, *id.*

[75] Horwitz, *Problems in D.C.*, *id.*

The 1996 primary was not the only time the Mayor used the police to illegally aid his crony Whittington. During the 1995 special election, held to replace now-Mayor Barry in Ward 8, a member of the Mayor's security detail entered the D.C. Board of Elections and Ethics office after hours, *using an electronic key that elections officials had not authorized and had no knowledge of.* When confronted, the officer said he was trying to get absentee ballots for Barry and his wife for the upcoming Ward 8 special election. Whittington won the special election by a single vote.[77]

Beyond this, the MPD was running wild. Police overtime was "uncontrollable" with many officers submitting false overtime claims.[78] Officers viewed overtime pay as an entitlement and managers felt they were "only responsible for seeing that it is distributed equally."[79] Chief Soulsby personally authorized unlimited overtime pay for homicide detectives. The thirst for money became so pervasive that on two different occasions cash was stolen from a safe inside a police station, including cash that was raised to benefit the family of a deceased fellow officer.[80]

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[76] Hamil Harris & Vanessa Williams, *D.C. Mayor's Police Escort Taxis Voters*, Wash. Post, Sept. 11, 1996, at A01.

[77] Harris, *D.C. Mayor's*, *id.*

[78] Horwitz, *Problems in D.C.*, *supra* note 6.

[79] Horwitz, *Problems in D.C.*, *id.*

In the early 1990s, 201 officers were arrested on charges running from shoplifting to rape and murder.[81] One out of every 14 graduates in the academy classes of 1989 and 1990 would subsequently be arrested.[82] The problems became so dire that the District had a list of 185 MPD Officers so tainted by corruption that prosecutors would not put these officers on the stand.[83] One proud new cadet received news of his acceptance to the MPD Academy while in jail in Prince George's County while awaiting trial on drug distribution charges.[84] Problems in the early 1990s became so bad that the FBI set up Operation Broken Faith, which eventually led to the arrest of 12 MPD officers for bribery and drug conspiracy. These 12 officers took a total of $85,000 in cash bribes to protect FBI agents posing as drug dealers shipping in hundreds of kilos of cocaine.[85]

Corruption was certainly not limited to the early 1980s, late 1990s or early 1990s. In the mid and late

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[80] Cheryl W. Thompson & Emily Wax, *Second Theft Reported from D.C. Police Safe*, Wash. Post, Oct. 8, 1999, at B01.

[81] Horwitz, *Problems in D.C.*, *supra* note 6.

[82] Mary Pat Flaherty & Keith A. Harriston, *District Police are Still Paying for Forced Hiring Binge*, Wash. Post, Aug. 28, 1994, at A1.

[83] Flaherty, *District Police*, *id.*

[84] Flaherty, *District Police*, *id.*

[85] Flaherty, *District Police*, *id.*

1980s the FBI actually went to the extreme measure of penetrating the MPD during an undercover investigation of corruption within the department. As one official put it, "It has not escaped anyone's observation that in recent memory the Internal Affairs Division has never successfully investigated any high-ranking official in this department or in the District government."[86] The Internal Affairs Division (IAD) was largely viewed with distrust, as it was not an independent agency, but rather was subject to the political control of the mayor and the chief.[87]

Corruption is not limited to rank and file officers and elected officials. The MPD has a history of promoting supervisory rank officers who have been involved in off-duty incidents. Charles R. Bacon is just one such example.

After firing four shots at a girlfriend, Bacon was charged with assault with intent to murder. The victim declined to testify and charges were dropped, but the MPD internal investigation found against Bacon and recommended demotion. Bacon successfully fought this recommendation and, far from being demoted, he was promoted to inspector and then promoted to deputy chief. Bacon subsequently faced an additional criminal complaint from a new girlfriend, who alleged Bacon tried to ram her car. Bacon faced no charges or action after an IAD investigation cleared him.[88]

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[86] John Ward Anderson & Victoria Churchville, *FBI Investigation Underlines Distrust of D.C. Police Unit*, Wash. Post, Sept. 21, 1987, at A1.

[87] Anderson, *FBI Investigation*, *id.*

Fred W. Raines has faced a string of domestic assault charges in Prince George's County. None have resulted in convictions, and Raines went on to serve as the department's ethics officer and eventually headed the Police and Fire Clinic. Inspector Claude J. Beheler was named commander of the entire Northeast District while a sexual harassment complaint was pending against him. The complaint was upheld and a 20-day suspension without pay was recommended.

Winston Robinson attempted to flee the scene of an off-duty accident, fought with officers and gave a false name. He received a $50 ticket and was subsequently promoted to inspector, court liaison officer and commander of the 7th District.[89]

Perhaps the most outrageous component of the corruption permeating the MPD is the nature of the people who are disciplined by the department and IAD: the whistle blowers. As summarized by police union attorney Robert E. Deso, "I find it ironic that the only action taken so far in this thing is against the people who gave information that initiated the investigation in the first place."[90] Sergeants Christopher Sanders and Harry Hill testified to the council's Judiciary Committee that they were retaliated against for refusing to illegally certify payroll records and reporting the illegal conduct to supervisors.[91]

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[88] Mary Pat Flaherty, *Off-Duty Missteps Haven't Derailed the Career of Some Supervisors*, Wash. Post, Aug. 31, 1995, at A10.

[89] Flaherty, *Off-Duty*, *id.*

At hearings held by the Special Committee on Police Misconduct and Personnel Mismanagement, officers testified to: retaliation against officers who bring information about corruption or misconduct to the attention of supervisors; transfers for reporting sexual harassment; transfers to the midnight shift or a cut in pay for writing traffic tickets to a supervisor; and finally, in an incident involving a highly esteemed homicide investigator, transfer to purgatory at the Academy after several clashes with the chief.[92]

F. The MPD has stifled private security and mismanaged the industry's regulation.

Citizens facing a crime problem and a police department failing to provide the most basic of services can turn to private security as an alternative. Private security services are a counterweight to government power and abuse, often investigating police misconduct and government corruption for attorneys, the media, watchdog groups and private citizens. Security companies fill gaps and ensure that public safety agencies do not monopolize protective services. Unfortunately, the District has granted the MPD *de jure* control over the private security industry, allowing the MPD to license, regulate and control its only private-sector competition, exacerbating the crime problem in the process by taking sworn officers off the street to serve as regulatory bureaucrats rather than peace officers.[93]

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[90] Anderson, *FBI Investigation*, *supra* note 84.

[91] Vernon Loeb, *Barry, Evans call for Independent Police Probe*, Wash. Post, Dec. 10, 1997, at B01.

[92] Jonetta Rose Barras, *Cleaning up the Corruption*, Wash. Times, Mar. 6, 1998, at A21.

Private industry has been ill-served by the MPD, as illustrated in 1993 when District shopkeepers were promised increased protection by the MPD. When it became apparent that the promised increased protection would not materialize, the MPD instead suggested that shopkeepers close their businesses early, thus avoiding the usual high-crime period of the day.[94] Effective, vibrant private security provides shopkeepers a viable alternative to meekly surrendering a portion of the business day to criminals. This alternative is not limited strictly to private businesses, either. Respondent Dick Heller, a licensed special police officer who carries a handgun while on duty at the Federal Judicial Center, is but one example of the private security industry providing the public sector with solutions.

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[93] See MPD Directive 308.07 (Private Security, effective Sept. 28, 1993), Part I, paras. G, H, available at http://www.buckeyefirearms.org/privatefiles/heller/_0204133631_001.pdf (visited 2/4/08.)

[94] Brooke A. Masters, *Close Early to Cut Crime, D.C. Chief Tells Retailers*, Wash. Post, Nov. 19, 1993, at A01.

Under District law, the industry is divided into four license categories: security officers (unarmed guards for low risk assignments), private detectives (unarmed investigators in private employ), "special police" (armed private security guards) and private detective agencies (the only entity that may employ any of the first three individual licensees.)[95] The mayor is granted broad discretion in appointing citizens to serve as special police officers, private detectives and security officers. Private detective agencies may hire only employees licensed by the mayor.[96] Additionally, the mayor is granted absolute discretion in issuing rules governing these private citizens.[97] The mayor has implemented this process through a series of rules and directives to the MPD.[98]

It is not surprising that the MPD performs this function poorly. *Amici's* members, already licensed in multiple states, have reported that it can take nearly a year to obtain licensing as a detective agency in the District. Applicants with felonies were licensed by the MPD without the MPD notifying the employers of the convictions.[99] Applicant licensing files are not maintained properly, with some files lacking background checks, current employment records and drug test results.[100] A 2005 Inspector General report " ... found that the lack of effective internal controls at MPD jeopardizes the review and approval process for security personnel seeking licenses in that there is no assurance that MPD (verified) eligibility for each license it issued to security personnel."[101]

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[95] MPD Directive 308.07, *supra* note 93 at Part I.

[96] D.C. CODE §5-129.02(a) (2007); 17 D.C. CODE MUN. REGS. §2000 (2007); 6A D.C. CODE MUN. REGS. §1100 (2007); 17 D.C. CODE MUN. REGS. §2105 (2007.)

[97] D.C. CODE §5-129.02(c) (2007); D.C. CODE §47-2839 (2007); D.C. CODE §47-2839a (2007.)

[98] See 96 and 97, *id.*

Despite these basic, fundamental failures in licensing regulation, the MPD micromanages the industry by dictating minutiae, including the specific type of weapons to be carried[102] and where those weapons may be stored,[103] the specific property or persons that may be protected,[104] the size, shape, location, color and words appearing upon required sleeve patches,[105] nickel-plated buttons of at least five-eighths inch diameter on the uniform coat with gold buttons specifically prohibited,[106] screening for severe epilepsy,[107] the color of cap worn,[108] regulations allowing the use of initials on the uniform only with the prior written consent of the mayor and specifying that chevrons denoting rank must be red with white piping.[109] The arbitrariness of the District's regulatory scheme prevents a licensed private detective, whose sole function is to solve crime, from carrying a firearm for protection while working.[110]

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[99] *Gov't of the District of Columbia, Office of the Inspector Gen., Audit of Background and Training of Security Personnel at District of Columbia Public Schools* (July 15, 2005), No. 03-2-14GA(c), pages 8-9, available at http://oig.dc.gov/news/view2.asp?url=release%2FDCPS%5FBackground%5Fand%5FTraining%5FFinal%5FReport%5FOIG%5FNo%5F03%2D2%2D14GAc%2Epdf&mode=release&archived=1&month=20056 (visited 2/4/08.)

[100] *Id.* at 10-11.

[101] *Id.* at 11.

[102] MPD Directive 308.07, *supra* note 93 at Part I, paras. D.7 and F.1.

[103] 6A D.C. CODE MUN. REGS. §1100 and 1103 (2007.)

[104] 6A D.C. CODE MUN. REGS. §1101 (2007.)

[105] 6A D.C. CODE MUN. REGS. §1109 (2007.)

There is perhaps no clearer example of the irrationality of the District's licensing authority over private-sector competition than that of special police officer Lt. Fred Williams. Williams, the chief of security for the Martin Luther King Library, in uniform and armed, was required to leave the library to respond to a subpoena to testify in a hearing at the U.S. Attorney's Citizens Complaint Center. After hearing the testimony, the Assistant U.S. Attorney hearing the case ordered Williams arrested for carrying a gun without a license. Williams was carrying his duty sidearm, *which was registered to the D.C. government*. Fifteen months later, a four-day trial resulted in the jury acquitting Williams, but only after thousands of dollars in legal expenses on both sides.[111]

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[106] 6A D.C. CODE MUN. REGS. §1109 (2007.)

[107] 17 D.C. CODE MUN. REGS. §2105 (2007.)

[108] 17 D.C. CODE MUN. REGS. §2112 (2007.)

[109] 17 D.C. CODE MUN. REGS. §2113 (2007.)

[110] MPD Directive 308.07, *supra* note 93 at Part I, paras. C.1., but, compare F.3.

Williams is far from the only private security professional to suffer arrest at the hands of his competitors, the MPD, for infractions that amount to status offenses. In an assortment of cases over the past 48 years, the MPD has charged numerous private detectives, security officers and "special police" with these violations. *Henderson v. United States*, 687 A.2d 918 (D.C. 1996) (Former special police officer charged with weapons possession); *Hood v. United States*, 661 A.2d 1081 (D.C. 1995) (Off duty special police officer convicted of unlicensed weapons possession, conviction reversed when seizure of gun suppressed); *Chapman v. United States*, 493 A.2d 1026 (D.C. 1985) (Special police officer convicted of two counts of unlicensed weapon possession, one count reversed); *Timus v. United States*, 406 A.2d 1269 (D.C. 1979) (Off duty special police officer convicted of unlicensed weapons possession); *Franklin v. United States*, 271 A.2d 784 (D.C. 1970) (Off duty special police officer convicted of unlicensed weapons possession); *Leven v. United States*, 260 A.2d 681 (D.C. 1970) (Licensed private detective convicted of unlicensed weapons possession); *McKenzie v. United States*, 158 A.2d 912 (D.C. Mun. Ct. App. 1960) (Off duty special police officer convicted of unlicensed weapons possession.)

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[111] Greene, *The Case*, *supra* note 6.

Far from being an effective, viable alternative to the MPD, the private security industry has been regulated to the brink of ineffectiveness by the MPD.

II. THE CITIZENS OF WASHINGTON, D.C. HAVE NO LEGAL RECOURSE AGAINST THE METROPOLITAN POLICE DEPARTMENT FOR THESE FAILURES.

The citizens of D.C., faced with an epic crime problem, turn to a police force suffering from incompetence, mismanagement and corruption. Against this backdrop, courts have consistently granted the police civil immunity for even the most egregious of failures. "Over a century ago, the Supreme Court enunciated a rule which remains the law: law enforcement officials and, consequently, state governments generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct (citations omitted.)" *Morgan v. District of Columbia*, 468 A.2d 1306, 1310 (D.C. 1983.)

Absent some special relationship between the police and the citizen, the police owe no duty of protection to the citizen. The *Morgan* case even went so far as to say that the police owe no duty of protection to any individual citizen, even when the citizen calls 911 to request help.[112] This case law merely reaffirms prior case law granting the MPD immunity for their failures.

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[112] *Id.* at 1313. See also *Morgan v. Barry*, 785 F.Supp. 187, 194 (D.D.C. 1992.)

Illustrative of this failure is the case of *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981.) In the late winter of 1975, three women (Warren, Taliaferro and Douglas, plus Douglas' four-year-old daughter) were asleep in a rooming house on Lamont Street, NW in the District. In the early morning hours, two burglars entered the property and raped Douglas. Warren and Taliaferro heard Douglas' screams and called the MPD at 6:23 a.m. to report a burglary in progress. They were assured police were on the way. At 6:26 a.m., three cruisers were dispatched to the rooming house on a "priority 2" call. One officer knocked on the door while other officers remained in their cruisers. Receiving no response at the door, the officers left. Warren and Taliaferro watched in horror from the roof of their building before crawling back into their room, where they continued to hear Douglas' screams. They called the MPD again at 6:42 a.m. and asked for immediate assistance. Again, they were told assistance was on the way. The dispatcher never dispatched additional police, unbeknownst to the two who yelled reassurance to Douglas and were, as a result, discovered by the burglars. All three women were then abducted at knifepoint and held prisoner for 14 additional hours, while being beaten, robbed, raped and directed to perform sex acts on each other.[113]

All three women subsequently brought a tort action against the MPD for its failure to respond and protect them from the assaults. All three had their cases dismissed.[114] The D.C. Gun Ban rendered these women defenseless in their own home; the MPD failed to protect these women, even when called specifically to provide protection; and the court granted the MPD immunity for these same failures.

While it is notable that several immunity cases have arisen as a direct result of the failures of the MPD specifically, it is accurate to state that the law is similar in all 50 states: the police have no duty to protect you, and it is almost impossible to construct a fact pattern that will trigger liability when the police fail to protect citizens. As recently as the year 2005, in the case of *Town of Castle Rock v. Gonzales,* 545 U.S. 748 (2005), this court reaffirmed this reasoning, stating that a protective order is not a "benefit" or "entitlement" to protection.

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[113] *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981.)

[114] *Warren, id.*

III. WHEN THE POLICE FAIL TO PROTECT THE CITIZENS AND THE COURTS IMMUNIZE THE POLICE FOR THESE SAME FAILURES, THE SECOND AMENDMENT MUST BE INTERPRETED AS A PRIVATE RIGHT TO KEEP AND BEAR FIREARMS FOR THE DEFENSE OF SELF AND OTHERS.

Amici's prior arguments can be best summarized as follows:

1. D.C.'s Gun Ban has disarmed all victims within the District, thus removing their best means to resist criminal attack.
2. The District continues to suffer from high crime rates while providing, at best, sub-par police protection.
3. Citizens have no entitlement to protection from the police and courts grant police immunity for failing to protect citizens.

This court has already spoken to this exact circumstance in the case *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989),

> ... when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. (citations omitted) The affirmative duty to

> protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. *DeShaney,* at 200.

Stated plainly, the District has affirmatively exercised power by disarming the citizens in the District. The myriad of problems faced by the MPD combined with court-granted immunity for these same failures means the District fails to provide their citizens with the most basic human need, personal safety. The District and the courts have abdicated all responsibility for the disarmed citizens. This is a singularly unconscionable result and cannot stand up to scrutiny under *DeShaney.*

This court has two alternatives to avoid government-sanctioned victimization. First, the long string of precedents granting police immunity for failing to protect citizens could be reversed. Second, this court could interpret the Second Amendment to the U.S. Constitution as granting a fundamental, individual right to own and bear firearms for defense of self and others. Obviously the second alternative is the most practical and effective.

The police can never be everywhere at once, and simple logic dictates that the one best able to resist criminal attack is the one being attacked. The victim will always be present at the time of the crime; the police will almost never be present, serving instead to respond to the crime after it has happened. The most fundamental rights enshrined in our legal tradition were summarized as the right to life, liberty and the pursuit of happiness. Those same rights are meaningless under a framework where random criminal attack is not only expected but accepted without recourse.

By interpreting the Second Amendment to the U.S. Constitution as a fundamental, individual right to keep and bear firearms, this Court will empower citizens to defend themselves from criminal attack without regard to the political whim of any branch or level of government. Citizens, not politicians worried about editorial boards, will decide what is best for their own personal safety. Citizens will no longer face the excruciating choice between a trip to jail over a firearm owned illegally for self-defense and a trip to the morgue at the hands of an armed criminal.

For those citizens not comfortable with assuming this burden, interpreting the Second Amendment to the U.S. Constitution as a fundamental, individual right to keep and bear firearms will empower and reenergize the private security industry as a viable provider of private police services, providing citizens an alternative when their local police fail. No longer will the private security professional have to worry about vindictive or politically motivated regulation or arrest at the hands of their public-sector competition.

CONCLUSION

The United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA *ET AL.*,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE CATO INSTITUTE AND HISTORY PROFESSOR JOYCE LEE MALCOLM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

[The Right Inherited from England]

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QUESTION PRESENTED

Whether the following provisions — D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST[1]

The Cato Institute is a public-policy research foundation in Washington, D.C. Named after *Cato's Letters* (published in England in the 1720s), it seeks to include in public debate traditional American principles of limited government, individual liberty, free markets, and peace. Cato therefore promotes understanding of the Constitution's common-law context.

Professor Joyce Lee Malcolm long has been the leading authority on the historical English right to arms. Her works include two books published by Harvard: *Guns and Violence: The English Experience* (2002) ("*G&V*"), and *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994) ("*K&B*"). The latter was cited below, Pet. App. 21a n.8, and in *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring); Antonin Scalia, *A Matter of Interpretation* 136-37 (1997); and *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel, *passim* (Aug. 24, 2004) ("*OLC Opinion*"), *available at* www.usdoj.gov/olc/opinions.htm; among other places. She has a Ph.D in comparative history from Brandeis University, is a Fellow of the Royal Historical Society, and is Professor of Legal History at George Mason University School of Law.

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[1] The parties have letters on file with the Clerk consenting to the filing of *amicus* briefs in support of either party upon seven-days' written notice; *amici* complied with this condition. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the brief's preparation or submission. No person other than the *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Over a century ago, this Court declared it "perfectly well settled" that the Bill of Rights was "not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors," including the rights' "well-recognized exceptions." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). Indeed, "[t]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925).

Robertson included among those inherited rights "the right of the people to keep and bear arms (art. 2)." 165 U.S. at 281-82. The court below briefly made "reference to" the Second Amendment's foundation in English law. *See* Pet. App. 20a-21a. But Petitioners make none, citing neither the English Bill of Rights, nor any English case, nor Blackstone (yet citing him for another purpose, Pet. Br. 17), nor any other English authority—nor even the three leading early commentators on the Constitution, all of whom recognized the Amendment's English foundation.

Amici therefore set out below the right to have and use arms in English law by the time of the Founding. *Amici* then show how early American authorities claimed and extended that right, including in interpreting the Second Amendment. The English right was a right of individuals, not conditioned on militia service; individuals might exercise the right collectively, but the unquestioned core was a broadly applicable and robust right to "keep" firearms in one's home for self-defense. Even the "well-recognized exceptions" confirmed this core right, by focusing on the carrying, not the keeping, of weapons.

That core right is what the District of Columbia tramples. It bans keeping a handgun in one's home (including use there in self-defense) and keeping any functional firearm in one's home. Pet. App. 4a, 48a-55a; Resp. Br. 52-54. The Second Amendment, like the English right, may well present difficult questions concerning its outer limits. But this case does not. This Court should affirm.

ARGUMENT

I. THE ENGLISH RIGHT TO HAVE AND USE ARMS BELONGED TO INDIVIDUALS BROADLY, REGARDLESS OF MILITIA SERVICE, AND PARTICULARLY PROTECTED THEIR "KEEPING" OF GUNS FOR SELF-DEFENSE.

The English right to arms emerged in 1689, and in the century thereafter courts, Blackstone, and other authorities recognized it. They recognized a personal, individual right. It could not have been a federalism provision, and none of them conditioned it on militia service—depredations by the king's militia having provided one reason for it. Pre-existing restrictions fell away as the right developed after 1689, such that by the Second Amendment's adoption Americans had inherited a broadly applicable and robust individual right that had been settled for at least fifty years. This right of course had limits, but they did not intrude on the core right to keep firearms to defend home and family: They confirmed it.

A. The English Right was, by Well Before the Founding, a Broadly Applicable Right of Individuals, not Depending on Militia Service.

1. The right to arms was declared in the 1689 Declaration of Rights, part of England's Glorious Revolution. A "Convention" Parliament adopted the Declaration; William and Mary accepted it before Parliament proclaimed them King and Queen; and the ensuing regular Parliament enacted it as the Bill

of Rights. William Blackstone, 1 *Commentaries* *128, *211-16 ("*Blackstone*").[2]

The Declaration presented twelve indictments against King James II (Mary's father), including for having "caus[ed] several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law." Then, in a parallel list of thirteen articles, it stated: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." 1 W. & M., Sess. 2, c.2, § 1 (1689).

This article set out a personal right. *See* Lois G. Schwoerer, *The Declaration of Rights, 1689*, at 283 (1981) (recognizing that many articles "guaranteed rights to the individual," including the right "to bear arms (under certain restrictions)"). Neither the article nor the indictment tied having arms to militia service, which the Declaration nowhere mentioned. Rather, being "armed" and "employed" were distinct. Furthermore, the right belonged to "Subjects," allowed arms "for their Defence"; indeed, Parliament adopted such language in lieu of the House of Commons' drafts referring to "their common Defence," *see G&V* at 58-59.

The article's two concluding clauses—"suitable to their Conditions and as allowed by Law"—were not specially expounded. Blackstone noted them without explanation, 1 *Blackstone* at *143-44, and the judge of a prominent trial in 1820 treated them as just indicating that the right was not unlimited. *King v.*

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[2] For consistency, this brief in citing Blackstone uses the star pagination in Tucker's edition, discussed below in Parts I.A.3 and II.B.1.

Dewhurst, 1 St. Tr. 529, 597-98 (Lancaster Assize 1820).

To the extent the final clause recognized that Parliament might regulate the right's scope, it is unremarkable: In "the English constitutional experience," *Loving v. United States*, 517 U.S. 748, 766 (1996), evident with the Declaration, rights restricted the Crown's prerogative power, not "law." Federalists highlighted this—pointing to the Declaration—in opposing a bill of rights. *See Federalist No. 84*, at 578-79 (Cooke ed., 1961) (Hamilton). Yet Americans borrowed English rights as the foundation for more secure rights in a distinct constitutional structure. As James Madison conceded in proposing the Bill of Rights to Congress, although "it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States." Speech of June 8, 1789, *reprinted in Creating the Bill of Rights* 80 (Veit *et al.* eds., 1991).

But the English experience does mean that, to determine the bearing of an English right on the Constitution, one must determine how English law regulated it and how it had grown by the Founding. This too is unremarkable: The Declaration contains no freedom of the press; it was five years later that "the press became properly free," and merely upon expiration of a licensing act, 4 *Blackstone* at *152 n.a, which Parliament could have revived "by Law." Even that freedom only set the foundation for a broader American right.

2. As explained below, by the 1700s, the English right had shed many pre-1689 restrictions, most based on "Conditions" (wealth). The one general regulation that remained "by Law" only barred

carrying weapons in a threatening manner, and is explained below in Part I.C. Three pre-existing restrictions particularly fell away:

First, a 1671 act had provided that anyone not among the few rich qualified to hunt game was "not allowed to have or keep" any "guns." 22 & 23 Car. II, c.25, § 3. In a 1693 game act, and again in 1706, Parliament omitted "guns" from the list of implements that those not qualified could not "keep or use." 5 Ann., c.14, § 4 (1706); *see* 4 & 5 W. & M., c.23 (1693).

The courts interpreted this omission as protecting a broadly applicable right to keep a gun so long as one did not hunt game with it. In 1704, the Devonshire Quarter Sessions, in ordering searches for hunting implements, cautioned that no Protestant subjects were to be "'disturbed in keeping arms for their own preservation.'" *K&B* at 127. The first decision of a principal court was *King v. Gardiner* in 1738. 93 Eng. Rep. 1056 (K.B.); 95 Eng. Rep. 386 (different reporter). The Court of Common Pleas six years later thought the matter "settled and determined." *Mallock v. Eastly*, 87 Eng. Rep. 1370, 1374 (1744). And in 1752 the King's Bench, citing *Gardiner*, thought it "not to be imagined" that Parliament had intended "to disarm all the people of England." *Wingfield v. Stratford*, 96 Eng. Rep. 787, 787-88. Richard Burn pasted *Gardiner* into his authoritative manual for local officers, first published in 1755. 2 *The Justice of the Peace, and Parish Officer*, tit. "Game," 232-33 (11th ed. 1769) ("*JP*"); *see also* 1 *Blackstone* at *354 (recommending Burn); 4 *id.* at *175 (citing Burn regarding game).

Second, a statute from 1548 had primarily outlawed shot, by which "an infinite sort of fowl" and "much Game" had been killed. 2 & 3 Edw. VI, c.14. The question arose in 1692 whether it remained in force, and the King's Bench concluded that it did. *King v. Alsop*, 87 Eng. Rep. 256. Parliament repealed it three years later, noting its desuetude. 6 & 7 Will. III, c.13, § 3 (1695).

Finally, an even older statute, from Henry VIII, had restricted ownership of cross-bows and short "hand-guns" (generally those under a yard) to the rich, those earning at least 100 pounds a year. 33 Hen. VIII, c.6, §§ 1-2 (1541). It also fined anyone, lacking such wealth, who should "carry, or have in his or their journey, going or riding in the King's highways or elsewhere," any loaded cross-bow or "gun," except in war. *Id.* § 3.

This statute also fell into desuetude in the wake of the Bill of Rights and had been pronounced obsolete before the Founding. The English Reports record no successful prosecution after 1689. *See King v. Bullock*, 87 Eng. Rep. 315 (K.B. 1693); *King v. Litten*, 89 Eng. Rep. 644 (K.B. 1693); *King v. Silcot*, 87 Eng. Rep. 186 (K.B. 1691); *King v. Lewellin*, 89 Eng. Rep. 440 (K.B. 1689). They record no prosecution at all after 1693.

One reason the statute withered was that it had come to be considered a game act. After 1689, even in local courts it is "difficult to find a case in which anyone was fined for possession of a gun of any sort unless it was connected with a poaching incident or with possession of other hunting equipment." *K&B* at 127.

Burn confirmed this understanding, and the statute's obsolescence. In editions before the Founding, he placed it last in a litany of game laws; simply summarized it; and cited no case after *Silcot*.

See 2 *JP* at 240-43. In a note, he acknowledged it was "undoubtedly in force, and consequently may be put in execution," but explained, "nevertheless it seemeth now to be obsolete, the object thereof [primarily encouraging "the use of the long bow"] being a matter not in any use, and the effect of it with respect to the game being superseded as it were by the several subsequent statutes." *Id.* at 243 n.; *see id.* at 245 n. (object "doth not now exist"); *Sander's Case*, 85 Eng. Rep. 311, 311 n.(1) (K.B. 1671) (editor's note, 1799, describing statute as "obsolete, as the object of it is a matter no longer in any use") (footnote omitted). Beginning in 1800, the treatise dismissed the statute in one sentence, as "a matter more of curiosity than of use." 2 *JP* at 439 (J. Burn ed., 19th ed.). Parliament formally repealed it in 1831, in a litany repealing twenty-seven game laws covering 400 years. 1 & 2 Will. IV, c.32, § 1.

3. Thus, in the 1700s, English subjects of all classes possessed a broad individual right to have arms. Blackstone confirmed this in the 1760s. He delineated three "primary . . . rights of the people of England," which echo in our Constitution: "the right of personal security, the right of personal liberty, and the right of private property." 1 *Blackstone* at *129. He identified five "auxiliary subordinate rights of the subject"—"to protect and maintain" these. *Id.* at *140-41. Fourth was the right of petition, and fifth was the right to have arms, both of which, he noted, the Bill of Rights had recognized. *Id.* at *143-44. He reiterated that "the subjects of England are entitled . . . to the right of having and using arms." *Id.* at *144. A posthumous edition by Edward Christian, published in the early 1790s, added that "every one is at liberty to keep or carry a gun, if he does not use it

for the destruction of game." William Blackstone, 2 *Commentaries* *412 n.8 (Lewis ed., 1900) (reprinting Christian's annotation); *see* St. George Tucker, 2 *Blackstone's Commentaries*, advertisement & *145 n.42 (1803) ("*Tucker's Blackstone*") (using and discussing Christian's edition).

Jean-Louis de Lolme likewise explained before the Founding, drawing on Blackstone, that the Declaration had "expressly ensured to individuals the right of publicly preferring complaints against the abuses of government and, moreover, of being provided with arms for their own defence." 2 *The Rise and Progress of the English Constitution* 886 (Stephens ed., 1838) (1784). De Lolme was well known. *See* 1 *Tucker's Blackstone* at 316.

Particularly striking confirmation of the right is the 1780 opinion from London's Recorder, on the legality of a private self-defense association. He was the city's legal adviser and primary criminal-court judge. *See* 3 *Blackstone* at *80-81 n.i & *334; 4 *id.* at *404. His opinion, prompted by the Gordon Riots, was "of wide interest." Leon Radzinowicz, 4 *A History of English Criminal Law* 107 (1968); *see G&V* at 87-88.

Acknowledging the "difficulty" of defining the "limits" of the "rights of the people" to "bear arms, and to instruct themselves in the use of them, *collectively*," the Recorder began with basics:

> The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to

> assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that this right, which every Protestant most unquestionably possesses *individually*, *may*, and in many cases *must*, be exercised *collectively*, is likewise a point I conceive to be most clearly established . . . .

"Legality of the London Military Foot-Association" (1780), *reprinted in* William Blizard, *Desultory Reflections on Police* 59, 59-60 (1785) ("*Recorder*").

Forty years later, the judge in *Dewhurst* asked, "are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law?" 1 St. Tr. at 601. He too answered that "people in the ordinary class of life" had a "clear right to arms." *Id.*

4. In none of the above does the right of English subjects depend on militia service. This is no surprise: The 1662 Militia Act had authorized royally appointed militia officers, on their own warrants, "to search for and seize all arms" of anyone they judged "dangerous to the peace of the kingdom." 13 & 14 Car. II, c.3, § 14.[3] Both James II and his father "made effective use" of it "to try to snuff out political and religious dissent." Schwoerer, *Declaration* at 76; *see K&B* at 36-38, 43-53, 85, 100, 115-16, 123 (examples). It is part of the context for the Declaration's indictment.

Thus, the right enacted in the Bill partly "reflected the idea that the Militia Laws were grievous and tacitly denied the right of the government to confiscate weapons." Schwoerer, *Declaration* at 76. Blackstone later explained that any royal proclamation "for disarming any protestant subjects, will not bind." 1 *Blackstone* at *271. In discussing the right, he did not connect it to militia service, *id.* at *143-44; in discussing the militia, he did not mention the right, *id.* at *412-13.

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[3] Persons having more than 100 pounds per year provided "a case of pistols" for horsemen; others provided muskets of at least a yard for infantry. *Id.* §§ 5 & 21.

B. The Core of the English Right, Settled by at Least the 1730s, was the Right of Ordinary Subjects to "Keep" Firearms for Defense of Their Homes and Families.

As discussed further below in Part I.C, there was room for debate as to the outer limits of the right of English subjects when bearing arms. But one thing was not open to doubt: The core of the right, especially by the Founding, was the right of ordinary individuals to "keep"—possess and own—firearms for defense of their homes and families.

The Declaration suggested this, in securing subjects' right to "have Arms for their Defence." Even a contemporaneous law restricting Roman Catholics allowed such a person, with permission of a justice of the peace, to "have or keep . . . necessary weapons . . . for the defence of his house or person." 1 W. & M., Sess. 1, c.15, § 4 (1689). The restrictive class statute of Henry VIII still emphasized that a subject living in or near a town could keep a gun (of the length permitted for the non-rich) "for the defence of his person or house," and that one outside a town could "keep and have in his said house, for the only defence of the same, hand-guns" of the permitted length. 33 Hen. VIII, c.6, §§ 4 & 7.

The cases recognizing the significance of the new game laws emphasized this core of the right. In *Gardiner*, a defendant charged with "keeping a gun" noted that the 1706 act did not list guns and argued, with regard to its prohibition of "other engines," that "though there are many things for the bare keeping of which a man may be convicted; yet they are only such as can only be used for destruction of the game, whereas a gun is necessary for defence of a house, or for a farmer to shoot crows." The King's Bench agreed: "[A] gun differs from nets and dogs, which can only be kept for an ill purpose." 93 Eng. Rep. at 1056.[4] The Court of Common Pleas considered settled that "a man may keep a gun for the defence of his house and family" and "must use the gun to kill game before he can incur any penalty." *Mallock*, 87 Eng. Rep. at 1374. And the King's Bench reiterated that "a gun may be kept for the defence of a man's house, and for divers other lawful purposes." *Wingfield*, 96 Eng. Rep. at 787.

Even earlier, the Quarter Sessions order noted above had protected subjects' "'keeping [of] arms for their own preservation.'" *K&B* at 172. And by 1717 most justices on the King's Bench accepted that "the keeping a gun" might be done "for the defence of [one's] house," rather than "to destroy the game." *King v. Filer*, 93 Eng. Rep. 657 (K.B. 1722); *see Gardiner*, 95 Eng. Rep. at 387.

William Hawkins in his treatise, first published in 1716, clarified that a law (discussed below) regulating being armed in public still left one free to "assembl[e] his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle." 1 *Treatise on the Pleas of the Crown*, ch. 63, § 8 (Leach ed., 6th ed. 1788) ("*Hawkins*"); *see id.*, ch. 65, § 10 (same); *Payton v. New York*, 445 U.S. 573, 596 n.44 (1980) (explaining rule).

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[4] An apparently separate case the next year was to the same effect. *King v. Gardner*, 87 Eng. Rep. 1240, 1241 (K.B. 1739) (defendant, arguing that "to charge only that he kept a gun is improper, for it includes every man that keeps a gun," and that guns are kept "for the defence of a man's house"); *id.* (Lee, C.J.) (words of statute "do not extend to prohibit a man from keeping a gun for his necessary defence").

Blackstone twice connected the arms right to personal defense. He described it as "a public allowance under due restrictions, of the natural right of resistance and self-preservation," and as "for self-preservation and defence." 1 *Blackstone* at *144. A few pages earlier, he highlighted the law's not punishing homicide "*se defendendo*" or "to preserve" one's limbs, as showing the "high value" of life and limb. *Id.* at *130; *see* 4 *id.* at *180-85 (elaborating). He declared self-defense "the primary law of nature" and explained that a person "forcibly attacked in his person or property" could "repel force by force." 3 *id.* at *3-4; *cf.* 1 *id.* at *251 (distinguishing resistance to government).

The Recorder thought "clear and undeniable" the right of subjects to have arms "for their *own* defence," and listed "immediate self-defence" as the first lawful use of arms. *Recorder* at 59, 63 (emphasis added). And the court in *Dewhurst* began with the proposition that a man "in the ordinary class of life . . . has a clear right to arms to protect himself in his house." 1 St. Tr. at 601.

C. Rather than Interfering with the Freedom of Individuals to Keep Firearms for Self-Defense, English Law in the 1700s Protected the Peace by Directly Punishing Belligerent Uses of Those Arms.

English law in the 1700s thus did not meddle with the ability of ordinary English subjects to keep firearms. The law was not indifferent to keeping the peace: It was becoming harsher, notoriously so in the Black Act, which in 1723 added innumerable felonies—punished with forfeiture and execution. *See G&V* at 64-70; 4 *Blackstone* at *4, *18, *97-98, *245. Yet the law did not restrict individuals in keeping arms (or in simply carrying them), but rather kept the peace by punishing those who broke it, with a firearm or otherwise; and by punishing, through one common-law rule, those who carried weapons in public belligerently. That this liberal regime endured in such a context shows how robust the English right was—particularly the core right to keep.

1. Of course one had no right to use firearms to attack others, commit other crimes, or otherwise breach the peace or violate private property. Blackstone, for example, while criticizing ancient game laws, approved restrictions on trespassing. 4 *Blackstone* at *416; 2 *id.* at *411-12. He catalogued offenses against the peace (and a quasi-nuisance) that often involved weapons. *See OLC Opinion* at 48 n.195; 4 *Blackstone* at *125-26 (striking in palace or courts, or injuring those under court protection); *id.* at *131 (conveying arms to a prisoner), *176-77 (homicide), *243 (robbery with a sword).

Moreover, "the common law hath ever had a special care and regard for the conservation of the peace." 1 *Blackstone* at *349. One way of conserving it, apart from prosecutions, was to demand a surety from persons who posed particular risks. And one circumstance justifying a surety was if someone "shall go about with unusual weapons or attendants, to the terror of the people." *Hawkins*, ch. 60, § 1; *see* 4 *Blackstone* at *254-55 (same).

2. Beyond this, English law depended on one general regulation of the right: a common-law rule against going about armed so as to terrify the people. Related was the medieval Statute of Northampton. It provided that "no man, great nor small," except royal officials and subjects responding to "a cry made for arms to keep the peace," could

> be so hardy [1] to come before the king's justices, or other of the king's ministers doing their office, with force and arms, [2] nor bring no force in affray of peace, [3] nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere,

on pain to "forfeit their armour" and be imprisoned "at the king's pleasure." 2 Edw. III, c.3 (1328), *quoted in Hawkins*, ch. 63, § 4 (numbers added).

By the 1600s, the courts had reduced this to the common-law offense. *See Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (Croke, J.); *K&B* at 81 (local-court example). According to Professor Malcolm, the statute "does not appear to have been enforced" then—except that men "were occasionally indicted for carrying arms to terrorize their neighbors." *K&B* at 184 n.36 & 104, respectively; *see id.* at 191-92 n.32 (similar).

This interpretation was confirmed in the agitation of the Glorious Revolution. An information charged that Sir John Knight, a torment to James II, "did walk about the streets armed with guns, and that he went into" a church, "in the time of divine service, with a gun, to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686); *see K&B* at 104-05. He had been carrying pistols. *King v. Knight*, 90 Eng. Rep. 330 (different reporter). The Chief Justice explained that the statute's "meaning" was "to punish people who go armed to terrify the king's subjects," which had been "a great offense at the common law." 87 Eng. Rep. at 76. The statute was "almost gone in desuetudinem," but "where the crime shall appear to be malo animo, it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security)." 90 Eng. Rep. at 330. Knight was acquitted and bound to good behavior. 87 Eng. Rep. at 76.

Hawkins thereafter discussed Northampton in a chapter on affray—fighting in public to the terror of the people. He thought it "certain," based on Northampton, "That in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people." *Hawkins*, ch. 63, § 4. Blackstone tracked this formulation. 4 *Blackstone* at *149.

It followed that "no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people," by causing "suspicion of an intention to commit an[ ] act of violence or disturbance of the peace." *Hawkins*, ch. 63, § 9. *Dewhurst* thus concluded that "[a] man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purpose of business." 1 St. Tr. at 601-02. Hawkins added that Northampton also did not bar arming oneself "to suppress dangerous rioters, rebels, or enemies." *Hawkins* ch. 63, § 10. The Recorder shared this view. *See Recorder* at 62.

Hawkins did not elaborate on "dangerous and unusual" weapons. Given general usage, a firearm likely was "dangerous." *See, e.g., King v. Oneby*, 92 Eng. Rep. 465, 467 (K.B. 1727) ("dangerous weapon" includes "a pistol, hammer, large stone &c. which in probability might kill B. or do him some great bodily harm"). Unusualness might contribute to causing a terror: "[P]ersons of quality" were "in no danger of offending against this statute by wearing common weapons." *Hawkins*, ch. 63, § 9.

Northampton, in its third subsection, did make it illegal to "go [ ]or ride armed" before officials or in "fairs," "markets," or any other "part," suggesting a concern with particular places. But this was subject to the judicial gloss just described. Before *Knight*, "the strict prohibition" in this subsection "had never been enforced." *K&B* at 104. *Knight* involved going armed to a "part"—a church—yet the court did not suggest this was illegal per se, apart from whether Knight was carrying pistols "malo animo," "to terrify the king's subjects." 90 Eng. Rep. at 330; 87 Eng. Rep. at 76, respectively. The location could be relevant, however, given that Hawkins approved going armed with attendants "in such places, and upon such occasions" as was common. *Hawkins*, ch. 63, § 9. And if an affray did occur, the law could punish it more based on "the place wherein it is committed," particularly courts or churches. *Id.* § 23. Blackstone, following Hawkins, mentioned aggravated punishment where "the particular place ought to restrain and regulate men's behavior more than in common ones." 4 *Blackstone* at *145-46.

3. The difficulties arose not from law-abiding individuals going about their business—much less keeping arms—but rather from armed groups. English law dreaded mobs, riots, and rebellions. It long had specially punished crimes by three or more persons. *See* 4 *id.* at *146-47. Charles II restricted "tumultuous petitioning." *Id.* at *147. And in the 1710s, Parliament added the Riot Act, which made it a felony for twelve or more persons to disobey orders to disperse. *See id.* at *142-43, *147.

An *armed* mob would be worse, and so an armed group posed a particular risk of causing terror. The commission of justices of the peace, from 1590, charged them based on Northampton to inquire into persons who went or rode "in companies, with armed force against the peace." *Butt v. Conant*, 129 Eng. Rep. 834, 849 (C.P. 1820).

After 1689, the law wrestled with reconciling this concern and the arms right. Hawkins concluded that "persons of quality" not only could wear common weapons but also could "hav[e] their usual number of attendants with them, for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them." *Hawkins*, ch. 63, § 9. Yet "persons riding together on the road with unusual weapons, or otherwise assembling together in such a manner as is apt to raise a terror in the people," were guilty of unlawful assembly. *Id.*, ch. 65, § 4.

The London Recorder, although finding the basic individual right "clear and undeniable," wondered "[w]here, then, shall we draw the line?" on the right of private, collective bearing. *Recorder* at 59 & 61. His "best consideration" was that a private group needed to (1) have a "lawful" "purpose and object"; (2) "demean themselves in a peaceable and orderly manner" consistent with it; (3) not assemble in numbers that "manifestly and greatly exceed" that purpose; and (4) not "act without the authority of the civil magistrate" unless suppressing "sudden, violent, and felonious, breaches of the peace." *Id.* at 62 (emphases omitted).

The court in *Dewhurst* similarly had "no difficulty in saying you have no right to carry arms to a public meeting if the number of arms which are so carried are calculated to produce terror and alarm." 1 St. Tr. at 602; *see id.* (similar). The court relied on Hawkins. *Id.* at 596-97.

Unsurprisingly, when Parliament thirty years after the Founding enacted its first restrictions on the English right since before the Declaration, it was spurred by riots and the resulting "Peterloo Massacre," which in turn led to the unlawful assembly at issue in *Dewhurst. See generally King v. Hunt*, 106 Eng. Rep. 768 (K.B. 1820); *G&V* at 95-98. And Parliament restricted what the Recorder had cautiously allowed, barring unauthorized "Meetings and Assemblies" to learn "the Use of Arms" or military movement, and denouncing those who had caused "great Terror and Alarm [to] His Majesty's peaceable and loyal Subjects." 60 Geo. III, c.1, § 1 (1819).[5] Yet this difficult area was far afield from keeping arms for self-defense or simply carrying them—each of which *Dewhurst* reaffirmed as "a clear right," four months later. 1 St. Tr. at 601.

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[5] Another act authorized officers, in certain counties "disturbed" by riots, to search for and seize weapons kept "for any purpose dangerous to the Public Peace" (with a warrant upon the oath of one credible witness) and (with a warrant) to arrest persons "found carrying Arms" and justly suspected of

II. THE SECOND AMENDMENT SECURES AT LEAST THE INDIVIDUAL RIGHT INHERITED FROM ENGLAND, AS EARLY AMERICAN AUTHORITIES DEMONSTRATE.

The English right was invoked in America before and soon after the Second Amendment's adoption—including in authority interpreting that Amendment. Americans not only inherited England's individual right but also expanded it, dropping England's religious and class restrictions and coming to see it as the foundation for a citizen militia. Like the English, they confirmed the core right of keeping for self-defense by focusing regulation not on keeping but rather on belligerent bearing.

A. Authorities Before the Second Amendment's Adoption Recognized the Right Inherited from England and, due to the Revolution, that it Facilitated not only Self-Defense but also a Militia of the People.

Early Americans well knew their inheritance from England. Alexander Hamilton celebrated the Glorious Revolution, *see Federalist No. 26*, at 165-66, and the Declaration contains the foundation not only

---

(continued...)

such a purpose. 1 Geo. IV, c.2, §§ 1, 3, 8 (1819). It was "hotly contested in Parliament." The government conceded it was "'not congenial with the constitution'" and infringed "'the rights and the duties of the people,'" but justified it on "'necessity.'" It expired after two years. *G&V* at 96-97.

of the Second Amendment but also of the First Amendment's Petition Clause and the Eighth Amendment, among other things.

As part of this inheritance, they claimed the individual right to arms. In Boston in 1768, as tensions rose, a town meeting led by Samuel Adams, John Hancock, and others resolved that this right in the Declaration was "founded in Nature, Reason and sound Policy, and is well adapted for the necessary Defence of the Community"; praised the colony's law requiring "every listed Soldier and other Householder" to be armed; and requested that, to "be prepared in Case of Sudden Danger," any Bostonian lacking arms "observe the said Law." Boston Chronicle at 363 (Sept. 19, 1768), *quoted in* Stephen P. Halbrook, *A Right to Bear Arms* 1-2 (1989) ("*Bear*").

British troops occupied Boston two weeks later. *Id.* at 2. The Maryland Gazette republished the resolution, *id.* at 61, and Boston newspapers defended it:

> [I]t is certainly beyond human art and sophistry, to prove the British subjects, to whom the *privilege* of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip'd with *arms*, &c. are guilty of an *illegal act*, in calling upon one another to be provided with them, as the *law directs*.

Boston Gazette & Country J. at 2 (Jan. 30, 1769), *quoted in Bear* at 6; *see Boston under Military Rule, 1768-1769*, at 61 (Dickerson ed., 1936) ("*Boston*") (reprinting from different paper).

A subsequent anonymous article by Adams recounted the Glorious Revolution and quoted both discussions of the right by the recently-published

Blackstone. Adams attacked critics of the town vote, "calling upon the inhabitants to *provide themselves with arms for their defence*," as insufficiently "attend[ing] to the rights of the constitution." Boston Gazette at 3 (Feb. 27, 1769), *reprinted in* 1 *The Founders' Constitution* 90 (Kurland & Lerner eds., 1987).

A New York newspaper denounced the troops' "licentious and outrageous behavior" and argued:

> It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.

"Boston, March 17," N.Y.J. Supp. at 1 (Apr. 13, 1769), *reprinted in Boston* at 79; *Bear* at 7 (same).

A year later, the right was reaffirmed in the "Boston Massacre" murder trial of British soldiers for firing on a harassing crowd. John Adams, their counsel, argued that they had acted in self-defense. In closing, he quoted Hawkins and conceded: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence." 3 *Legal Papers of John Adams* 247-48 (Wroth & Zodel eds., 1965). Adams also later recognized the propriety of "arms in the hands of citizens, to be used . . . in private self-defence," which he distinguished from militia service. 3 *Defence of the Constitutions of Government of the United States of America* 475 (1787).

Soon after Lexington and Concord, North Carolina's royal governor denounced those urging people "to be prepared with Arms" and train under committees of safety. North Carolina's congressional delegates, however, publicly urged the committees "to form yourselves into a Militia" in the exercise of "the Right of every *English* subject to be prepared with Weapons for his Defense." N.C. Gazette (Newbern) at 2 (July 7, 1775), *quoted in Bear* at 29-30.

Thomas Paine that year in a Pennsylvania magazine even satirized the game laws, for allowing local English judges to disarm commoners on the pretext that they had hunted with guns. *Bear* at 24-25. Pennsylvania's 1776 Declaration of Rights protected hunting, and a newspaper article defended this by arguing that, even though "guns are not engines appropriated to kill game," aristocrats still used the game laws to disarm commoners, through false witnesses. *Id.* at 24. Noah Webster later mocked the minority of Pennsylvania's ratifying convention for proposing that the Constitution protect hunting, because America lacked the feudalism that had prompted English-style game laws. "America," Daily Advertiser (Dec. 31, 1787), *reprinted in* 1 *Debate on the Constitution* 553, 559-60 (Bailyn ed., 1993). He had a point: An early American adaptation of Burn omitted the "Game" chapter. *Burn's Abridgement, or the American Justice* 198 (Ladd ed., 2d ed. 1792).

As the admonition of North Carolina's delegates highlights, Americans came to add to the English arms right, which was tied to individual self-defense, an affection for a citizen militia, and came to view the right as its foundation. The Boston resolution even suggests this, describing the right as "adapted for" community defense. The Revolution incubated such notions. *See OLC Opinion* at 51-55 & 24-31; Resp. Br. 20-29. This notion did not *restrict* or *replace* the

English right, but rather built on it. A similar dynamic apparently had occurred in England. Whigs' "claim that the right not only ensured individual self-defense, but served as a restraint on government," and their corresponding demand for a reformed militia, could not prevail in 1689, and only "gradually came to be accepted in the eighteenth century." *K&B* at 122; *see* Schwoerer, *Declaration* at 75-76 (similar).

B. Authorities Soon After the Second Amendment's Adoption Recognized it as Securing—and Expanding—the Right Inherited from England, with the Additional Purpose of Facilitating a Militia of the People.

The American embrace of the right inherited from England, along with the affection for militias built on it, continued in the earliest authorities after the Second Amendment's adoption. They also recognized, and praised, that the right as transplanted to America lacked England's religious and aristocratic restrictions.

1. Each of the three leading early commentators on the Constitution viewed the Amendment as built on the foundation of the individual English right, and each viewed it as better because broader.

St. George Tucker set out his views in his 1803 edition of Blackstone. In an introductory essay on the Constitution, he quoted the Second Amendment, and, like Blackstone, connected the right to "self defence." He noted the Declaration's "right of bearing arms," but criticized its religious limitation and qualification based on "condition," which had allowed use of game laws to undermine the right. 1 *Tucker's Blackstone, Note D,* at 300. He reiterated this criticism in discussing the Second Amendment right together with the First's right of assembly and petition, explaining that both exceeded their English antecedents. *Id.* at 315-16; *see id.* at 289 & 357 (further mention).

In annotating Blackstone's descriptions of the right, Tucker praised the Second Amendment "right of the people" for omitting "any qualification as to their condition or degree, as is the case in the British government," and again criticized the game acts. 2 *Tucker's Blackstone* at *143-44 nn.40-41; *see id.* at *145 n.42 (explaining England's hunting restrictions). And in a note to one of Blackstone's critiques of the game laws, Tucker lamented that "it seems to be held" that no one but aristocrats has "any right to keep a gun in his house" or "keep a gun for their defence." But "in America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty." 3 *id.* at *414 n.3. (He here omitted Christian's clarifying note, quoted in Part I.A.3.) In none of these passages did Tucker suggest that the Second Amendment *added* a restriction—dependence on militia service.

William Rawle likewise contrasted the Second Amendment right with the English one— "secured to protestant subjects only" and "cautiously described to be that of bearing arms for their defence, 'suitable to their conditions, and as allowed by law.'" He denounced the game laws for allowing forfeiture of a gun used to kill game, and noted Blackstone's critique. *View of the Constitution of the United States of America* 126 (2d ed. 1829) ("*View*"). Rawle concurred in the preamble's praise of the militia, viewed the Amendment's operative text as a "corollary" from this, and emphasized that the operative text's "prohibition is general," barring any "flagitious attempt" by Congress, or a State, "to disarm the people." *Id.* at 125-26; *see id.* at 153 ("In a people permitted and accustomed to bear arms, we have the rudiments of a militia.").

Joseph Story, in explaining the Second Amendment, devoted a paragraph to England's "similar provision" ("confined" to Protestants). He quoted the Declaration, cited Blackstone's descriptions, and followed Tucker's criticism of the effect of the game laws on England's "defensive privilege." 3 *Commentaries on the Constitution of the United States* § 1891 (1833). Story elsewhere noted the Declaration's "right to bear arms." *Id.* § 1858.

These three were not alone. Henry Tucker, a judge and law professor, explained that "in America" the "right of bearing arms" was "not limited and restrained by an arbitrary system of game laws as in England; but is practically enjoyed by every citizen." *Commentaries on the Laws of Virginia* 43 (1831). And Blackstone's "auxiliary" right was "secured with us by" the Second Amendment. *Id.*

The leading commentator after the Civil War, Thomas Cooley, described the Second Amendment as a "modification and enlargement from the English Bill of Rights" and "enabl[ing] the government to have a well-regulated militia." *General Principles of Constitutional Law* 271 (1880). He also explained that state constitutions' "defences to personal liberty" included "the right of the people to keep and bear arms." He recounted the Glorious Revolution, described a "well-regulated militia" as an alternative to a standing army, and observed that one "cannot exist unless the people are trained to bearing arms."

He also cited two cases recognizing a broad individual right. *Treatise on the Constitutional Limitations* 350 (1868).

2. Several of the earliest cases likewise acknowledged the English foundation of the right to keep and bear arms. The leading antebellum one was *State v. Reid* in 1840. The Alabama Supreme Court upheld a ban on carrying guns or knives secretly, under the State constitution's provision that "[e]very citizen has a right to bear arms, in defence of himself and the State." 1 Ala. 612, 614-15 (1840). The court began with its origins in England's "provisions in favor of the liberty of the subject." Quoting the Declaration, the court explained: "The evil which was intended to be remedied . . . was a denial of the right of Protestants to have arms for their defense, not an inhibition to wear them secretly." *Id.* at 615. But "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at 616-17.

Soon after, the Tennessee Supreme Court upheld a conviction for secretly carrying a bowie knife, under the State's right of "free white men . . . to keep and bear arms for their common defence." It too recognized the English roots; although mangling them, perhaps because of "common defence" in the state provision, the court still concluded that Tennessee "citizens have the unqualified right to keep" arms. *Aymette v. State*, 21 Tenn. 154, 156-58 (1840). For analysis of *Aymette* and related Tennessee cases, see *OLC Opinion* at 87, 91-96.

In 1846, the Georgia Supreme Court in *Nunn v. State* (which Cooley cited) reversed a conviction for openly carrying a pistol. 1 Ga. 243 (1846). The court distinguished *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and applied the Second Amendment. It viewed both the Amendment and state protections as securing the pre-existing English right: "[T]he Constitution of the United States, in declaring that the right of the people to keep and bear arms, should not be infringed, only reiterated a truth announced a century before, in the act of 1689." 1 Ga. at 249. This right was "re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*." In the United States, "a reason why this right shall not be infringed" was that its "free enjoyment" would "prepare and qualify a *well-regulated militia*." "The right of the whole people," "and not militia only," furthered this "important end." *Id.* at 250-51.

C. Early American Authorities Likewise Adopted the English Focus on Directly Punishing Belligerent Uses of Arms, rather than Interfering with the Freedom of Individuals to Keep them for Defense of Home and Family.

Not only did American authorities recognize the foundation of the right to keep and bear arms in the English right, but they also confirmed the core of that right by focusing on directly punishing belligerent uses of those arms. As in England, the focus was on applying—and adapting—the common-law rule against terrorizing the people. That is why in 1868 Cooley could "happily" note the paucity of cases on "regulat[ing] this right," making it unnecessary to determine "[h]ow far" a legislature could go. *Constitutional Limitations* at 350. There was no federal regulation of private firearms until 1934. *OLC Opinion* at 3.

1. As in England, the right did not authorize breaching the peace. The Massachusetts Supreme Court in a libel case likened the freedom of the press to the "right to keep fire arms," which did not protect "him who uses them for annoyance or destruction." *Commonwealth v. Blanding*, 20 Mass. 304, 314 (1825). The Michigan Territory's Supreme Court, also in a libel case, explained that the Constitution "grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into a right in him who keeps a gun to destroy his neighbor." *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 1829 WL 3021, at *12.

The three earliest suggestions for the Bill of Rights expressed this truism. Pennsylvania's convention minority proposed protecting the right to bear arms, yet allowing disarming "for crimes committed, or real danger of public injury from individuals." Bernard Schwartz, 2 *The Bill of Rights: A Documentary History* 665 (1971). Samuel Adams and other delegates urged the Massachusetts convention to recommend barring Congress from "prevent[ing] the people of the United States, who are peaceable citizens, from keeping their own arms." *Id.* at 674-75. The New Hampshire convention proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *Id.* at 761.

2. Also as in England, the main further restriction (apart from racial ones, mirroring England's on non-Protestants, *see, e.g.*, *State v. Newsom*, 27 N.C. 250 (1844)) was the Statute of Northampton, as reduced

to the common law. *See K&B* at 140 ("usual restrictions" on using firearms "to terrify" applied). Tucker, like Hawkins, implicitly treated it (as enacted in Virginia) as a species of affray, which requires terror. *See* 5 *Tucker's Blackstone* at *146 n.6, *149 n.14. Rawle observed that a "disturbance of the public peace" would abuse the Second Amendment right, and, citing Hawkins, that a person's "carrying of arms . . . attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them" would justify a surety. *View* at 126.

The fullest antebellum judicial treatment was in *State v. Huntly*, 25 N.C. 418 (1843). Northampton was not in force, but the court, discussing Blackstone, Hawkins, Burn, *Knight*, and Coke, held the offense was at common law. It affirmed a conviction but cautioned that the "carrying of a gun *per se* constitutes no offense. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun." *Id.* at 422-23.

The overriding issue in antebellum cases was the constitutionality of new bans on carrying weapons secretly. Apart from the initial divided decision in *Bliss v. Commonwealth*, 12 Ky. 90 (1822), *overruled by* Ky. Const. art. XIII, § 25 (1850), every court upheld or approved them. In addition to *Reid*, *Aymette*, and *Nunn* (which approved them while finding keeping and openly carrying pistols protected), see, *e.g.*, *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833); *State v. Buzzard*, 4 Ark. 18 (1842); and *State v. Chandler*, 5 La. Ann. 489 (1850).

Courts implicitly extended the common law by analogy, based on an overwhelming consensus that any person carrying secretly must be planning to terrorize someone and, correspondingly, that carrying secretly did not serve self-defense. *Reid* described the law as intended "to put down lawless aggression and violence," barring carrying in "such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others." 1 Ala. at 617. Absent evidence, it was "only when carried openly" that arms could be "efficiently used for defence." *Id.* at 619. *Aymette* referred to the "terror which a wanton and unusual exhibition of arms might produce" and the danger of "desperadoes with concealed arms." It rejected any right to bear arms "merely to terrify the people or for purposes of private assassination," and thought "the manner in which they are worn and circumstances under which they are carried indicate to every man the purpose." 21 Tenn. at 159-60; *see also Chandler*, 5 La. Ann. at 489-90 (law "became absolutely necessary" to prevent surprise "assassinations"; Second Amendment protected open carrying). Thus, this Court, in later declaring "laws prohibiting the carrying of concealed weapons" consistent with the Second Amendment, had cause to think them within a "well-recognized" exception, even though not one specifically "inherited from our English ancestors." *Robertson*, 165 U.S. at 281-82.

3. Laws regarding carrying in particular places seem to have been connected to fear of armed groups and in any event to have had in mind the common law. Several colonial statutes *required* bringing arms to church, while "[t]he usual restriction on the *use* of firearms in crowded areas" applied—a restriction implicit in the common-law rule and no doubt barring firing without cause. *K&B* at 139-40 (emphasis

added); *cf.* Pet. Br. 3, 42. Tucker appended Northampton's first subsection (coming before judicial officers "with force and arms") to the offense of *injuring* persons under judicial protection, and indicated that Virginia laws regarding churches barred disturbances. *See* 5 *Tucker's Blackstone* at *126, *54 & *146; *see also Aymette*, 21 Tenn. at 159 (no right of "ruffians to enter the theatre in the midst of the performance, with drawn [weapons], or to enter the church in the same manner, during service, to the terror of the audience"). The 1776 Delaware Constitution provided that "[t]o prevent any violence or force being used at . . . elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day." *Quoted in OLC Opinion* at 55 n.225; *see also Reid*, 1 Ala. at 616 (stating that no right existed "to bear arms upon all occasions and in all places," but focusing on threatening carrying).

The right of assembly was less restricted. *See* 5 *Tucker's Blackstone* at *146-48. But Rawle recognized regarding the Second Amendment that "[a]n assemblage of persons with arms, for an unlawful purpose, is an indictable offense." *View* at 126. The Minutemen had begun as private associations, *see OLC Opinion* at 51-53—unlawful to the British—but, after the Civil War, Americans faced struggles with such groups similar to England's. Cooley in 1880 thought the Second Amendment required a view akin to the Recorder's, while this Court in 1886 briefly upheld under the Second Amendment a state restriction of private armed associations similar to the 1819 British law discussed above. *Compare General Principles* at 271, *with Presser v. Illinois*, 116 U.S. 252, 264-65. As in

England, however, this area of dispute was far removed from the core right of keeping for self-defense, which neither questioned.

CONCLUSION

The District of Columbia laws violate the core of the right to arms inherited from England and secured by the Second Amendment. The Court should affirm.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA and ADRIAN M. FENTY,
Mayor of the District of Columbia,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE* [1]

The Center for Individual Freedom (hereinafter "*Amicus*") is a non-profit, non-partisan organization dedicated to defending the individual rights protected by the United States Constitution, including the right of the people to keep and bear arms. Since its founding in 1998, *Amicus* has appeared before this Court as *amicus curiae* in several cases involving individual liberties enshrined in the Constitution's Bill of Rights.

Consistent with this mission, *Amicus* files the instant brief in support of Respondent, and to bring to the attention of the Court matter not already addressed, matter that may be of considerable assistance to it. More precisely, *Amicus* submits for consideration its view that United States Supreme Court precedent does not reject an individual right of the people to keep and bear arms under the Second Amendment, subject to reasonable regulation, afforded other individual rights preserved by the Constitution. *Amicus* also submits that the potential real-world consequences that could ensue from acceptance of Petitioners' collective right position would severely endanger the very freedoms that *Amicus* exists to promote.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have received notice of, and consented to, the filing of this brief.

Pursuant to Rule 37.6, *Amicus* affirms that no counsel for any party authored this brief in whole or in part, that no party or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or entity other than *Amicus Curiae*, its supporters, or its counsel made such a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Bill of Rights is almost entirely a declaration of individual rights held by "the people." Petitioners, however, contend that the Second Amendment somehow stands strangely alone among the individual freedoms guaranteed by the Bill of Rights by protecting only a collective right of state governments to arm and maintain formal militias. In support of this proposition, Petitioners insist that Supreme Court precedent refutes an individual right to keep and bear arms.

That assertion is incorrect. Rather, the Supreme Court has never settled the issue of whether the Second Amendment protects an individual right of the people to keep and bear arms, nor has it held that the Second Amendment protects only the collective right of state governments to maintain organized militias.

Petitioners and their *amici* go to great lengths to suggest that recognizing an individual right to keep and bear arms would create disruptive consequences. That conclusion is also incorrect. It is, in fact, a *collective* right ruling that could create even more unexpected and disruptive effects, and result in more dramatic and transformative consequences for the nation, its military organizations, and its laws. Among other effects, such a holding would contradict multiple provisions of the Constitution, undermine numerous federal firearms laws, and compel reexamination of the structure of the nation's military and National Guard as they now exist.

These potential repercussions highlight the implausibility of the proposition that Petitioners ask this Court to accept. Accordingly, this brief examines the rarely-considered but broad consequences of Petitioners' collective right position.

ARGUMENT

Amicus respectfully joins in the arguments set forth in Respondent's brief that the text and history of the Second Amendment establishes an individual right of the people to keep and bear arms. In addition, *Amicus* considers it critical to refute Petitioners' argument that Supreme Court precedent rejects an individual right interpretation of the Second Amendment, and to bring to this Court's attention the radical effects that could flow from a collective right interpretation.

Accordingly, this brief demonstrates in Part I that the Supreme Court has never determined whether the Second Amendment protects either an individual or collective right of the people to keep and bear arms.

In Part II, this brief examines the radical repercussions that Petitioners' collective right proposition could generate. In the divisive contemporary public and legal debate over the meaning of the Second Amendment, many commentators have discussed the logical consequences that could flow from an individual right to keep and bear arms. There is little discussion, however, of the dramatic consequences that would follow a collective states' right to keep and bear arms. Perhaps the startling and chaotic nature of the consequences of a collective right position is precisely why this thesis receives so little discussion. Given the importance of this case, consideration of such potential consequences is imperative.

I. SUPREME COURT PRECEDENT DOES NOT ESTABLISH A COLLECTIVE RIGHT OF STATES TO KEEP AND BEAR ARMS, NOR DOES IT REJECT AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

Petitioners and their *amici* contend that the Supreme Court in *United States v. Miller*, 307 U.S. 174 (1939), somehow established only a collective Second Amendment right of the states, rather than of individuals, to keep and bear arms. Pet. Br. 11. They further suggest that lower courts have uniformly, scrupulously, and justifiably applied such a holding since that time. *Id.* Under their view, the Second Amendment imposes few, if any, restraints upon governmental ability to infringe upon individual citizens' right to keep and bear arms outside a formal military context. *Id.* at 15.

That is an incorrect reading of *Miller*. No unequivocal precedent exists to settle the question currently before the Court. Neither *Miller*, nor any other decision by the Court, stands for Petitioners' proposition that the Second Amendment protects a collective right of the states to keep and bear arms, or rejects an individual rights view. Rather, the Court in *Miller* declared itself unable to determine the defendants' Second Amendment rights because no counsel appeared on behalf of the defendants at oral argument to defend their position.

Since *Miller*, subsequent lower courts and commentators have unfortunately misread, misapplied, and distorted that decision and other Supreme Court precedent regarding the Second Amendment. Initially, lower courts quickly began to recognize that almost *any* type of weapon can be used by militias in modern warfare. *Cases v. United States*, 131 F.2d

916 (1st Cir. 1942). Consequently, they shifted from *Miller's* inquiry regarding whether the weapon could be used by a militia to an inquiry into the defendant's state of mind. *Id.* These courts asked whether the person bearing the weapon in question possessed the requisite cognitive intent to serve in an organized militia. *Id.*

Ultimately, however, courts retreated to Petitioners' instant position that *Miller* recognized only a collective states' right to maintain militias of sufficient power to repel federal armies, and that individual citizens cannot claim a Second Amendment right to keep and bear arms for their own protection. *United States v. Tot*, 131 F.2d 261, 266 (3d. Cir. 1942). In other words, according to this view, the Second Amendment merely empowers states to maintain military organizations free from federal interference. *Id.*

Citing *Miller* for a proposition for which *Miller* does not stand, Petitioners make *Miller* falsely appear to establish a rule that it in fact does not, rendering the Second Amendment peculiar by defining "the people" to mean governmental entities. It is therefore critical that Second Amendment precedent be analyzed in a reasoned and rightful manner, and applied accordingly without any preconceptions.

A. The Supreme Court In *United States v. Miller* Was Unable To Determine Whether The Defendants' Second Amendment Rights Had Been Violated

United States v. Miller is the sole case in which the Court has directly considered the Second Amendment in the past century. *Miller*, 307 U.S. at 174. Although Petitioners cite *Miller* for the proposition that no individual right to keep and bear arms derives from the Second Amendment, the holding is actually equivocal and indefinite.

In *Miller*, criminal defendants Jack Miller and Frank Layton were charged in federal court with "unlawfully, knowingly, willfully, and feloniously" transporting an unregistered shotgun with a barrel fewer than the required 18 inches in length from Oklahoma to Arkansas in violation of Section 11 of the National Firearms Act. *Id.* at 175. Defendants demurred, and the trial court sustained the Demurrer on the basis that the National Firearms Act "offend[ed] the inhibition of the Second Amendment to the Constitution." *Id.* at 176.

Thus, it must initially be noted that the trial court recognized an individual right to keep and bear arms under the Second Amendment, disproving any assertion that early federal courts uniformly recognized only a collective states' right.

Following the trial court's dismissal, the government appealed, ultimately to the Supreme Court. The defendants, however, refused to even appear before the Supreme Court to defend their position or engage in oral argument, as their indictment had been quashed. *Id.* at 177. Because no appearance by counsel was made on behalf of the defendants, their position thus wasn't argued.

As a result, a unanimous Supreme Court held only that the failure of the defendants to appear for argument rendered the Court unable to determine whether the Second Amendment protected the defendants' right to keep and bear the firearm in question:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a

> barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178. Thus, the Court didn't reject an individual right of the people to keep and bear arms under the Second Amendment, nor did it hold that the Second Amendment creates a collective states' right. Rather, the Court observed that the absence of evidence entered into the record rendered it unable to thoroughly apply the Second Amendment's provisions to the allegations in question. *Id.* at 179.

Notably, the Solicitor General in *Miller* argued Petitioners' present proposition in their brief. Specifically, the government in *Miller* claimed that the Second Amendment refers only to state militias' privilege to keep and bear arms. Appellant's Br. at 15, 307 U.S. 704 (No. 696). According to the government's brief at the time, the right "to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state." *Id.*

This precisely reflects Petitioners' collective rights proposition, and it is significant that the Court did not resolve the matter on that basis.

Given the Court's limited holding, it obviously did not accept wholesale the government's collective states' right argument. Had the Court agreed with the government's argument (now repeated by Petitioners), it could have explicitly so stated. Alternatively, the Court could have decided the defendants' fate on the basis of lack of standing to invoke Second Amendment protections, since neither defendant had presented evidence that he was a member of an organized state militia.

Instead, the Court relied upon the government's *secondary* position that a sawed-off shotgun was outside the scope of the term "Arms" in the Second Amendment. Appellant's Br. at 18, 307 U.S. 704 (No. 696). Clearly, the Court focused on the *type* of firearms protected by the Second Amendment, not the question of whether the Second Amendment establishes an individual or collective right. *Miller*, 307 U.S. at 178. Had the Court decided to settle the larger question, it could have observed that neither defendant presented evidence that he was affiliated with an organized militia, instead of observing that neither defendant presented evidence that the weapon was of use to an organized militia. *Miller*, 307 U.S. at 177.

Thus, *Miller* does not stand for the proposition that the Second Amendment is unrelated to an individual right of the people to keep and bear arms. To the contrary, the *Miller* Court acknowledged that "the Militia comprised all males physically capable of acting in concert for the common defense." *Id.* at 179. Had the defendants retained counsel to represent them and present argument before the Supreme Court, or had argued their reading of the Second Amendment, the Court might have ruled quite differently. Unfortunately, the Court was unable to conduct a thorough analysis, and its decision created as many questions as it settled.

Regardless, Petitioners cannot claim that *Miller* settled the Second Amendment's meaning or established a collective right to keep and bear arms.

B. Subsequent Lower Courts Have Misconstrued The Holding In *United States v. Miller*

Early lower court cases applying *Miller* quickly fell into the habit of misinterpreting its actual holding, de-emphasizing its focus on whether the firearm in question was one with which a military unit might equip itself. Instead, they shifted the focus to the state of mind of the person claiming Second Amendment protections. *Cases*, 131 F. 2d at 923.

In *Cases*, the defendant was charged with illegally possessing and transporting a firearm and ammunition. *Id.* In affirming the defendant's conviction, the court recognized the logical limitation of the *Miller* decision of just three years earlier:

> [U]nder the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia. . . At any rate the rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well known fact that in so called "Commando Units" some sort of military use seems to have been found for almost any modern lethal weapon.

Id. at 922. The United States Court of Appeals for the First Circuit then broadly reformulated its directive into an examination of the defendant's state of mind. More precisely, the *Cases* court held that an individual asserting a Second Amendment claim must have intended to serve and maintain a formal militia as his paramount motive. *Id.* at 923. Because the *Cases* defendant had possessed and transported the contraband firearm "purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia that the Second Amendment was designed to foster as necessary to the security of a free state," the conviction was upheld. *Id.* In so doing, the First Circuit revised and expanded the limited *Miller* decision.

Subsequent lower courts continued to misinterpret the Supreme Court's *Miller* holding, most often by applying the state of mind requirement concocted by the *Cases* decision. *See, e.g., United States v. Wiley*, 309 F. Supp. 141, 145 (D. Minn. 1970) (*citing Cases*, 131 F.2d 916 (1st Cir. 1942)). Recognizing the logical limitations of that test, however, lower courts again misapplied *Miller* to hold that the Second Amendment protects only a states' right to maintain organized militias. *Tot*, 131 F.2d 265.

In *Tot,* the defendant had been convicted of illegal possession of a firearm capable of being fitted with a silencer in violation of federal law. *Id.* Despite the fact that nothing in *Miller* refutes an individual right to possess a firearm, the *Tot* Court chose to cite it for precisely that proposition, stating that the Second Amendment "was not adopted with individual rights in mind, but as a protection for the States in maintenance of their militia organizations against possible encroachment by the federal power." *Id.* at 266.

Continuing that flawed line of reasoning, the United States Court of Appeals for the Sixth Circuit held in *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971), that because the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right to possess a firearm." *Id.* at 149. In so doing, the court cited page 178 of the *Miller* opinion. *Id.* Once again, however, the *Miller* decision only observed that because the defendants had failed to appear or present evidence that a sawed-off shotgun was a weapon useful to a militia, the Court was unable to determine whether the Second Amendment protected its possession. *Miller*, 307 U.S. at 178.

More recent lower courts have continued to grasp at the proposition that the Second Amendment exists only to thwart federal interference with state militias, despite the fact that in *Miller*, the Supreme Court sidestepped the government's contention that the Second Amendment protects only a collective right. *Id.*

In *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), the plaintiff appealed rejection of his concealed carry firearm application by California authorities. *Id.* at 100. The United States Court of Appeals for the Ninth Circuit dismissed the plaintiff's appeal on the basis that he lacked standing, stating that "the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen." *Id.* at 101. This misapplication of *Miller's* holding is flawed on several grounds. First, the opinion asserts that *Miller* "upheld a conviction under the National Firearms Act," when in fact

Miller merely vacated the district court's decision quashing the defendants' indictment. *Miller,* 307 U.S. at 178. More fundamentally, as noted above, the *Miller* decision had refused to accept the proposition advanced by the government's brief in that case, which the *Hickman* court nevertheless adopted. *Id.* Thus, the *Miller* court had refused to endorse the very assertion for which the *Hickman* court cited it.

The Supreme Court has thus not settled the question at issue in this case or held that the Second Amendment protects only a collective states' right to keep and bear arms in service of an organized militia. The limited holding of *United States v. Miller* did not answer the question of whether the Second Amendment protects an individual or collective governmental right to keep and bear arms. Unfortunately, subsequent lower courts cited by Petitioners held otherwise. By misconstruing *Miller* and its legacy, however, Petitioners essentially write a provision of the Constitution out of existence.

II. ADOPTING PETITIONERS' COLLECTIVE RIGHT VIEW WOULD TRIGGER RADICAL, UNEXPECTED, AND DISRUPTIVE CONSEQUENCES

Should the Court nevertheless adopt Petitioners' collective right view of the Second Amendment, several Constitutional conflicts could flow therefrom.

Assuming, *arguendo*, Petitioners' contention that the Second Amendment protects only a collective right of states to keep and bear arms, the legal effects on the nation, the Constitution, federal laws, and military organizations are logically inescapable and could be monumental. Indeed, the sweeping Constitutional tension of such consequences emphasizes the implausibility of the proposition that Petitioners ask this Court to accept. After all, had Petitioners' rationale prevailed among those who drafted and ratified the Constitution, these inherent contradictions would have been readily apparent.

A. A Collective Right Ruling Would Create A Cause Of Action For States To Litigate That Right In Federal Court

As noted above, the Bill of Rights is almost entirely a declaration of individual rights. Accordingly, when a provision within the Bill of Rights protects an individual right of "the people," the practical implications are typically straightforward and familiar. Specifically, the individual right renders its subject matter protected from government infringement or abuse absent sufficient justification. In turn, individual citizens possess a legal right of action against government to seek relief to ensure the full enjoyment and exercise of that right. 42 U.S.C. § 1983.

Should this Court rightfully recognize that the Second Amendment protects an individual right of the people to keep and bear arms, the results would thus be rather familiar, allowing an ordinary and customary private action against the federal government to enforce that right.

By the same token, however, a collective right would create a right of action by the state against the federal government to seek relief. For example, states' Eleventh Amendment protection against defending lawsuits in federal courts is regularly enforced by the Supreme Court. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Accordingly, should this Court rule that the Second Amendment protects only a collective right, it could unleash a flood of new claims by which states would enforce their newfound right against the federal government.

Despite the relative dearth of legal discussion on this issue, these are critical consequences that must be addressed.

B. A Collective Right To Keep And Bear Arms Would Contradict Other Constitutional Provisions, Call The National Guard Into Question, And Collide With Existing Federal Firearms Laws

If this Court accepts Petitioners' collective right proposition, then the Second Amendment guarantees state governments the right to maintain military instruments as a counterweight to the federal military. Pet. Br. 12. In other words, according to Petitioners' view, the Second Amendment protects independent state military forces capable of resisting the powerful federal forces.

As noted previously, such a holding would render the Second Amendment and its straightforward use of the phrase "the right of the people" anomalous among the Bill of Rights. It would also create a wave of other unanticipated and radical consequences. Namely, if the Second Amendment creates only a state right, then that contradicts several military power provisions within the Constitution, it likely renders the National Guard as currently administered unconstitutional, and it potentially allows state governments the right to disregard federal firearms laws that presently limit states' ability to formulate a powerful militia.

1. *A Collective Right Decision Would Contradict Other Provisions Of The Constitution*

It is well established that Constitutional provisions are to be read as harmonious wherever possible. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (according definition of "the people" as used by the First, Second, Fourth, Ninth, and Tenth Amendments). A collective right ruling, however, would necessarily place the Second Amendment in conflict with several clauses of the Constitution. This is because many of the powers granted the federal government by Article I contradict Petitioners' position that the Second Amendment merely empowers states to maintain militia forces as a counterweight to the federal military.

For example, Article I, Section 8, Clause 15 empowers Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15. If this Court were to create a collective states' right from the Second Amendment, the federal government might suddenly be prevented from calling militias in a manner that would trump state control. For example, deploying state forces outside of national borders, integrating them with federal forces during deployment, or placing them under long-term federal command would be suspect.[2]

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[2] For instance, federal activation of National Guard troops during Hurricane Katrina in 2005, as well as deployment to Iraq and Afghanistan, provide immediate, real-world examples of potential sources of conflict if Petitioners' collective right proposition is accepted.

As another example, Article I, Section 8, Clause 16 empowers Congress:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. CONST. art. I, § 8, cl. 16. Should this Court adopt a collective right holding, Congress's ability to dictate the organizing, arming, disciplining, and training of state militias under this clause might be dramatically circumscribed because it could obviously undermine states' ability to maintain those same militias. Even the appointment of federal officers, rather than state-appointed officers, to control such state militia forces might violate the Second Amendment under a collective right view.

As a third example, Article I, Section 10, Clause 3 commands that:

> No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10, cl. 3. If Petitioners are correct in their contention that the Second Amendment protects the states' right to keep and bear arms as a bulwark against federal power, then almost *any* federal measure limiting state militia independence in the manner described above could suddenly be subject to dispute and litigation. After all, under the collective right view, the "militia" refers to organized state military organizations, and the preceding clause's limitation upon states' ability to "keep Troops" is immediately suspect. Pet. Br. 12.

Such Constitutional conflicts could be unavoidable under a collective right decision.

2. *A Collective Right Holding Could Immediately Call Federal Firearms Laws Into Question*

If Petitioners are correct in their assertion that the Second Amendment protects only the states' right to maintain militias, then federal firearms laws are also suddenly open to legal challenge.

Assuming the validity of Petitioners' collective right view, the purpose of the Second Amendment is to preserve state militia independence from federal control and suppression. Pet. Br. 21. In turn, this would require that state militias be sufficiently powerful and independent to repel the federal military. *Id.* Because arming and maintaining a state militia of sufficient size and force would be extremely expensive, states could opt to compel citizens to obtain and preserve firearms and other military instruments. Pet. Br. 16-17. By doing so, states would not only save money, but also ensure that citizen militia members would naturally become more familiar with their weapons without as much need for formal, periodic, costly state training. *Id.* In fact, that is precisely what Congress compelled via the Militia Act of 1792, which stated:

> Be it enacted . . . [t]hat each and every free able-bodied white male citizen of the respective

> states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia. . . And . . . [t]hat every citizen so enrolled and notified shall, within six months thereafter, provide himself with a good musket or firelock, sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accounted and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.

Act of May 8, 1792, ch. 33, 1 Stat. 271 (1792). Other nations such as Israel and Switzerland similarly compel such citizen self-arming to this day. Indeed, those nations allow for citizen possession or control of such weapons as missiles, artillery, and anti-aircraft weaponry. *See* SWITZ. CONST. art. 18; David Kopel, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 283, 292, 295 (1991).

Obviously, a collective right view of the Second Amendment as applied to such a system would run head-on into existing federal firearms laws. As just one example, the federal prohibition against automatic weapons could suddenly be in jeopardy. 18 U.S.C. § 922(o) (1988).

Furthermore, states could argue that their refusal to outlaw particular weapons preempted a federal right to limit or prohibit possession of those weapons by implication. Just as the Commerce Clause sometimes prohibits state regulation of interstate commerce by negative implication, states might determine that they also possessed such a power over firearms by negative implication. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (addressing whether burden imposed upon interstate commerce by facially non-discriminatory statute renders it unconstitutional). From that point forward, federal authority to regulate firearms could be limited to laws concerning their movement in interstate commerce.

Thus, inherent in Petitioners' collective right position is the consequent power of states to challenge discordant firearms laws and enact legislation authorizing possession of weaponry currently prohibited by federal law. Furthermore, a collective right holding could allow a dramatically broader variety of arms in the hands of citizens than would a decision recognizing an individual right of the people to keep and bear arms. This is because an individual rights view would extend to individualized weapons only, subject to reasonable restriction. Resp. Br. 45.

In contrast, a collective right view could logically include *all* variety of weapons currently within the federal arsenal, because the states would be empowered to arm themselves sufficiently to thwart those same federal forces. Pet. Br. 21. Given the fact that there is no Constitutional limitation upon the types of weapons that the federal government can possess, a collective states' right position could logically require a similar freedom for the respective state militias. If the logic behind the Second Amendment is to preserve the right of states to maintain militias that constitute a counterweight to federal forces, as Petitioners contend, then states would logically be allowed to keep and bear even the most potent and destructive weapons of modern warfare.

Once again, if Petitioners are correct, then they must be taken at their word, and the enormous potential consequences of that position must be considered.

3. *A Decision Establishing A Collective Right Would Immediately Open The National Guard As Presently Constituted To Legal Challenge*

Third, if the Court accepts Petitioners' position that the Second Amendment exists to preserve state militias, as opposed to an individual right of the people to keep and bear arms, then the National Guard as presently governed could also be subject to court challenge. Given the National Guard's critical role in our nation's international war against terrorism, this is a particularly critical inquiry today.

As discussed above, the 1792 Militia Act originally established the militia to include every able-bodied male citizen between the ages of eighteen and forty-five, whom it required to self-arm and self-equip. Act of May 8, 1792, ch. 33, 1 Stat. 271 (1792). In subsequent decades, however, the militia as originally constituted proved insufficient for America's growing military requirements, and Congress gradually enacted reforms that ultimately forged today's National Guard. In so doing, Congress transformed the National Guard from a disordered assemblage into a nationalized organization. 10 U.S.C. § 332 (1988); *Perpich v. Department of Defense*, 496 U.S. 334, 349 (1990).

As a result of those gradual reforms, the modern National Guard members serve a hybrid designation, simultaneously subject to both their respective state officers and the federal military structure. 10 U.S.C. § 311 (1988). Members therefore undertake an oath to both their state and federal governments, but the federal government possesses the preemptive power and duty to activate, lead, pay, supply, arm, and train them. *Id.* Perhaps most critically for purposes of this case, individual states are prohibited by law from refusing National Guard activation by the federal government. 10 U.S.C. § 332 (1988); *Perpich*, 496 U.S. at 349 (1990).

Given this gradual transformation, and the current structure of the National Guard, it logically cannot serve the role of state militia that underlies Petitioners' collective right interpretation of the Second Amendment. Stated differently, the National Guard cannot stand as a *state* bulwark against abuses by the federal government, because it now exists primarily as a *federal* force subject to national control.

The Court in *Perpich* confirmed this conclusion. The issue before the Court was whether individual state governors were empowered to prohibit their respective National Guard units from deployment abroad by the federal government. *Id.* at 336. The Court determined that control of the National Guard rested with Congress through its powers to declare war and raise armies under Article I, not state officials. *Id.* at 349. Accordingly, the National Guard is primarily a federal entity in character and structure, with only limited control by individual state governors. *Id.* at 351.

Given this fact, the National Guard's status as an organization subject to federal authority might immediately be exposed to challenge if Petitioners' collective right proposition is adopted.

Thus, should Petitioners' contention that the Second Amendment confers only a collective right upon the states prevail, then a dramatic reexamination of other relationships between state and federal governments will be necessary. If this Court rules that the Second Amendment effectuates the proposition that state militias exist to check federal power, then other seemingly settled questions of state-federal relations may be reopened to question.

These inescapable conflicts provide additional reason to conclude that Petitioners' collective right proposition is unfounded. The Second Amendment's language refers to the "right of the people" rather than the "right of the states," just as the Constitution's Preamble identifies "We the People" as the source of authority, not "We the States." An individual rights view of the Second Amendment accords much more consistently with the other provisions of the Constitution, and it avoids the collisions between state and federal governments that would follow a collective right holding.

CONCLUSION

For each of the foregoing reasons, *Amicus* respectfully submits that the decision below should be affirmed, and that the Second Amendment to the United States Constitution confers an individual right of the people to keep and bear arms.

Respectfully Submitted,

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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF
THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

◆

BRIEF OF LAW PROFESSORS ERWIN CHEMERINSKY AND ADAM WINKLER, AS AMICI CURIAE IN SUPPORT OF PETITIONER

◆

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INTEREST OF AMICUS CURIAE

This amicus curiae brief is submitted on behalf of Erwin Chemerinksy and Adam Winkler in support of Petitioner.[1] Amici are professors at law schools located in the United States who have studied and written about the Second Amendment.

Erwin Chemerinsky is the Alston & Bird Professor of Law and Professor of Political Science at Duke University School of Law, and, as of July 1, 2008, will be the Dean of the Donald Bren School of Law at the University of California, Irvine. Adam Winkler is Professor of Law at University of California, Los Angeles School of Law.

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SUMMARY OF THE ARGUMENT

If the Court holds that the Second Amendment guarantees a private, individual right to keep and bear arms unrelated to militia service, the Court also will have to determine what standard of review applies to laws regulating firearms and other deadly weapons. No right is absolute, thus the constitutionality of legislation ordinarily turns on the standard of review used to weigh and assess the governmental interests behind a challenged law.

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[1] Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. Amici curiae further state that no one made a monetary contribution to the preparation or submission of this brief.

State supreme courts in the forty-two states with their own constitutional protections for the individual right to bear arms universally hold that legislatures have substantial leeway to adopt reasonable regulations on arms to further public safety. This Court has also consistently upheld reasonable restrictions on dangerous weapons.

Should this Court hold that the Second Amendment protects an individual right apart from service in the militia, this Court should follow the consistent, longstanding federal and state constitutional practice and hold that the right to keep and bear arms is subject to reasonable regulation. Reasonableness review is appropriate because most weapons regulations are unquestionably legitimate means of enhancing public safety, reducing crime, or protecting children. Where the vast majority of regulation in an area is legitimate, this Court has held that the predicate for heightened scrutiny is absent and the judiciary should presume the constitutionality of legislation. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 444 (1985). Moreover, the text of the Second Amendment, the history of the right to bear arms in federal and state constitutional law, and federalism values all support permitting legislators substantial latitude to adopt reasonable regulations of arms.

The plain language of the Second Amendment recognizes the "necessity" of a militia, or armed citizenry, that is "well regulated." The history of the right to bear arms in American constitutionalism is marked by a long tradition, dating back to the Founders, of legislative authority to enact reasonable restrictions on dangerous weapons. Furthermore, should this Court hold that the Second Amendment applies against the states, adoption of any form of heightened scrutiny will disrupt the federal-state balance, substituting a novel, untested federal standard for the well-established reasonableness test universally preferred by states. Any Second Amendment standard more demanding than reasonableness review is likely to burden the states with a flood of litigation challenging prior state criminal convictions for weapons offenses and severely limit the ability of local authorities to shape public safety laws to fit local circumstances.

Reasonableness review remains the appropriate standard even if the Court concludes that the right to keep and bear arms is a "fundamental" right. Not all fundamental rights trigger heightened scrutiny and many are governed by reasonableness tests or other forms of relatively deferential scrutiny. Moreover, assuming an individual's right to keep and bear arms unrelated to militia service, that right would be essentially a property right to own, possess, and use a particular kind of physical object. Under current constitutional doctrine, reasonable restrictions on the right to own, possess, and use property are constitutionally permissible even though the right of property is fundamental.

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ARGUMENT

I. REASONABLE RESTRICTIONS ON THE RIGHT TO KEEP AND BEAR ARMS ARE CONSTITUTIONALLY PERMISSIBLE.

If the Second Amendment protects an individual right to bear arms for private uses, the constitutionality of weapons safety laws will turn on the standard of review this Court adopts to review challenged legislation. The question of which standard is appropriate for the right to bear arms has been asked and answered in scores of cases decided under state constitutional law and the law in every state with constitutional protections for the private, individual right to bear arms provides that the right is subject to reasonable regulation.[2] Forty-two states have

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[2] *See, e.g.*, *Hoskins v. State*, 449 So. 2d 1269, 1270 (Ala. Crim. App. 1984) ("[T]he constitutional guarantee of the right of a citizen to bear arms is subject to reasonable regulation by the state under its police power, and that the classification created under the statute is warranted and is clearly a reasonable exercise of the State's police power."); *City of Tucson v. Rineer*, 971 P. 2d 207, 213 (Ariz. Ct. App. 1998) ("If it can be shown that an ordinance is directed at a legitimate legislative purpose and that the means by which the city seeks to achieve that purpose are reasonable, then the ordinance is a proper exercise of the city's police power."); *People v. Swint*, 572 N.W.2d 666, 674 (Mich. Ct. App. 1997) ("The right to bear arms . . . is not absolute and is subject to . . . reasonable limitations. . . ."); *James v. State*,

(Continued on following page)

constitutional protections for a private, individual right to bear arms and, with hundreds of state court decisions ruling on the constitutionality of weapons laws, the right-to-bear-arms jurisprudence at the state level is well developed and comprehensive. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 715-26 (2007). Every state, without exception, applies the same standard of review, requiring only that laws be reasonable regulations of the right. *Id.* at 686. Under this standard, the people's elected representatives have substantial leeway to craft weapons safety laws, which the courts consistently uphold so long as the laws do not destroy the right by disarming the people or are irrational or arbitrary. This Court should follow the uniform, long established practice and apply a relatively deferential standard that permits reasonable regulation of the right to keep and bear arms short of complete disarmament.

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731 So. 2d 1135, 1137 (Miss. 1999) ("In limiting the possession of firearms by those persons who have been shown to present a threat to public safety, peace and order, the state is reasonably exercising its power to protect in the interest of the public."); *State v. White*, 253 S.W. 724, 727 (Mo. 1923) (holding that the "right to bear arms may be taken away or limited by reasonable restrictions"); *see also State v. LaChapelle*, 451 N.W.2d 689, 690 (Neb. 1990); *State v. Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004); *State ex rel W.V. Div. of Nat. Res. v. Cline*, 488 S.E.2d 376, 380-81 (W. Va. 1997); *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003); *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986).

A. The Vast Majority of Weapons Safety Regulations Are Unquestionably Legitimate, and Thus the Predicate for Heightened Scrutiny Is Absent.

This Court has held that heightened scrutiny is inappropriate where "in the vast majority of situations" legal regulation "is not only legitimate but also desirable." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 444 (1985). In *City of Cleburne*, this Court explained that deferential scrutiny of classifications based on mental disability was necessary because policymaking in this area was "a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." *Cleburne*, 473 U.S. at 442; *see also Turner v. Safley*, 482 U.S. 78, 84 (1987) (deferential review of prison regulations is appropriate because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform") (citation and internal quotation marks omitted).[3] This Court has repeatedly held that heightened scrutiny is reserved for areas of law where courts should "presume that *any given legislative action* . . . is rooted in considerations that the Constitution will not tolerate." *Cleburne*, 473 U.S. at 444 (emphasis added). Many forms of arms regulation are clearly legitimate and thus the "predicate for such judicial oversight" *id.* at 443, is not present.

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[3] This Court has also traditionally reserved heightened scrutiny for areas of law where the burdened individuals are victimized by "a continuing antipathy or prejudice" that triggers "a corresponding need for more intrusive oversight by the judiciary." *Cleburne*, 473 U.S. at 443. Gun owners are hardly a suspect class. Gun rights advocates have succeeded in amending twelve state constitutions since 1978 to add protections for the individual right to bear arms and, since 1990, twenty-nine states have passed legislation permitting the concealed carrying of firearms. *See* Winkler, *supra*, at 702-03.

1. The Vast Majority of Weapons Regulations Are Clearly Legitimate.

The vast majority of weapons regulations are both legitimate and desirable, as a brief overview of types of current restrictions makes clear. States and localities, including those with constitutional guarantees of a private, individual right to bear arms, commonly prohibit possession of particular types of weapons, such as machine guns, *see, e.g.*, Colo. Rev. Stat. § 18-12-102; Fla. Stat. ch. 790-221; sawed-off shotguns, *see, e.g.*, Ind. Code § 35-47-5; automatic firearms, *see, e.g.*, Ariz. Rev. Stat. §§ 13-3101, 13-3102; explosives, *see, e.g.*, Tex. Penal Code Ann. § 46.05; assault rifles, *see, e.g.*, Denver Mun. Code § 38-130; switch-blade knives, *see, e.g.*, Wis. Stat. Ann. § 941.24; and, in some densely populated urban areas, handguns, *see, e.g.*, Chicago Mun. Code § 8-20-040(a), -050(c). States and local governments also ban silencers, *see, e.g.*, Calif. Penal Code § 12520; armor-piercing ammunition, *see, e.g.*, Fla. Stat. ch. 790.31; and the carrying of concealed arms, *see, e.g.*, Ala. Code § 13A-11-50; Ariz. Rev. Stat. § 13-3112. State and local governments mandate safe storage of firearms, *see, e.g.*, Md. Code Ann. § 4-104; limit the transportation of loaded firearms, *see, e.g.*, Md. Code Ann. § 4-203; and prohibit the possession of arms in schools, *see, e.g.*, Colo. Rev. Stat. § 18-12-105.5; Ind. Code § 35-47-9-2; courthouses, *see, e.g.*, S.D. Codified Laws § 22-14-23; and places where alcohol is served or sold, *see, e.g.*, Wis. Stat. Ann. § 941.237. States commonly bar violent felons from keeping and bearing arms, *see, e.g.*, Colo. Rev. Stat. § 18-12-108; and restrict the ability of minors, *see, e.g.*, Neb. Rev. Stat. § 28-1204, and the mentally disabled, *see, e.g.*, Idaho Code §§ 18-3302, 18-3316, to possess weapons. Many of these same restrictions are found in federal law. *See, e.g.*, 18 U.S.C. § 922(g)(1) (felons); 18 U.S.C. § 922(g)(4) (mentally ill); 18 U.S.C. § 922(b)(1) (minors). The pervasiveness of weapons safety laws across jurisdictions is a strong indication that many restrictions on the right to keep and bear arms are legitimate means of enhancing public safety.

The legitimacy of these weapons safety regulations is also shown by the many state and federal court decisions, including decisions of this Court, affirming the constitutionality of reasonable burdens on gun ownership and use. This Court has repeatedly affirmed the legitimacy of numerous types of gun safety regulation, including the federal bar on the possession of firearms by convicted felons, *see, e.g.*, *Beecham v. United States*, 511 U.S. 368, 370-74 (1994); *Lewis v. United States*, 445 U.S. 55, 65 (1980), and criminal penalty enhancements for using a firearm in the commission of a crime, *see, e.g.*, *Caron* *v. United States*, 524 U.S. 308, 316-17 (1998); *Smith v. United States*, 508 U.S. 223, 225, 240-41 (1993). In 1897, this Court stated that a federal law banning the carrying of concealed weapons would be constitutional. *See Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). The lower federal courts have likewise upheld gun safety laws in numerous cases. *See, e.g., United States v. Emerson*, 270 F.3d 203, 264-65 (5th Cir. 2001) (upholding a federal prohibition on the transportation of firearms or ammunition in interstate commerce by persons subject to a domestic restraining order, despite recognizing a Second Amendment right to bear arms unrelated to militia service).

Under state constitutional guarantees of a right to bear arms, state courts have affirmed the legitimacy of a wide variety of weapons safety laws. *See* Winkler, *supra*, at 719-20. Over the past eighty years, every state court to consider the question has upheld, without exception, bans on the possession of firearms by felons, *see, e.g., State v. Ricehill*, 415 N.W.2d 481, 483-84 (N.D. 1987); *State v. Hirsch*, 114 P.3d 1104, 1105 (Or. 2005); *Perito v. County of Brooke*, 597 S.E.2d 311, 321 (W. Va. 2004); prohibitions on possession of particular types of firearms, *see, e.g., Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 269-73 (Ill. 1984) (handguns); *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978) (short-barreled shotguns); *Rinzler v. Carson*, 262 So.2d 661, 666-67 (Fla. 1972) (machine guns); prohibitions on carrying concealed weapons, *see, e.g., Klein v. Leis*, 795 N.E.2d 633, 638 (Ohio

2003); *State v. McAdams*, 714 P.2d 1236, 1236-38 (Wyo. 1986); bans on the transportation of loaded firearms, *see, e.g., State ex rel. W. Va. Div. of Natural Res. v. Cline*, 488 S.E.2d 376, 382-83 (W. Va. 1997); bans on the possession of firearms by intoxicated individuals, *see, e.g., People v. Garcia*, 595 P.2d 228, 230 (Colo. 1979); bans on the possession of firearms in places where alcohol is sold or served, *see, e.g., State v. Lake*, 918 P.2d 380, 382 (N.M. Ct. App. 1996); *Second Amendment Found. v. City of Renton*, 668 P.2d 596, 597-98 (Wash. Ct. App. 1983), including private residences, *e.g., Gibson v. State*, 930 P.2d 1300, 1302-03 (Alaska Ct. App. 1997); and criminal penalty enhancements for committing a crime while possessing a firearm, *see, e.g., State v. Daniel*, 391 S.E.2d 90, 96-97 (W. Va. 1990).

This overwhelming pattern of federal and state judicial decisions recognizing the legitimacy of reasonable restrictions on arms establishes that many forms of weapons regulation are constitutionally sound means of furthering public safety. As a result, the predicate for heightened scrutiny under the Second Amendment is absent.

2. Weapons Safety Laws Are a Difficult and Technical Matter for Which Legislatures, Not Courts, Are Best Equipped to Make the Necessary Tradeoffs.

This Court has repeatedly held that deferential scrutiny is appropriate where desirable legislation is a difficult and technical matter best left to legislatures. *See Cleburne*, 473 U.S. at 443; *Turner*, 482 U.S. at 80. Weapons regulation is precisely the sort of complicated policy matter that legislatures, guided by experts, are most qualified to design. Questions about the effectiveness of various sorts of gun safety laws are hotly contested, and even social scientists using the most sophisticated methodologies cannot agree. *See* Winkler, *supra*, at 713-14. Sorting out these complex questions should be left to the legislative branch, which is better equipped than the judiciary to conduct the necessary fact-finding and to balance the competing interests.

Moreover, achieving the right balance between public safety and weapons possession is inherently local. Lawmakers must be able to respond to local conditions, including the local crime rate, the types of crimes committed locally, the types of weapons used locally, the history of the area, and the preferences of the people in the community. Heightened scrutiny will hobble legislators from finding the optimal balance between rights and regulation for their communities.

Unquestionably, many gun laws are so clearly grounded in the compelling interest of public safety that they would survive even the strictest scrutiny. Nevertheless, as this Court has stated, "[e]ven assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all." *Cleburne*, 473 U.S. at 444. In light of the undisputable legitimacy of many forms of gun safety regulation, heightened scrutiny runs the risk of discouraging the people's representatives from enacting reasonable measures to enhance public security, reduce crime, and protect children.

B. Assuming an Individual Right Unrelated to Militia Service, the Text of the Second Amendment and the History of the Right to Bear Arms Support the Application of Reasonableness Review.

1. A Reasonableness Test Is Consistent with the Text of the Second Amendment, Which Explicitly Acknowledges the Necessity of Government Regulation for Public Safety and Security.

The text of the Second Amendment acknowledges that the people have the authority to regulate the right to keep and bear arms for public safety. The provision explicitly voices an expectation that the "militia" – the armed citizenry – will be "well regulated." U.S. Const., Amend. II. Indeed, proper regulation is not only legitimate, it is "*necessary* for the security of a free state." *Id.* (emphasis added). By these terms, the Second Amendment imposes a duty on government to regulate the militia adequately to further public safety and security. In light of this clear textual recognition of a legitimate sphere of regulatory authority, the Court should adopt a standard that affords the people's representatives relatively broad leeway to regulate arms to enhance public safety.

The Second Amendment's explicit support for regulation stands in stark contrast to provisions in the Constitution that traditionally trigger heightened scrutiny. The First Amendment, for example, provides that "Congress shall pass *no law*" infringing on First Amendment rights. U.S. Const., Amend. I (emphasis added). The Fourteenth Amendment declares that "[n]o state shall make or enforce *any law*" which denies due process or equal protection of the laws. U.S. Const., Amend. XIV (emphasis added). Whereas the First and Fourteenth Amendments assume that any government burden violates their respective rights, the Second Amendment acknowledges and invites at least some regulation in the furtherance of public security.

By explicitly recognizing the legitimacy of regulation, the Second Amendment follows a common practice in constitutional provisions guaranteeing a right to bear arms. The 1689 English Bill of Rights recognized the right to bear arms, while also expressing the appropriateness of legislative oversight: "Subjects which are Protestants may have Armes for their defence Suitable to their Condition and as allowed by Law." 1 W. & M. 2d Sess., c. 2 sect. 7 (1689). Blackstone's Commentaries on the Law of England, written in 1765, also emphasized that the right was subject to regulation. According to Blackstone, the right was enjoyed only "as allowed by law" and "subject to due restrictions." 1 William Blackstone, Commentaries on the Laws of England 139 (Univ. of Chicago Press, 1979) (1765). Similar language may be found in state constitutions. *See, e.g.,* Ga. Const. art. I, § 1, ¶ VIII (providing that "the General Assembly shall have the power to prescribe the manner in which arms may be borne"). The right to keep and bear arms has thus long been expressly tied to the power of the people's representatives to regulate dangerous weapons in the interests of public safety.

Achieving a "well regulated" militia, as compared to a poorly regulated one, requires local authorities to have ample authority to balance public safety against individual rights in light of local conditions. The balance drawn in a rural area with little violent crime might not be appropriate in a densely populated area with a high crime rate. Yet, heightened judicial scrutiny would impose a straightjacket on legislators and discourage experimentation to meet local needs. A reasonableness standard that affords local officials substantial deference best ensures that each community will be able to achieve the ideal level of regulation suitable for its particular circumstances.

In light of the Second Amendment's recognition of a legitimate sphere of government regulation, the appropriate standard of review is one that permits legislatures leeway to protect public safety and security. While a private, individual right reading of the Second Amendment would mean that legislatures cannot completely disarm the people, reasonable burdens on gun ownership, possession, and use are consistent with the Second Amendment's recognition of the necessity of a "well regulated militia."

2. There Is a Long, Established History and Tradition of Legislative Authority to Reasonably Regulate the Right to Keep and Bear Arms.

The long history of weapons regulation provides additional support for broad legislative power to impose reasonable restrictions on the right to keep and bear arms. As evidenced by the many forms of weapons regulation adopted by the Founding generations, the original understanding was that the right to keep and bear arms was not infringed by reasonable measures short of complete disarmament of the citizenry.

Every generation of Americans since the Founding has regulated weapons. Today every one of the fifty states, the federal government, and all U.S. territories have weapons safety laws in effect. Moreover, there is a long tradition of courts upholding reasonable restrictions on weapons in constitutional controversies. In light of the pervasive recognition of legitimate legislative authority to regulate weapons throughout American constitutional history, this Court should adopt a reasonableness standard for the Second Amendment.

a. Gun Control in the Founding Era.

During the Revolutionary and Founding era, legislatures adopted a diverse array of restrictions on gun ownership and possession, some quite onerous. *See* Saul Cornell & Nathan DeNino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Ford. L. Rev. 487, 502-05 (2004). In the 1780s and 1790s, Pennsylvania, New York, and Massachusetts adopted laws that mandated how gunpowder could be stored or transported. *See* Act of Dec. 6, 1783, ch. CIV, 1783 Pa. Laws 161, ch. MLIX, 11 Pa. Stat. 209; Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627; Act of June 26, 1792, ch. X, 1792 Mass. Acts 208. The Massachusetts law barred the inhabitants of Boston from keeping loaded arms in "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building" in the city because "the depositing of loaded Arms in the Houses of the Town of Boston, is dangerous." Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. To protect against harmful accidents, laws required that gunpowder be kept on the top floor of buildings, *see* § XLII, 1781-1782 Pa. Laws 41; stored in small containers, *see* Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627; or maintained in public storage facilities, *see* Act of June 19, 1801, ch. XX, 1801 Mass. Acts 507; Act of Oct. 4, 1780, ch. V, 1780 Mass. Acts 326.

Legislative authority over firearms was broad enough to permit categorical disarmament of selected groups of citizens. The right to keep and bear arms was not infringed by laws, such as those in

Pennsylvania and Massachusetts, which banned possession of a firearm by any person who failed to swear a loyalty oath. *See* Act of Apr. 1, 1778, ch. LXI, 2, 5, 1777-1778 Pa. Laws 123, 126; Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31. Nor did laws that authorized the disarmament of the disorderly and the riotous infringe the right to keep and bear arms. Act of June 10, 1799, ch. DCCCVI, 2, 1799 N.J. Laws 561, 562; Act of Feb. 24, 1797, ch. DCXXXVII, 1, 1797 N.J. Laws 179, 179. In each of these instances of early American gun safety laws, public safety outweighed any private, individual right to keep and bear arms.

To achieve a "well regulated militia," the Founders recognized broad legislative power to burden gun owners. States compelled men to serve in militias in defense of the community; to outfit themselves with particular types of weapons and gear; and to report for mandatory "musters," public assemblies of militiamen at which local leaders inspected the men and their weapons. *See* Cornell & DeNino, *supra*, at 509. Individuals were expected to bear the cost of equipment personally; militia-related property was exempted from the ordinary requirement that government compensate all takings of property. *Id.* at 496. The Founders understood that such profound intrusions on personal liberty and individual choice were not infringements of the right to bear arms; they were a necessary corollary of the right.

In the decades following the adoption of the Second Amendment and similar state constitutional provisions guaranteeing a right to bear arms, weapons safety laws became more, not less, pervasive. In the early 1800s, in response to a rise in violent crime, numerous states passed laws banning the carrying of concealed weapons. *See, e.g.*, Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts 15; Act of Feb. 2, 1838, 1838 Va. Acts ch. 101, at 76; Act of Mar. 18, 1859, 1859 Ohio Laws 56. In some states, the legislature went so far as to ban entirely the sale of particular classes of weapons, such as pistols, that were easily concealed. *See, e.g.*, Act of Dec. 25, 1837, 1837 Ga. Laws 90. Other states adopted licensing laws that required some citizens to obtain a license before owning a gun or gunpowder. *See* Act of Feb. 4, 1806, 1805-1806 Va. Acts ch. XCIV 51. As these laws suggest, the original understanding of the constitutional right to bear arms was that the right was not infringed by reasonable regulations of dangerous weapons to enhance public safety.

b. The Tradition of Legislative Authority to Regulate Dangerous Weapons.

Reasonable regulation of the right to bear arms has been a consistent tradition in Anglo-American law for at least six hundred years. *See, e.g.*, Statute of Northampton, 2 Edw. 3, c. 3 (1328) (banning the possession of arms in fairs, markets, and "before the King's Justices, or other of the King's Ministers"); Blackstone, *supra*, at 139 (recognizing that the right to bear arms was "subject to due restrictions"). As noted above, the Founders regulated dangerous weapons in a variety of ways and the American legal tradition has continued to recognize legislative authority to reasonably restrict the right to keep and bear arms. Every generation of Americans since the Founding has regulated access to dangerous weapons, and currently each of the fifty states and the federal government has in place a variety of restrictions on the right to possess dangerous weapons.

The history of judicial review under American constitutional provisions on the right to bear arms also counsels in favor of reasonableness review. None of this Court's decisions considering the Second Amendment ever has applied heightened scrutiny. *See, e.g.*, *Lewis*, 445 U.S. at 65 n.8, 66; *United States v. Miller*, 307 U.S. 174, 177 (1939); *Robertson*, 165 U.S. at 281-82 (1897). Reasonableness review also has been the unanimous choice of lower federal courts considering the constitutionality of restrictions on the right to bear arms. *See, e.g.*, *Cody v. United States*, 460 F.2d 34, 36-37 (8th Cir. 1974); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288, 1293 (7th Cir. 1974); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974). Moreover, this Court and lower federal courts repeatedly have refused to incorporate the Second Amendment or describe it as a fundamental right. *See, e.g.*, *Presser v. Illinois*, 116 U.S. 252 (1886) (affirming that the Second Amendment applies only to action by the federal government); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) ("The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government. . . . ").

State courts also have deferentially reviewed restrictions on the right to bear arms. As noted above, forty-two state constitutions guarantee an individual right to bear arms unrelated to militia service and every state applies reasonableness review to restrictions on the right, giving legislatures wide leeway to regulate weapons for public safety purposes. No state court applies heightened scrutiny of any sort to laws burdening the constitutional right to bear arms. *See* Winkler, *supra* at 705. State courts repeatedly and unanimously have refused to apply strict or even intermediate scrutiny to weapons safety laws. *See, e.g., State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003); *Arnold v. Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993); *State v. Mendoza*, 920 P.2d 357, 367-68 (Hawaii 1996).

Reasonableness review of arms regulation dates back well over a century. In 1886, for example, the Missouri Supreme Court upheld a prohibition on the possession of firearms by intoxicated individuals, concluding that "the act is but a *reasonable regulation* of the use of . . . arms, and to which the citizen must yield." *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886) (emphasis added).

Under the reasonableness test applied by the state courts, any law that is a reasonable regulation of the right is constitutionally permissible. Because of the legitimacy of many weapons regulations, courts presume the constitutionality of legislation and the challenger carries the burden of showing the regulation to be unreasonable. *See, e.g.*, *State v. Comeau,* 448 N.W.2d 595, 596 (1989). A law will be held to be unreasonable if it "eviscerates," *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003), renders "nugatory," *Trinen v. City of Denver*, 53 P.2d 754, 757 (Colo. Ct. App. 2002), or results in the "destruction," *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986), of the people's right to bear arms. The state courts will generally uphold a weapons law so long as the law is "not a total ban on the right to bear arms," *Mosby*, 851 A.2d at 1045, or the law is not irrational or arbitrary, *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978) ("[T]he question in each [right-to-bear-arms] case is whether the particular regulation involved is legitimate and reasonably within the police power, or whether it is arbitrary, and, under the name of regulation, amounts to a deprivation of the constitutional right.").

Judicial deference is not unlimited under the reasonableness test. If a state were to outlaw all dangerous weapons and leave the citizenry with no lawful alternative arms, such a law would nullify the right and be held unconstitutional. *See, e.g., City of Junction City v. Mevis*, 601 P.2d 1145, 1152 (Kan. 1979) (invalidating an ordinance barring any transportation of a firearm, loaded or unloaded, where "[a]pplying the city ordinance literally, it appears that virtually every private citizen of Junction City who has purchased a firearm since the passage of [the law] has committed a crime in possessing that firearm"). Moreover, state courts will invalidate arbitrary or irrational laws that further no legitimate government interests. *See, e.g., State v. Rupe*, 683 P.2d 571, 597 (Wash. 1984) (en banc) (invalidating capital sentence where prosecution introduced evidence that defendant owned firearms, all lawful and with no connection to any crime, because there is "no relation between the fact that someone collects guns and the issue of whether they deserve the death sentence"). Nevertheless, the deference afforded elected officials by the state courts is nevertheless broad and the vast majority of weapons safety laws are upheld as reasonable. *See* Winkler, *supra*, at 715-26.

The well-established governmental traditions of reasonable regulations of the arms right and deferential judicial review should be accorded due respect by this Court. *Cf. McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 892-95 (2005) (Scalia, J., dissenting) (arguing that established governmental practices should inform construction of the Establishment Clause).

C. Federalism Values Support the Adoption of a Reasonable Regulation Standard Consistent with Current State Constitutional Law.

Should this Court hold that the Second Amendment applies against the states and that a form of scrutiny more demanding than the reasonable regulation standard used by the states applies, the effect would be substantially disruptive of the federal-state balance. Despite disparate social, economic, and political demographics, the states have come together in a remarkable consensus on the appropriateness of relatively deferential review in right-to-bear-arms cases. This Court should not hastily replace the consensus choice of states with a new, untested standard with unknown consequences for public safety.

The state courts have been balancing the right to bear arms with public safety concerns for decades – in some cases, centuries – and have unanimously agreed that reasonable restrictions are constitutionally permissible. This Court should defer to the state courts' wealth of experience and expertise in selecting a Second Amendment standard, or risk rendering superfluous hundreds of state right-to-bear-arms precedents. Heightened Second Amendment scrutiny would effectively displace the entirety of the richly developed, long-settled right-to-bear-arms jurisprudence.

More troubling still, a departure from reasonableness review will raise constitutional doubts about all existing state weapons laws and invite individuals convicted under such laws to reopen their cases to make Second Amendment claims, substantially disrupting the state courts and burdening state penal systems. Adoption of a new rule of heightened scrutiny that calls into question existing weapons regulations would be a substantive, not procedural, change and thus would apply retroactively. *See Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Such a new constitutional rule certainly would "carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Bousely v. United States*, 523 U.S. 614, 620 (1998) (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

Public safety regulation, including restrictions on access to dangerous arms, is a traditional area of state regulation. Where state and local governments historically have exercised the authority to legislate in an area, the imposition of a federal mandate upsets the delicate federal-state balance. This Court should not impose a new right-to-bear-arms standard that prevents state and local governments from "experimenting and exercising their own judgment in an area to which the States lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). Adoption of the reasonableness standard will empower the people's representatives to shape public safety and weapons laws to fit local circumstances and needs.

II. EVEN IF THE RIGHT TO PRIVATE OWNERSHIP OF WEAPONS IS A FUNDAMENTAL RIGHT, REASONABLE REGULATIONS OF THE RIGHT REMAIN CONSTITUTIONALLY PERMISSIBLE.

Even if this Court declares the right to private ownership of weapons unrelated to militia service to be a "fundamental" right, reasonableness review remains the appropriate standard to judge weapons safety laws. The prevailing rule in the federal courts is that that the "right to possess a gun is clearly not a fundamental right," *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984), and this Court has declared that there are rights "far more fundamental" than the right to bear arms, *Lewis v. United States*, 445 U.S. 55, 66 (1980). If this Court now departs from precedent and deems the Second Amendment right fundamental, this should not automatically trigger heightened review.

First, despite the common expression that fundamental rights always receive strict scrutiny, this Court applies a number of different and more lenient standards of review, including reasonableness review, in fundamental rights cases. Second, guns are a form of property and even fundamental property rights trigger only lenient scrutiny under current constitutional doctrine.

Once again, state constitutional law is instructive. Even in states where the right to bear arms is considered a "fundamental" right under state constitutional law, the courts uniformly reject heightened scrutiny and apply instead reasonableness review. *See, e.g.*, *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004); *Klein v. Leis*, 795 N.E.2d 633, 637 (Ohio 2003); *Cole*, 665 N.W.2d at 336.

A. Fundamental Rights Do Not Universally Trigger Heightened Review.

Although members of this Court have stated that "a government practice or statute which restricts 'fundamental rights' . . . is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available," *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment and dissenting in part), this Court does not apply and has never applied heightened review to all fundamental rights. *See* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 Const. Comm. 227, 227-37 (2007).

Several fundamental rights are governed by reasonableness or rational basis review. No right is more fundamental than freedom of speech. Yet, just last term, this Court held that public school students' speech rights at official school outings may be limited whenever a reasonable basis exists for believing the speech to advocate illegal drug use. *See Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007); *see also*

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that public school officials can restrict student speech in the school newspaper "so long as their actions are reasonably related to legitimate pedagogical concerns").

In fundamental right of privacy cases under the due process clauses of the Fifth and Fourteenth Amendments, the Court has held that government burdens are invalid when there is "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In Eighth Amendment cases, the challenger must show that a criminal sentence imposed by the government is grossly disproportionate. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977). The right to contract free from state interference is also governed by reasonableness review. *See Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934) (the "question" in contracts cases is "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end"). The fundamental right to equal protection of the laws triggers rational basis scrutiny for discrimination against the disabled. *See Cleburne*, 473 U.S. at 446.

The Court in fundamental rights cases has applied a variety of different standards, including reasonableness review, to judge the constitutionality of burdensome laws. Should the Court determine that Second Amendment rights are fundamental, the Court may still reject heightened scrutiny in favor of reasonableness review consistent with current doctrine.

B. Guns Are a Form of Property Subject to Deferential Scrutiny.

Any individual right to keep and bear arms unrelated to militia service would be essentially a property right and, as such, ought to trigger deferential judicial scrutiny. Property rights are among the oldest "fundamental" rights. *See, e.g.*, *Chicago, Burlington & Quincy Ry. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897). Nevertheless, for seventy years, this Court consistently has applied deferential forms of scrutiny to laws that enhance public welfare by regulating the ability of individuals to own or use their real or personal property. Weapons safety laws, which do no more than regulate the ability of individuals to own or use one particular type of personal property, should receive the same judicial scrutiny regardless of whether the right to bear arms is fundamental.

This Court repeatedly has held that the right of individuals to own and use property is subject to reasonable restriction. In *Nebbia v. New York*, 291 U.S. 502 (1934), this Court upheld a New York law that set prices for milk, explaining that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." *Id.* at 537. This Court added that "neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows." *Id.* at 523-24. What this Court wrote about milk is even more applicable to arms: Government cannot exist if anyone can use his or her gun at will to the detriment of others.

Deferential scrutiny is the rule for the gamut of regulations of individuals' ability to own or use property. Under the Takings Clause, this Court applies a relatively lenient reasonableness type of review in most cases. Uncompensated regulatory takings trigger deferential scrutiny. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (explaining that a requirement that regulation "substantially advance" state interests "has no proper place in our takings jurisprudence"); *Penn Cent. Transp. v. New York*, 438 U.S. 104 (1992). This Court also uses deferential scrutiny in determining if a taking is for a public use. *See Kelo v. New London,* 545 U.S. 469, 483 (2005) ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

This consistent tradition of judicial deference to governmental regulation of individuals' right to own, use, and convey property shows that even the oldest, most fundamental constitutional rights explicitly provided for in the text of the Constitution may be appropriately governed by reasonableness review.

Like other forms of property, the right to own, use, and convey a weapon should trigger only relatively deferential scrutiny.

◆

CONCLUSION

The Founders' original understanding that the right to keep and bear arms did not prohibit even onerous weapons safety laws, the long history of firearms regulation in America, and the consistent federal and state constitutional law principle of reasonableness review all recommend against this Court adopting a heightened form of scrutiny for the Second Amendment.

For the foregoing reasons, amici respectfully request that, if this Court reads the Second Amendment to protect a right to possess guns for private purposes, the standard of review applicable to weapons regulation should be the reasonable regulation test used uniformly by the states.

Respectfully submitted,

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Petitioners,

v.

DICK A. HELLER,

Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE CITY OF CHICAGO AND THE BOARD OF EDUCATION OF THE CITY OF CHICAGO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The City of Chicago and the Board of Education of the City of Chicago will address the following question:

Whether the Second Amendment constrains the power of state and local governments to regulate possession and use of firearms.

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BRIEF OF THE CITY OF CHICAGO AND THE BOARD OF EDUCATION OF THE CITY OF CHICAGO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The City of Chicago, the third-largest city in the United States, has regulated handguns within its borders since at least the passage of the Chicago Weapons Ordinance in 1982. The Board of Education of the City of Chicago, a municipal corporation, oversees the Chicago Public Schools (CPS), the third-largest school district in the country.[1]

Chicago, like other big cities, has a compelling interest in reducing crime related to firearms. Chicago Police Department statistics show that from 2004 to November 2007 there were 43,685 firearms-related violent crimes in the city. Public schools feel this epidemic with particular acuteness. During the last school year, 29 CPS students were killed in firearms-related violence. During the first semester of the current school year, eight more students have been murdered. These figures might be even higher if CPS had not confiscated nearly 100 guns *on school grounds* since 2000.

Against this backdrop, the *amici* (collectively, Chicago) consider it imperative that the democratic process be uninhibited by federal constitutional constraints that were never intended to apply against state and local governments, and that the States be free to regulate firearms as they deem appropriate to the particular conditions in their communities.

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[1] The parties have each filed letters giving blanket consent to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Chicago is especially well situated to address the incorporation issues this case raises. Like the District, Chicago extensively regulates private firearms possession and use, and many of these regulations resemble the ordinances at issue in this case. For example, Chicago bans the possession of handguns by most residents; requires the registration of all other firearms; forbids carrying firearms on one's person or in a vehicle unless broken down to a nonfunctional state; and outlaws the transfer of firearms except through a licensed dealer. Municipal Code of Chicago, Ill. §§ 4-144-070 and 8-20-010 to 8-20-050 (rev. 2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether the Second Amendment was originally intended to protect private rights from federal interference or to apply solely to militia-linked rights, a central purpose of that Amendment was to protect the States against the threat to their sovereignty posed by the power of the federal government to raise and maintain a standing army. This federalist objective was not altered or abandoned by the adoption of the Fourteenth Amendment. Accordingly, the Second Amendment remains to this day inapplicable to the States.

This Court repeatedly reached this conclusion in the immediate aftermath of the Reconstruction amendments, holding, for example, that the Second

Amendment did not restrict the State of Illinois' authority to prohibit 400 armed men from marching through the streets of Chicago. *Presser* v. *Illinois*, 116 U.S. 252 (1886).

As the Court again considers the meaning of the Second Amendment, Chicago urges it to respect these settled non-incorporation precedents. The precedents are right—they are supported by text, by historical context, and by more than 200 years of state and local practice. Non-incorporation is also the correct result applying this Court's selective incorporation doctrine. Indeed, it would be fundamentally perverse to transform this provision, designed to protect state interests against federal interference, into a federal restriction on traditional state regulatory powers.

While we agree with the District that the Second Amendment protects not private rights but rather militia-linked rights, the position we urge is important if the Court should hold that there is a private right protected against federal interference. Further, we submit that even if the Second Amendment applies to state and local governments, it does not preclude handgun bans, such as those enacted by the District and Chicago.

ARGUMENT

I. The Second Amendment Should Not Be Incorporated Against The States.

As we explain below, the Second Amendment—regardless of how this Court defines the right it creates—is essentially a federalism provision. From this follows the conclusion that the Amendment cannot be incorporated against the States. It is, therefore, wholly unnecessary for this Court to undertake the incorporation analysis of *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). See Part I.A, *infra*. Nevertheless, the *Duncan* analysis supports affirmance of the non-incorporation holdings. See Part I.B, *infra*.

A. Because the Second Amendment is a federalism provision, it should not be incorporated against the States.

The Bill of Rights consists of two types of provisions. Some, like the Free Speech Clause, the Free Exercise Clause, the Fourth Amendment, or the right to trial by jury, are substantive provisions that were motivated primarily by the protection of private rights. Such provisions were at most only incidentally about the balance of power between the federal government and the States. Smith, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 22–27 (1995). Over time this Court has held that the Fourteenth Amendment incorporated most such provisions against the States. *Duncan*, 391 U.S. at 148.

Other constitutional amendments, however, are federalism provisions—that is, they assign jurisdiction between the federal and state governments and protect state authority against federal encroachment. They determine not the limitations on government power but rather who decides where those limits are. Examples include the Tenth and Eleventh Amendments; Section Two of the Twenty-First Amendment; and perhaps the Third[2] and Ninth[3] Amendments. Federalism provisions by their very nature "resist[] incorporation." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in the judgment); see also *id.* at 49–52.[4]

The Second Amendment is of the latter sort. First, its text simultaneously allocates power to the States and denies to the federal government the power to encroach on the States' prerogatives. Second, the Amendment's historical context reveals that it was a response to two threats to the power of the state militias: the national government (as demonstrated by English history and reflected in anxiety about a standing national army); and private persons not in a state militia (as in Shays' Rebellion). Finally, understanding the Amendment as a federalism provision is the only interpretation consistent with state and local governments' exercise over two centuries of broad police powers to control firearms and militias.

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[2] See Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms"*, 22 L. & HIST. REV. 119, 143 n.69 (2004) (noting that only four of the original States' constitutions prohibited peacetime quartering).

[3] *Griswold* v. *Connecticut*, 381 U.S. 479, 520 (1965) (Black, J., dissenting) (Ninth Amendment not incorporated because it was "enacted to protect state powers against federal invasion"); see also *id.* at 492 (Goldberg, J., concurring) (rejecting incorporation); Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 327 (2005). On Professor Amar's view of the effect of the Fourteenth Amendment, see n.18, *infra*.

[4] Perhaps because of the obvious nature of the Tenth Amendment, analysis of federalism provisions has largely occurred in the context of the Establishment Clause, where this Court's incorporation holdings have been subjected to sustained criticism. *E.g.*, Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990). We cite this debate not to challenge the incorporation of the Establishment Clause, but rather to suggest that a similar—but significantly stronger—argument may be made for non-incorporation of the Second Amendment. Not only do the text and history decisively support a federalism reading, but this Court has repeatedly and consistently reached this conclusion.

1. *The Second Amendment's text identifies it as a federalism provision.*

The state-protective character of the Second Amendment is manifested in its two-clause structure, with each clause corresponding to a different sovereign in our constitutional system:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. CONST. Amend. II.

The first clause identifies state-based concerns: "A well regulated Militia being necessary to the security of a free State * * *." U.S. CONST. Amend. II, cl. 1. This clause affirms the States' concurrent power to regulate the militia. U.S. CONST. Art. I, § 8, cl. 16; *United States* v. *Miller*, 307 U.S. 174, 178–182 (1939). In doing so, the clause reflects the States' duties and powers under the Articles of Confederation and the originally ratified Constitution. Under the Articles, each State was required to maintain "a well-regulated and disciplined militia." Articles of Confederation, Art. VI. The Constitution demarcates exactly which aspects of the militia are under federal control, and establishes that authority over all other aspects is "reserved" to the States. U.S. CONST. Art. I, § 8, cl. 15–16; *id.* Amend. X; *Miller*, 307 U.S. at 178–179. And in fact, at the time of the ratification of the Second Amendment, the States did pervasively regulate their militias—they defined "who was part of the militia, who was excused from duty, and what weaponry the citizens were required to procure to meet this obligation." Cornell & DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 508–509 (2004).

The second clause speaks to the federal government: "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. Amend. II, cl. 1. This clause denies the federal government the power to disarm the militia. As this Court has held—even after the Reconstruction amendments—this clause "means no more than that [the right] shall not be infringed by Congress." *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1876).

As the District argues, the Second Amendment created a militia-linked and not a private right. But whatever the reach of the Second Amendment right, the text of the second clause was widely understood before and after the ratification of the Fourteenth Amendment as protecting only against disarmament by the federal government. *Ibid.*[5] Indeed, by 1908 one state supreme court noted that "the ultimate conclusion to which practically all of the courts of the Union have finally arrived, including the United States Supreme Court, is that this amendment is a limitation on the federal government only." *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908).

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[5] See also Konig, *Missing Transatlantic Context*, 22 L. & HIST. REV. at 127–135 (describing fear of federal disarmament); Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 506–508 (describing laws that disarmed enemies of the States); Amar, AMERICA'S CONSTITUTION 325 (describing the original Second Amendment as "barr[ing] the *federal* government from using its authority under Article I to dissolve America's militia structure") (emphasis in original).

These clauses do not decide how much regulation of arms and militias there may or should be. Instead, they determine which level of government—namely, the States—has the constitutional authority to decide such questions. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 & n.38 (1986) (noting that the Second Amendment is "explicitly concerned with questions of federalism" and is thus one of those amendments that "it makes no * * * sense" to incorporate).[6]

This Court has already acknowledged that the Second Amendment is a federalism provision. Not long after ratification of the Fourteenth Amendment, the Court held that the Second Amendment both restricts the power of the federal government and reinforces the police power of the States. According to this Court, the Second Amendment is "one of the amendments that has no other effect than to restrict the powers of the national government," and it therefore leaves preeminent "the powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police." *Cruikshank*, 92 U.S. at 553 (internal quotation marks omitted). A decade later, in *Presser*, this Court reaffirmed *Cruikshank*'s holding that "the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States." 116 U.S. at 265. And yet another decade later, in *Miller* v. *Texas*, this Court rejected a pistol owner's challenge to a "law of the State of Texas forbidding the carrying of weapons" because, among other things, it was "well settled" that the Second Amendment "operat[ed] only upon the Federal power." 153 U.S. 535, 538 (1894). As described below, these cases have continued to be cited favorably by this Court and the courts of appeals. See Part I.B, *infra*.

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[6] It makes no difference that the Amendment lacks express language such as "reserved to the States." "[N]umerous constitutional provisions" reflect "[o]ur system of dual sovereignty," "not only those, like the Tenth Amendment, that speak to the point explicitly." *Printz* v. *United States*, 521 U.S. 898, 924 n.13 (1997). Indeed, there are rules of construction (Ninth and Eleventh Amendments), an express prohibition (Third Amendment), an express reservation (Tenth Amendment), and an endorsement of whatever local laws exist (Section Two of the Twenty-First Amendment). The Second Amendment thus is *more* complete than most other federalism provisions because its two clauses reflect, respectively, a reservation to the States and a prohibition on the federal government.

2. *The Second Amendment's historical context confirms that it is a federalism provision.*

The historical context in which the Second Amendment was ratified confirms that it was aimed at preserving state power against federal encroachment. First, as with most of the Bill of Rights, it was "substantially conditioned by contemporary opposition to specific British practices"[7]—in particular, the English example of a national government that for a century had demeaned and weakened its subordinate sovereigns by restricting their control of arms and militias. Second, the recent experience of Shays' Rebellion underscored the need for a government monopoly on the regulation of the use of force.

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[7] Primus, THE AMERICAN LANGUAGE OF RIGHTS 97 (1999).

a. When the Second Amendment was ratified in 1791, the people of the United States knew all too well how much a central government might seek to subvert the militias of its subordinate sovereigns. Most obviously, the founders knew this from their own experience as colonists under the authority of King George. As Elbridge Gerry argued in the debate over the Second Amendment, "Great Britain * * * used every means in their power to prevent the establishment of an effective militia," and Massachusetts's efforts to this end "were always defeated by the influence of the crown." Gerry, THE CONGRESSIONAL REGISTER, Aug. 17, 1789, reprinted in Veit *et al.*, CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 182 (1991).

The founders had also taken to heart the century of political humiliation that the English government had inflicted on Scotland by depriving it of control of arms and militias. Konig, *A Missing Transatlantic Context*, 22 L. & HIST. REV. at 127–135. For example, in 1708 the Queen vetoed a bill to restore the Scottish militia. *Id.* at 128. Then, in 1715, Parliament enacted a ban on the public possession of weapons, including "side-pistols," in the Scottish Highlands by all but the most wealthy Scots. *Ibid.* Throughout the Eighteenth Century the Scots chafed under what they regarded as unwarranted domination by the English government. As one Scottish leader declared at the beginning of the century, "[t]he essential quality of a militia consistent with freedom, is, [t]hat the officers be named, and preferred, and they, and the soldiers maintained, not by the prince but by the people." *Id.* at 136 (quotation marks omitted).

This Scottish history was well known to the founders and was often cited at the founding. *Id.* at 124–127, 140–147. And the Anti-Federalists, whose concerns animated the Second Amendment and the rest of the Bill of Rights, were especially troubled by the prospect that the federal government would undermine the States by "disarming" the people. *Id.* at 149–152 (quoting, among others, Elbridge Gerry, William Grayson, George Mason, and the New Hampshire and North Carolina ratifying conventions).

b. Shays' Rebellion provides a second aspect of the historical context for the Amendment. In 1786, Daniel Shays led a revolt in western Massachusetts, which was suppressed the following year by the militias of Massachusetts and several other States.[8] Capturing attention throughout the colonies, Shays' Rebellion was an "important military event that precipitated demands for a stronger national government" and was, in James Madison's words, one of the "ripening incidents" that led to the Constitutional Convention in Philadelphia.[9] This incident is more fully described in the briefs of other *amici*, *e.g.*, Br. of *Amici Curiae* Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schwoerer *et al.* at

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[8] Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 627 (2000); Weatherup, *Standing Armies And Armed Citizens: An Historical Analysis of The Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 981 (1975).

[9] Weatherup, 2 HASTINGS CONST. L.Q. at 981.

33, but it has special relevance for the States' interest in controlling arms and the use of force. The founders understood that the state militias had a central role in suppressing local revolts, THE FEDERALIST No. 28 (Hamilton) (supporting the use of the militia in putting down insurrection)—and Shays' Rebellion was a particularly vivid example of the States' need to remain vigilant.

c. These two aspects of the historical context explicate how the Second Amendment's aims were fundamentally about federalism. By preserving state militias from the effect of a federal disarmament, the Amendment was understood to further the three purposes for state militias: (1) contributing to the common defense, (2) enabling the States to control the use of force within their own borders, and (3) checking federal tyranny and the power of a federal standing army. Story, 3 COMMENTARIES ON THE CONSTITUTION § 1890 (1833), reprinted in Kurland & Lerner, eds., 5 THE FOUNDERS' CONSTITUTION 214 (1987) ("The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers.").[10] These aims are exactly what a federalism provision would be expected to protect, and they would be wholly subverted were the Amendment to apply to the States.

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[10] For more on these aims, see, *e.g.*, Washington, "Sentiments on a Peace Establishment," May 2, 1783, reprinted in 3 THE FOUNDERS' CONSTITUTION 129 (finding "conceded on all hands the Policy and expediency of resting the protection of the Country on a respectable and well established Militia"); Gerry, THE CONGRESSIONAL REGISTER, Aug. 17, 1789, reprinted in Veit, CREATING THE BILL OF RIGHTS 182 ("Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins."); Burgh, POLITICAL DISQUISITIONS (1774), reprinted in 3 THE FOUNDERS' CONSTITUTION 125 ("We all know, that * * * princes have never suffered a militia to be put upon

3. *The practice of state and local governments for two centuries confirms the Second Amendment as a federalism provision.*

With the concurrence of this Court, state and local governments have exercised broad police powers over arms and militias for more than 200 years. At the time of the founding, state law pervasively regulated the disarmament of rebels and enemies of the State, the identity and armament of the militia, and the safe storage and transport of ammunition.[11] In particular, this pervasive state regulation focused on arms in urban centers.[12] For example, a 1783 Massachusetts statute, which applied specifically to Boston, forbade loaded firearms in "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building."[13]

In the Nineteenth Century, States additionally prohibited the carrying of concealed weapons, including handguns.[14] In the 1830s, for example, Tennes-

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any good foot, lest standing armies should appear unnecessary.").

[11] Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 506–512.

[12] *Id.* at 511–512.

[13] Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. See also Act of June 26, 1792, ch. 10, 1792 Mass. Acts 208 (restricting the storage of gunpowder in Boston); Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 511–512.

[14] Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 512–516.

see banned the sale of any concealable weapon, including all pistols, "except such as are used in the army and navy of the United States, and known as the navy pistol."[15] Act of Jan. 27, 1838, ch. 137, 1837–1838 Tenn. Pub. Acts 200. See also Act of Apr. 1, 1881, no. XCVI, 1881 Acts of Ark. 191; Act of Dec. 25, 1837, 1837 Ga. Laws 90. Such laws are also extremely common today.[16]

The Fourteenth Amendment did not change the widespread state and local regulation of arms and militias. It is impossible to imagine that the States would have ratified *sub silentio* an amendment that removed their traditional and deeply cherished police powers over armaments.[17] Indeed, the States' continuing tradition of exercising broad police powers over private arms disproves any incorporation theory in which the Fourteenth Amendment tacitly but radically transformed the Second Amendment from a federalism provision into an anti-State principle of private autonomy.[18]

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[15] Tellingly, the exemption from the Tennessee prohibition was for military arms. State laws regulating private firearms were consistent with the views of many state courts that a right to bear arms extended only to firearms used in the public defense. *E.g.*, *State* v. *Buzzard*, 4 Ark. 18, 1842 WL 331 (1842); *Aymette* v. *State*, 21 Tenn. (2 Hum.) 154, 1840 WL 1554 (1840); *State* v. *Reid*, 1 Ala. 612, 1840 WL 229 (1840); *State* v. *Mitchell*, 3 Blackf. 229, 1833 WL 2617 (Ind. 1833). See also Bishop, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 793 (2d ed. 1883).

[16] Many States authorize local governments to exercise this police power over arms. For example, an 1825 Tennessee statute enabled two towns, consistent with state law, to "make any rules and laws regulating the police [and] * * * to restrain and punish * * * shooting and carrying guns, and enact penalties and enforce the same." Act of Dec. 3, 1825, ch. CCXCII, § 4, 1825 Tenn. Priv. Acts 307; Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 515. On the relevance of political subdivisions, cf. *Miller*, 307 U.S. at 182 (quoting at length a 1785 Virginia statute that allowed the militias of different counties to have different characteristics).

[17] Indeed, the scant consideration given to such an outcome is strong evidence that the Second Amendment's status as a fed-

True, at the time of the Fourteenth Amendment some legislators supported incorporation of the Second Amendment. But, even setting aside the ordinary problems of divining congressional intent from individual legislators,[19] these statements are riddled with inconsistencies.[20] The evidence to the contrary,

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eralism provision was unchanged by the Fourteenth Amendment.

[18] For objections to one such theory, Professor Amar's "refined incorporation," see n.20, *infra*; Goldstein, *The Specter of the Second Amendment: Rereading* Slaughterhouse *and* Cruikshank, 21(2) STUDIES IN AMERICAN POLITICAL DEVELOPMENT 131 (Sept. 2007); Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 591–595 & n.94 (2006); Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615, 616–626 (2006); Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 STAN. L. & POL'Y REV. 671, 690–692 (2006); Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 517–525; Thomas, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 199–214 (2001).

[19] *Rapanos* v. *United States*, 126 S. Ct. 2208, 2231 (2006) (plurality opinion) ("Congress takes no governmental action except by legislation.").

[20] For example, John Bingham claimed that the Fourteenth Amendment would protect private gun rights; but he also admitted that the Fourteenth Amendment would "take[] from no State any right which hitherto pertained to the several States of the United States." Bingham, *The Constitutional Amendment*

including this Court's Reconstruction-era precedents and the contemporaneous and uninterrupted state firearms regulation, is simply overwhelming. The views of a handful of individual Radical Republicans do not overcome the conclusion that the Second Amendment, as a federalism provision, could not possibly be incorporated.

B. This Court's selective-incorporation doctrine confirms that the Second Amendment should not apply to the States.

As we explain above, incorporation of the Second Amendment would both destroy its animating federalism principle and invade the States' traditional police powers. But incorporation remains inappropriate even under the criteria this Court applies to provisions predominantly focused on individual rights.

Under this Court's selective-incorporation doctrine, the Due Process Clause of the Fourteenth Amendment incorporates a substantive federal constitutional right against the state governments where the right is "fundamental to the American [or Anglo-American] scheme of justice." *Duncan*, 391 U.S. at 149. The Court applies a four-factor framework to implement its selective-incorporation doctrine, examining (1) the Anglo-American history of the putative right; (2) its recognition in the constitutions of the original States; (3) subsequent popular regard for the right; and (4) the purpose it serves. *Id.* at 151–158.

(Aug. 24, 1866), *in* CINCINNATI COMMERCIAL, Aug. 27, 1866, at 1; see also Cornell & DeDino, *A Well Regulated Right*, 73 Fordham L. Rev. at 523–524.

As demonstrated below, a private right to keep and bear arms outside of a government-sponsored militia or military is not "fundamental" under these factors. Indeed, this Court has repeatedly held—in *Presser*, 116 U.S. 252; *Cruikshank*, 92 U.S. 542; and *Miller* v. *Texas*, 153 U.S. 535—that the Second Amendment is not incorporated (albeit under its earlier incorporation tests). Although the Court has not revisited these non-incorporation holdings since clarifying the doctrine of selective incorporation, federal courts have reaffirmed their vitality,[21] and state courts have concurred with some frequency.[22]

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[21] *E.g.*, *Cases* v. *United States*, 131 F.2d 916, 921–922 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943); *Bach* v. *Pataki*, 408 F.3d 75, 84 (2d Cir. 2005), cert. denied, 546 U.S. 1174 (2006); *United States* v. *Tot*, 131 F.2d 261, 269–270 (3d Cir. 1942), rev'd on other grounds, 319 U.S. 463 (1943); *Love* v. *Pepersack*, 47 F.3d 120, 123 (4th Cir), cert. denied, 516 U.S. 813 (1995); *Peoples Rights Org*. v. *Columbus*, 152 F.3d 522, 538 n.18 (6th Cir. 1998); *Quilici* v. *Village of Morton Grove*, 695 F.2d 261, 269–270 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983); *Fresno Rifle & Pistol Club, Inc.* v. *Van de Kamp*, 965 F.2d 723, 730–731 (9th Cir. 1992).

[22] *E.g.*, *Fife* v. *State*, 31 Ark. 455 (1876); *In re Application of Rameriz*, 226 P. 914 (Cal. 1924); *Brewer* v. *State*, 637 S.E.2d 677 (Ga. 2006); *State* v. *Mendoza*, 920 P.2d 357 (Haw. 1996); *Kellogg* v. *City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State* v. *Amos*, 343 So. 2d 166 (La. 1977); *State* v. *Goodno*, 511 A.2d 456 (Me. 1986); *Scherr* v. *Handgun Permit Review Bd.*, 880 A.2d 1137 (Md. Ct. Spec. App. 2005); *Commonwealth* v. *Davis*, 343 N.E.2d 847 (Mass. 1976); *State* v. *Keet*, 190 S.W. 573 (Mo. 1916); *Harris* v. *State*, 432 P.2d 929 (Nev. 1967); *State* v. *Sanne*, 364 A.2d 630 (N.H. 1976); *Burton* v. *Sills*, 248 A.2d 521 (N.J. 1968); *People* v. *Morrill*, 475 N.Y.S.2d 648 (App. Div. 1984); *State* v. *Kerner*, 107 S.E. 222 (N.C. 1921); *Arnold* v. *City of Cleveland*, 616 N.E.2d 163 (Ohio 1993); *Ex parte Thomas*, 97 P. 260 (Okla. 1908); *State* v. *Kessler*, 614 P.2d 94 (Or. 1980); *Mosby* v. *Devine*, 851 A.2d 1031 (R.I. 2004); *Masters* v. *State*, 685

Moreover, state legislatures have repeatedly relied on this Court's precedents to enact a whole host of gun control laws, as this Court apparently recognized in *Miller*. 307 U.S. at 179–182 (describing at length the States' pervasive and detailed regulation of arms, ammunition, and militias).

This Court has in fact encouraged such reliance by signaling the stability of this rule. For starters, the Court has explicitly distinguished the Second Amendment from nearly all the incorporated provisions of the Bill of Rights. *Malloy* v. *Hogan*, 378 U.S. 1, 4 n.2 (1964).

Moreover, just months after clarifying the modern incorporation framework in *Duncan*, the Court dismissed, "for want of a substantial federal question," the appeal in *Burton* v. *Sills*, 248 A.2d 521 (N.J. 1968), dismissed, 394 U.S. 812 (1969). The New Jersey Supreme Court had ruled in that case that the Second Amendment differs from other amendments that protect private rights and, unlike them, is not incorporated by the Fourteenth Amendment against the States. 248 A.2d at 528. As one commentator has noted, "it is logical to view *Burton* as a reaffirmance of *Presser*." Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said about the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 145 (1999).

Finally, under modern doctrine only fundamental rights are incorporated; yet as recently as 1980 this Court stated that the private right to gun ownership by an individual not associated with a gov-

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S.W.2d 654 (Tex. Crim. App. 1985); *State* v. *Hopkins*, 706 N.W.2d 704 (Wis. Ct. App. 2005); *Mecikalski* v. *Office of Atty. Gen.*, 2 P.3d 1039 (Wyo. 2000).

ernment-sponsored militia or military is not fundamental. *Lewis* v. *United States*, 445 U.S. 55, 65 n.8 (1980) (observing that federal restrictions prohibiting a convicted felon from possessing a firearm "are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties").

The stability of these non-incorporation precedents, and the States' extensive reliance upon them, counsel strongly against altering the rule. *John R. Sand & Gravel Co.* v. *United States*, __ U.S. __, 2008 WL 65445, *7 (2008).[23] But even if the Court intends to revisit its precedents on incorporation of the Second Amendment, application of the selective-incorporation test confirms these prior holdings.

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[23] When this Court confronts a question of abiding political controversy, its history cautions it to act with restraint. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854–855 (1992). Here, this wisdom is reinforced by two considerations. First, state and local governments have had a free hand to regulate arms and militias—or not, as they see fit—for more than 200 years, and incorporation could upend thousands of longstanding, democratically adopted legislative decisions. Second, gun policy at state and local levels is influenced not only by empirical evidence but also by the vastly different cultural significance of firearms of various sorts in different parts of the United States. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3 (2003). Allowing a local option thus not only allows a State "as a laboratory [to] try novel social and economic experiments without risk to the rest of the country," *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), but also allows communities to define themselves culturally and morally.

1. The history of the Second Amendment demonstrates that any private right to own guns outside of a militia context is not fundamental.

The *Duncan* Court observed that "by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries." 391 U.S. at 151. The same cannot be said of the private right to possess firearms, and especially handguns, for a non-military purpose.

a. Private gun rights were far from universal in England prior to the founding of the United States. English law, as early as Edward III, prevented all persons, whatever their condition, "to go or ride armed by night or day." Statute of Northampton, 2 Edw. III, c. 3 (1328); see also Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 473 (1915); *Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686), reprinted in 5 THE FOUNDERS' CONSTITUTION 209. English common law granted only limited gun rights and required that they be exercised for a civic end. In the events precipitating the Glorious Revolution, King James II disarmed the Protestant population and quartered Catholic soldiers among them. Parliament restored the Protestants' rights, but only for their collective security. Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 48 (1966) (describing Protestant gun rights as "a class right rather than an individual right," and noting that "individual self-defense was not within its protective purpose"). Moreover, gun ownership was limited to the wealthy, and only "as allowed by law." *Id.* at 49. The combination of these qualifications meant that the "a large proportion of the people were entirely disarmed." *Aymette*, 21 Tenn. (2 Hum.) 154, 1840 WL 1554, *2.

b. As discussed above (Part I.A.2), the historical context of the Second Amendment also precludes the idea that a private right to own guns was fundamental. After the national government gained the powers to raise a standing army and muster the state militias, Anti-Federalists complained that Congress could render these militias a nullity by design or neglect. The result would be a standing army fully outside the control of the States and no effective counterbalancing state militias. To guard against such a possibility, the Second Amendment protects not only the independence but also the existence of effective state militias.

Rather than take up the proposals for an amendment from Massachusetts, New Hampshire, or Pennsylvania—proposals that explicitly recognized a private right to gun ownership outside of a state-sponsored militia—the First Congress started with a proposal Madison had originally suggested for Article I, § 9 of the Constitution:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (Cogan ed. 1997).

Far from what one would expect for any right considered fundamental, not a single statement in the congressional debate over Madison's proposal suggests any legislative intent to create a private right to keep and bear arms distinct from participation in a state-sponsored militia. Instead, the debate focused almost exclusively on the religious exemption from bearing arms. *Id.* at 171–172; see also Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 127–128 (2000).

That Madison proposed such an exemption at all speaks to the civic nature of the amendment. If the "right of the people to keep and bear arms" referred to a private right to keep and bear arms outside of state-sponsored military service, the exemption for conscientious objectors would have been unnecessary: true rightholders need no permission *not* to exercise a right.[24]

c. The *Miller* Court highlighted the fact that the laws of three original States—Massachusetts, New York, and Virginia—required residents to equip themselves for state militia service and penalized failure to do so. 307 U.S. at 179–182. Because state governments historically *compelled* individuals to keep and bear arms, despite the Second Amendment, there can be no serious claim that the amendment makes private gun ownership outside of a military context a right fundamental to the American scheme of justice. This is far different from the fundamental right to free speech under the First Amendment, which States may not compel citizens to exercise. *Wooley* v. *Maynard*, 430 U.S. 705, 713–715 (1977).

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[24] The substitution of "free State" for "free country" was also intended to emphasize the primacy of the state militia over the federal standing army. Yassky, *Structure, History and Constitutional Change*, 99 MICH. L. REV. at 610.

2. *A private right for persons not associated with any state militia even arguably exists in the constitution of at most one of the original States.*

The *Duncan* Court observed that all of the original States constitutionally guaranteed the right to trial by jury. 391 U.S. at 153. By contrast, only one of the original States' constitutions—Pennsylvania's—even arguably guaranteed a private right to keep and bear arms outside of a state-sponsored military context.

In particular, the founding documents (including colonial charters, constitutions, and declarations of rights) in ten of the original States either make no mention of an armed populace or do so without establishing a right.[25] THE COMPLETE BILL OF RIGHTS at 183–184; see also Lieber, *The* Cruikshank *Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court's Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1112 (2005).

The constitutions of two other States, Massachusetts and North Carolina, contained provisions protecting the "right" to arms, but, in harmony with the militia-linked interpretation of the Second Amendment, each specifically limited that right to the common defense. *E.g.*, MASS. CONST. Pt. 1, Art. XVII

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[25] These include Connecticut, Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, and Virginia. The 1776 Maryland Declaration of Rights provides an example of States that made allowances for an armed population without explicitly creating a right. Md. Decl. of Rights, § 15 ("That a well regulated militia is the proper and natural defence of a free government.").

(1977) ("The people have a right to keep and bear arms for the common defence.").

Only the Pennsylvania Constitution even arguably protects a private right to bear arms outside of the militia context:

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

PA. DECL. OF RIGHTS, § XIII (1776). Even then, the private right is limited to self-defense.[26] Moreover, Pennsylvania's contemporaneous legislation reveals that the state constitution was not thought to confer an absolute right. A 1778 law required gun owners to swear loyalty to the State. Any person who "refuse[d] or neglect[ed] to take the oath or affirmation" was required to turn in his arms and was barred from keeping any firearms or ammunition in his "house or elsewhere." Act of Apr. 1, 1778, ch. LXI, § 5, 1777–1778 Pa. Laws 123, 126; see also Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 39 RUTGERS L.J. 1041 (forthcoming 2008) (challenging private-right reading of PA. DECL. OF RIGHTS, § XII (1776)). Other laws limited the amount of ammunition a person could keep in his home, Act of Dec. 6, 1783, ch. 104, 2 Pa. Laws 256, and prohibited firing guns in towns and cities.

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[26] These restrictions are significant since Pennsylvania's Constitution also separately addressed hunting rights. PA. CONST. § XLIII (1776).

Act of Feb. 9, 1750, ch. CCCLXXXVIII, 1750–1751 Pa. Laws 108.

Such regulation was common elsewhere, too. New York, for example, regulated the storage of gun powder (Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627), while Delaware prohibited firing guns in towns and cities (Act of Feb. 2, 1812, ch. CXCV, 1812 Del. Laws 522). See also Part I.A.3, *supra.*

Thus, from the inception of the Nation, the original state governments exercised plenary police powers to regulate private gun ownership, and their state constitutions were never understood to prevent that. It would be anomalous, to say the least, to use these same constitutional provisions as a basis for incorporating the Second Amendment against the States and thus curtailing the States' police powers.

3. Many later state constitutions do not preclude gun regulation, and state and local governments have implemented myriad gun control regulations with strong popular support.

In *Duncan*, the Court stressed that the constitutions of every State to enter the Union after the original thirteen States also protected the right to trial by jury in criminal matters. 391 U.S. at 153–154. Moreover, the Court noted, the right to trial by jury continued to receive strong support, with no State having dispensed with it or having made any movement toward dispensing with it. *Id.* at 154. Again, experience with the Second Amendment is in stark contrast.

a. Numerous state constitutions did not (and do not) preclude regulation or prohibition of private ownership of guns outside the context of a state militia.

Six state constitutions currently make no mention of any gun rights whatsoever.[27] An additional thirteen States entered the Union without including such a right in their constitutions.[28] Two other States explicitly protect only a militia-related right to keep and bear arms.[29]

Some States ostensibly protect a private right, but they do so less broadly than might appear at first glance. In Maine, where the constitution proclaims that "Every citizen has a right to keep and bear arms and this right shall never be questioned," ME. CONST. Art. I, § 16, the private right to gun ownership is limited. *Hilly* v. *Portland*, 582 A.2d 1213, 1215 (Me.

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[27] These include the California, Iowa, Maryland, Minnesota, New Jersey, and New York constitutions.

[28] Of the original States, Connecticut, Delaware, Georgia, New Hampshire, Rhode Island, and South Carolina did not adopt constitutional provisions dealing with gun ownership until well after the founding. CONN. CONST. Art. I, § 15 (1818); DEL. CONST. Art. I, § 20 (1987); GA. CONST. Art. I, § 4 (1865); N.H. CONST. Pt. 1, Art. 2-a (1982); R.I. CONST. Art. I, § 22 (1842); S.C. CONST. Art. I, § 28 (1868). The adoption of limited gun rights also lagged behind statehood in Illinois (admitted 1818), Louisiana (1812), Nebraska (1867), Nevada (1864), North Dakota (1889), West Virginia (1863), and Wisconsin (1848). ILL. CONST. Art. I, § 22 (1970); LA. CONST. Art. 3 (1879); NEB. CONST. Art. I, § 1 (1988); NEV. CONST. Art. I, § 11(1) (1982); N.D. CONST. Art. I, § 1 (1984); W. VA. CONST. Art. III, § 22 (1986); WIS. CONST. Art. I, § 25 (1998).

[29] Both Kansas and Massachusetts have interpreted their state constitutional provisions to protect only a militia-linked right. *City of Salina* v. *Blaksley*, 83 P. 619, 620 (Kan. 1905) (KAN. BILL OF RIGHTS, § 4); *Commonwealth* v. *Davis*, 343 N.E.2d 847, 848–850 (Mass. 1976) (MASS. CONST. Pt. 1, Art. XVII).

1990) (upholding a concealed-carry ban in Portland). In Alaska, which amended its constitution in 1994 to add a private right to keep and bear arms, the result is similar. *Gibson* v. *State*, 930 P.2d 1300, 1301–1302 (Alaska Ct. App. 1997) (finding that the Alaska legislature did not intend to overturn existing gun control measures). And in Illinois, where the constitution provides that "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed," ILL. CONST. Art. I, § 22, the state supreme court upheld an ordinance prohibiting the possession of any operable handgun. *Kalodimos* v. *Village of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984).

b. As the above examples demonstrate, States have long implemented wide-ranging restrictions on private possession or use of firearms not linked to any civic purpose. Indeed, these regulations date to the beginning of the Republic, and "the evidence for robust regulation is extensive" if one "looks at the gun laws adopted in the Founding Era and early Republic." Cornell & DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. at 502–505. These regulations became more extensive and expanded with the growth of the Nation; they remain pervasive. See Part I.A.3, *supra*.

c. Widespread popular support for state gun control legislation is likely attributable in part to changes in the country's circumstance since the founding.[30] Today, the majority of households do not contain a firearm of any sort. See Polston & Weil, *Unsafe by Design: Using Tort Actions to Reduce Firearm-Related Injuries*, 8 STAN. L. & POL'Y REV. 13, 14 (1997). The frontier is gone. In domestic matters and international affairs, state militias have been displaced by organized police forces, the National Guard, and the federal military. And criminals with firearms—especially handguns—wreak havoc in American cities.[31] Thus the widespread public support for significant regulation of gun ownership is unsurprising.

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[30] Based on the General Social Survey, the majority of Americans support some form of gun control. Smith, *Public Attitudes towards the Regulation of Firearms* (NORC/U. Chi. March 2007). Such support has only increased this century. *Ibid.*

4. The federalist purpose of the Second Amendment further confirms that even if incorporation were a theoretical possibility, the Court should nonetheless affirm Presser.

Finally, the unique federalist purpose of the Second Amendment, see Part I.A, *supra*, distinguishes the rights incorporated in *Duncan* and other cases from any private right to keep and bear arms outside of a state-sponsored militia.

The Second Amendment has always been understood to limit federal power by ensuring a counterweight to a standing army. But it would serve no purpose to incorporate the Amendment against state governments already prohibited from maintaining their own standing armies. U.S. CONST. Art. I, § 10. Indeed, Madison worried about the possibility that the federal government would use its standing army to aggrandize itself vis-à-vis the States; he saw the

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[31] For the Court's convenience, we have included Chicago's startling data. See Appendix, *infra*.

States and their militias as indispensable safeguards against such a possibility.[32]

The Second Amendment strikes a balance between state and federal power. To States reluctant to cede authority to a strong central government, it was vitally important to know that they retained their police powers and that the new federal government could not subvert these powers by disarming the people.

The concern about disorderly private rebellions at the founding also belies the notion that a private right to gun ownership outside of state aegis might enhance democracy. The inability of the federal government, under the Articles of Confederation, to fashion a well-coordinated military response to Shays' Rebellion provided a major impetus for the Constitutional Convention.[33] With state militia companies quelling the armed insurrection, it is difficult to imagine that the founders saw their purpose in Philadelphia that summer as protecting private gun ownership. See *Silveira* v. *Lockyer*, 312 F.3d 1052, 1078 (9th Cir. 2002); Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.–KENT L. REV. 291, 320 (2000) ("Yet when the rebels took up arms, they were put down by the militia because, in the unsurprising judgment of the properly constituted governments, no tyrannical conditions justified the revolt."). And one of the first orders of business after ratification of the Second Amendment was suppression of yet another privately armed insurrection—the Whiskey Rebellion in 1794. Kohn, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802 at 169–170 (1975).

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[32] See THE FEDERALIST NO. 46 (Madison) ("Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments, with the people on their side, would be able to repel the danger.").

[33] See n.9, *supra*.

Finally, it is a historical truism that governments retain a monopoly on the regulation of the use of force. Together with the militia clauses of Article I, the Second Amendment allocates portions of this monopoly between the federal government and the States. To incorporate the Amendment against the States would cede large parts of this traditional government monopoly—it would imply that *no level of government* possesses the traditional police power over private arms. Such an unprecedented abdication is made even less probable by the Fourteenth Amendment's exclusion from political office of those who took up arms against the federal government. U.S. CONST. Amend. XIV, § 3. Indeed, the Reconstruction amendments are concerned with the problems of excessive decentralization of political decision-making and use of force. It would be truly perverse to read them as establishing a private autonomy against regulation by any level of government whatsoever.[34]

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The Second Amendment is susceptible to incorporation neither as a matter of logic nor under this Court's doctrine of selective incorporation. As such, the right guaranteed by the Amendment—whether private or militia-linked—is a protection against federal disarmament and does not restrict state and local governments from regulating firearms.

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[34] For the same reason, it makes no sense for the Second Amendment to apply to District-specific legislation.

II. In Any Event, State Or Local Handgun Bans—And The District's Handgun Ban—Are Constitutional.

Regardless of this Court's view on incorporation, or whether it even reaches that issue, the District's gun laws—and Chicago's similar regulations—are lawful. We urge the Court, if it holds by whatever theory that the Second Amendment applies to the District and protects some form of private right, to uphold the ordinances challenged here.

The text of the Second Amendment expressly envisions regulation. Its opening clause calls for a "well regulated" militia. None of the rights that are fundamental, and therefore require strict scrutiny of regulation, contains such a grant of government regulatory power. There is no mention of a "well regulated" press, for instance, in the First Amendment.

As set out in greater detail by other *amici*, *e.g.*, Br. of Law Professors Erwin Chemerinsky and Adam Winkler as *Amici Curiae*, this textual commitment to regulation means that the standard for judging a regulation under the Second Amendment is whether it is reasonable.[35] Under that standard, prophylactic measures reasonably directed to saving lives or reducing serious crime should be upheld. See, *e.g.*, *Lewis*, 445 U.S. at 67 (upholding prohibition on possession of firearms by convicted felons because Congress rationally could have wanted to keep weapons away from "potentially dangerous persons"). And a handgun ban is just such a regulation—reasonable because it greatly reduces the harm inflicted by handguns. See Pet. Br. 50–54.

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[35] Of course, all other constitutional limits that apply to government regulation—such as the Privileges or Immunities Clause, the Equal Protection Clause, substantive due process, and the "void-for-vagueness" doctrine—would also continue to apply.

Further, concealed weapons are both the primary tool of violent street crime and the primary method by which gangs control turf to sell drugs and intimidate communities. Handguns are the most readily concealable firearms. See, *e.g.*, Act of Jan. 27, 1838, ch. 137, 1837–1838 Tenn. Pub. Acts 200. While their small size and limited range make handguns unsuitable for general military use, *e.g.*, *Aymette*, 21 Tenn. (2 Hum.) 154, 1840 WL 1554, *3–4, their essential attribute of concealability makes them well suited to gang-related crime, as well as urban violence more generally. *E.g.*, Appendix, *infra*; Br. of *Amici Curiae* Major American Cities, The United States Conference of Mayors, and Legal Community Against Violence at 4–8; Pet. Br. 4. For precisely this reason, many state and local governments ban the carrying of concealed weapons. Indeed, laws prohibiting concealed-carry are a particularly valuable law-enforcement tool because they can be enforced under *Terry* v. *Ohio*, 392 U.S. 1 (1968), and when enforced on the street, allow the police to remove guns from circulation and effectively drive down violent crime.

The constitutionality of a ban on concealed-carry has been regularly upheld. Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 717 (2007). See also *Robertson* v. *Baldwin*, 165 U.S. 275, 281–282 (1897) ("the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons"). No such ban is challenged in this case.

A ban on possession of handguns directly serves state and local governments' interest in preventing concealed weapons. Banning possession of handguns can rationally be expected to reduce the availability of handguns and, in turn, reduce the number of handguns that can be used as concealed weapons. This Court has repeatedly sustained regulation of certain conduct as a prophylactic means of addressing another evil. See, *e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 759–762 (1982); *Andrus* v. *Allard*, 444 U.S. 51 (1979); *Champion* v. *Ames*, 188 U.S. 321 (1903) ("The Lottery Case"). That kind of broad regulatory power is particularly appropriate in dealing with deadly objects, where reasonable regulation may include stringent controls and even an outright ban.

Allowing state and local governments to approach this issue politically is also consistent with democratic traditions for addressing socially divisive issues. Citizens may voice their support or objections to state and local gun control at the ballot box—or by moving to another jurisdiction with a laxer approach to gun regulation.

In sum, regardless whether this Court reaches the incorporation issue, if it examines the challenged ordinances on the merits, the Court should hold that laws such as the District's do not violate the Second Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Table 1
Total Number Of Index Crimes Involving Firearms
(Detailed Offense Information)
City of Chicago, 2004–2006 and Jan–Nov 2007

Primary	Secondary	2004	2005	2006	Jan–Nov 2007
Murder Total		**338**	**340**	**384**	**307**
Crim Sexual Assault	Aggravated: Handgun	114	90	82	101
Crim Sexual Assault	Aggravated: Other Firearm	1	2	0	5
Crim Sexual Assault	Attempt Aggravated: Handgun	11	13	7	5
Criminal Sexual Assault Total		**126**	**105**	**89**	**111**
Robbery	Armed: Handgun	5,456	5,392	5,312	4,633
Robbery	Armed: Other Firearm	84	73	72	66
Robbery	Attempt: Armed-Handgun	520	534	507	454
Robbery	Attempt: Armed-Other Firearm	18	13	10	15
Robbery Total		**6,078**	**6,012**	**5,901**	**5,168**
Assault	Aggravated Pro. Emp: Handgun	13	20	16	21
Assault	Aggravated Pro. Emp: Other Firearm	8	3	8	7
Assault	Aggravated PO: Handgun	52	51	56	44
Assault	Aggravated PO: Other Firearm	4	5	5	4
Assault	Aggravated: Handgun	3,169	2,852	2,662	2,386
Assault	Aggravated: Other Firearm	119	110	123	99
Aggravated Assault Total		**3,365**	**3,041**	**2,870**	**2,561**
Battery	Aggravated Pro. Emp: Handgun	13	9	19	14
Battery	Aggravated Pro. Emp: Other Firearm	2	1	4	1
Battery	Aggravated Domestic Battery: Handgun	21	28	38	49
Battery	Aggravated Domestic Battery: Other Firearm	13	21	40	24
Battery	Aggravated PO: Handgun	11	10	9	23
Battery	Aggravated PO: Other Firearm	1	0	1	2
Battery	Aggravated: Handgun	1,671	1,594	1,636	1,445
Battery	Aggravated: Other Firearm	48	42	43	52
Ritualism	Aggravated Ritual Mut: Handgun	0	0	4	0
Aggravated Battery Total		**1,780**	**1,705**	**1,794**	**1,610**
Total Violent Index Crimes Involving Firearms		**11,687**	**11,203**	**11,038**	**9,757**

[Notes and key on next page]

NOTES TO TABLE 1

Source: CHRIS_DWH_CRIMES_ALLV and Detective Division Homicide Database queries on 27 Dec 2007.

Battery incidents involve only those cases when actual physical contact is made between the victim and offender. There are three possible aggravating factors:

(1) the victim suffered great bodily harm (serious injury);

(2) the offender used a dangerous weapon capable of causing death or great bodily harm AND there was contact made with the victim during the attack; or

(3) there was contact made with the victim during the attack (including minor contact or injury) AND the victim was a police officer or other protected employee.

Assault incidents, without exception, involve the use of force but do not involve any actual contact between the victim and offender. All unsuccessful attempts at force by an offender that do not involve a deadly weapon (*e.g.*, attempting to punch someone or throwing a stone at another person when no one is actually struck) are classified as assaults. All unsuccessful attempts at force by an offender that do involve a deadly weapon (*e.g.*, shooting a firearm at another person when no one is actually struck) are classified as aggravated assaults.

Please note, the FBI Uniform Crime Report guidelines define **aggravated assault** as a combination of both the aggravated assault and aggravated battery categories described above.

Aggravated PO: Assault against a police officer.

Aggravated Pro. Emp.: Protected employees include peace officers; community policing volunteers; firefighters; correctional officers; emergency medical technicians; paramedics; ambulance drivers; other medical assistance personnel; public transportation employees; Illinois State or municipal corporation employees; teachers; school employees; park district employees on school or park district grounds or property; or employees of the State Department of Public Aid, County Department of Public Aid, Department of Human Services on public aid grounds or in a residence of a public aid applicant or recipient while in performance of official duties.

Table 2
Arrests For Unlawful Use of a Weapon (UUW)–Firearm
City of Chicago, 2004–2006 and Jan–Nov 2007

Statute	Description	2004	2005	2006	Jan–Nov 2007
430 ILCS 65.0/2-A-1	Firearm w/o Valid FOID/Elig	255	244	144	148
430 ILCS 65.0/2-A-1	Possess Expired Firearm FOID	9	3	2	4
430 ILCS 65.0/2-A-1	Possess Revoked Firearm FOID	4	4	3	0
430 ILCS 65.0/3-A	Illegal Transfer Firearms	8	5	6	6
430 ILCS 65.0/3-B	Fail Keep Record of Transfer/Firearm	38	29	25	26
720 ILCS 5.0/16-16.1-A-2	Agg Possess 6–10 Stolen Firearms	0	1	0	0
720 ILCS 5.0/16-16.1-A-4	Agg Possess 21–30 Stolen Firearms	5	0	0	0
720 ILCS 5.0/16-16-A	Possess Stolen Firearm	10	8	4	2
720 ILCS 5.0/24-1.1	Unlawful Use Firearm by Felon	1	0	0	0
720 ILCS 5.0/24-1.1-A	UUW – Weapon – Felon, Possess/Use Firearm	1,116	1,011	854	667
720 ILCS 5.0/24-1.1-A	UUW – Weapon – Felon/Parole – Possess/ Use Firearm Prior	78	97	128	77
720 ILCS 5.0/24-1.1-A	UUW – Weapon – Felon Possess/Use Firearm/Parole	0	0	0	33
720 ILCS 5.0/24-1.1-A	UUW – Weapon – Felon Possess/Use Machine Gun	0	0	0	2
720 ILCS 5.0/24-1.2	Aggravated Discharge Firearm	0	1	0	0
720 ILCS 5.0/24-1.2-A-1	Agg Discharge Firearm – Bldg/School	3	2	1	2
720 ILCS 5.0/24-1.2-A-1	Agg Discharge Firearm – Occupied Bldg	22	14	12	9
720 ILCS 5.0/24-1.2-A-2	Agg Discharge Firearm – Occupied Veh	45	37	40	16
720 ILCS 5.0/24-1.2-A-3	Agg Discharge Firearm – PO/Fireman	5	2	3	2
720 ILCS 5.0/24-1.2-A-5	Agg Discharge Firearm – 1st Aid Person	3	3	1	0
720 ILCS 5.0/24-1.2-A-7	Agg Discharge Firearm – School Employee/School	1	0	0	2
720 ILCS 5.0/24-1.5-A	Reckless Discharge Firearm – Endanger	23	32	26	22
720 ILCS 5.0/24-1.5-B	Reckless Discharge Firearm – Passenger	5	7	5	3
720 ILCS 5.0/24-1.6-A-3-I	Agg UUW – Under 21 Handgun 1st Offns	41	53	87	111
720 ILCS 5.0/24-1-A-4	UUW – Weapon – Carry/Possess Firearm/2nd & Subsq.	43	22	15	7
720 ILCS 5.0/24-1-A-4	UUW – Weapon – Carry/Possess Firearm/School/Park	77	65	26	35
720 ILCS 5.0/24-1-A-4	UUW – Carry/Possess Firearm/1st	0	0	0	9
720 ILCS 5.0/24-1-A-5	UUW – Weapon – Set Spring Gun	9	8	4	2
720 ILCS 5.0/24-1-A-7-I	UUW – Weapon – Machine Gun/ Automatic Weapon	9	8	6	5
720 ILCS 5.0/24-1-A-7-I	UUW – Machine Gun/Auto Weapon/ School/Park	5	0	1	0
720 ILCS 5.0/24-1-A-7-II	UUW – Weapon – Rifle<16in – Shotgun<18in	40	35	42	29
720 ILCS 5.0/24-1-A-7-II	UUW – Weapon – Rifle<16in – Shotgun<18in/School/Park	8	5	2	1
720 ILCS 5.0/24-3.1-A1	UUW – Unlawful Possess Firearm <18	66	47	26	18
720 ILCS 5.0/24-3.1-A-1	UUW – Unlawful Possess Handgun	46	40	44	47
720 ILCS 5.0/24-3.1-A-2	UUW – Unlawful Possess Firearm/ Delq <21	4	2	5	5

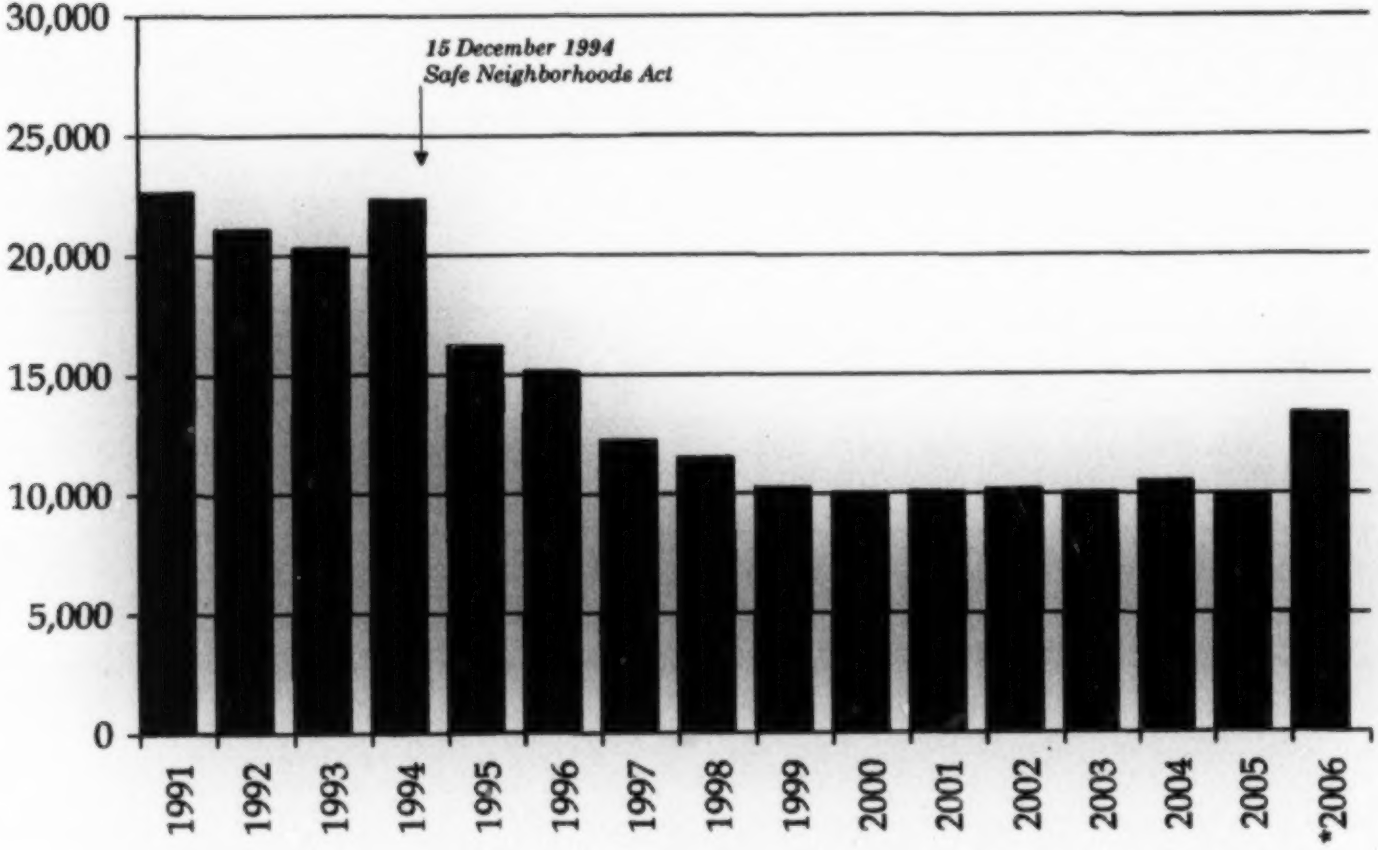
Statute	Description	2004	2005	2006	Jan-Nov 2007
720 ILCS 5.0/24-3.1-A-2	UUW – Unlawful Possess Handgun	32	19	20	16
720 ILCS 5.0/24-3.1-A-6	UUW – Unlawful Possess Firearm/ Explosive Bullet	0	0	0	2
720 ILCS 5.0/24-3.5-C	UUW – Purchase 6<10 Firearms – False Information	3	4	2	3
720 ILCS 5.0/24-3.5-C	UUW – Weapon – Purchase 1 Firearm/False Info	0	0	0	1
720 ILCS 5.0/24-3-A-A	UUW – Weapon – Sell Firearm Minor/ School/Park	0	1	0	0
720 ILCS 5.0/24-3A-A	Gunrunning	2	3	3	3
720 ILCS 5.0/24-3-A-D	UUW – Weapon – Unlawful Sale Firearm/Felon	1	4	0	0
720 ILCS 5.0/24-3-A-G	UUW – Unlawful Sale Firearm/Before 72 Hours	5	5	0	0
720 ILCS 5.0/24-3-A-H	UUW – Weapon – Unlawful Sale Non-Approved Firearm	2	2	0	0
720 ILCS 5.0/24-3-A-I	UUW – Sell Firearm to Minor w/o FOID	1	1	0	0
720 ILCS 5.0/24-3-A-K	Sell Firearm/No Valid FOID	0	0	2	2
720 ILCS 5.0/24-4	Fail Keep Registration/Firearm Sales	3	0	1	0
720 ILCS 5.0/24-5-A	Deface Firearm ID Markings	163	85	19	2
720 ILCS 5.0/24-5-B	Possess Firearm w/ Defaced Serial No	0	6	9	11
720 ILCS 5.0/24-9-A	Allow Minor Access to Firearm	2	0	0	1
8/16/1990	Firearms for Minors	0	1	0	0
8/20/1915	Possess Firearm in Motor Vehicle	0	1	1	0
8/20/1940	Registration of Firearms	105	76	83	71
8/20/1950	Unregisterable Firearms	13	34	31	17
8-20-050(A)	Weapons Violation Possess Sawed-Off Shotgun	1	0	0	2
8-20-050(B)	Weapons Violation Own/Possess Long Gun	0	0	3	0
8-20-090(A)	Weapons Violation Possess Firearm Prior Registration Receipt	0	0	0	1
8-20-090(B)	Weapons Violation Fail Re-Registration Firearm	3	3	3	0
8-20-140(C)	Weapons Violation Fail Secure Firearm	0	0	1	0
8-20-170(A)	Weapons Violation Sale/Transfer Handgun	0	1	0	0
8-20-170(C)	Weapons Violation Unlawful Loan Fire-arm/Ammunition	2	0	0	1
8-20-240	Acquisition/Possess Firearm Prohibited by Law	2	2	0	0
8/24/1910	Weapons Violation Unlawful Use Handgun	4	10	15	13
TOTAL		2,323	2,043	1,705	1,436

Source: CHRIS_DWH_ARREST ALL query on 28 Dec 2007.
Note: Excludes arrests for toy or replica guns.

Table 3

Guns Recovered

City of Chicago, 1991–2006



* The 2006 figure includes the number of guns received during two gun turn-ins: 2,944 guns were turned in on April 29, 2006, and 1,115 guns were turned in on December 16, 2006.

Table 4
Spending on School Security
Chicago Public Schools, FY2007

(1) CPS Security Spending by Expenditure Category		
Security Personnel Salary & Benefits:		
- School buildings, Rapid Response, Night Stalker	$62,044,345	
- AIO offices, Medill, Warehouse, eLearning	$1,338,402	
- Central Office Security and Administration	$1,706,204	
Salary & Benefits Sub-total (A)		$65,088,951
Chicago police patrol service for high schools	$8,000,000	
Security camera, metal detector, uniforms, and supplies	$968,741	
Student ID cards supply	$252,162	
Volunteer background check	$40,000	
Non-Personnel Cost Sub-total (B)		$9,260,903
Total FY07 Security Spending (A+B)		$74,349,854

(2) CPS Security Spending by Funding Sources		
General Fund	$1,053,726	
Tort Fund	$53,580,005	
PBC O&M	$4,675	
Board-funded Security Cost (a)		$54,638,407
Supplement General State Aid Fund	$18,835,665	
Federal Title I and IV	$875,782	
Other Government Funded Security (b)		$19,711,447
Total FY07 Security Spending (a+b)		$74,349,854

CPS Average Cost of	
a desktop computer	$1,000
a laptop computer	$1,400
science textbook	$58
English textbook	$61

Information Source: Purchasing

Table 5

Firearms on School Property

Bureau of Safety and Security, School Years 2006/07 and 2007/08

	DATE	UNIT	SCHOOL	GUN RECOVERED	WHERE RECOVERED	PERMANENT M/D ON-SITE	HOW GUN ENTERED SCHOOL	STUDENT	HOW DISCOVERED
5	12/13/07	1030	Dunbar H.S.	No	DNA	Yes	Unknown	Yes	Teacher Observation
4	12/3/07	1390	Hyde Park H.S.	Yes	Off Property	Yes	Book Bag	Yes	Police Investigation
3	11/21/07	3030	Dewey Elem.	Yes	Off Property	No	Unknown	Yes	Teacher Observation
2	11/20/07	1640	Wells H.S.	No	DNA	Yes	On Person	No	Teacher Observation
1	11/9/07	1340	Gage Park H.S.	Yes	In School	Yes	Book Bag/Front Door	Yes	Security Check X-ray

TOTAL FOR 2007/08 (through Dec. 14, 2007) 5

	DATE	UNIT	SCHOOL	GUN RECOVERED	WHERE RECOVERED	PERMANENT M/D ON-SITE	HOW GUN ENTERED SCHOOL	STUDENT	HOW DISCOVERED
6	6/4/07	6970	Tanner Elem.	Yes	In School	No	Book Bag	Yes	Student Turn In
5	4/20/07	3000	Delano Elem.	Yes	On Property	No	Not in School/On-Campus	DNA	Teacher Observation
4	4/10/07	1010	CVS H.S.	Yes	On Property	Yes	On Person	Yes	Police Investigation
3	1/25/07	1030	Dunbar H.S.	Yes	In School	Yes	On Person	Yes	Police Investigation
2	1/16/07	7380	South Shore	Yes	In School	Yes	Book Bag	Yes	Security Check X-ray
1	1/3/07	7210	Higgins	Yes	On Property	Yes	Not in School/On-Campus	DNA	Janitor Found

TOTAL FOR 2006/07 6

AMICUS CURIAE BRIEF

82

Supreme Court, U.S.
FILED

FEB 5 - 2008

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No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* CONGRESS OF RACIAL EQUALITY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions, D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Congress of Racial Equality, Inc. ("CORE") is a New York not-for-profit corporation founded in 1942, with national headquarters in Harlem, New York City. CORE is a nationwide civil rights organization, with consultative status at the United Nations, which is primarily interested in the welfare of the black community, and the protection of the civil rights of all citizens.

Judgment below should be upheld.

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[1] No counsel for any party authored this brief in whole or in part. No counsel for a party or party made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided by NRA Civil Rights Defense Fund. This brief is filed with the written consent of all parties, reflected in letters filed by the parties with the clerk. Amicus complied with the conditions of those consents by providing advance notice of its intention to file this brief.

SUMMARY OF ARGUMENT

The history of gun control in America has been one of discrimination, disenfranchisement and oppression of racial and ethnic minorities, immigrants, and other "undesirable" groups. Robert Cottrol and Raymond Diamond, *Never Intended to be Applied to the White Population: Firearms Regulation and Racial Disparity--The Redeemed South's Legacy to a National Jurisprudence?*, 70 Chi. Kent L. Rev. 1307-1335 (1995); Robert Cottrol and Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Georgetown L.J. 309-361 (1991); Raymond Kessler, *Gun Control and Political Power*, 5 Law & Pol'y Q. 381 (1983); Stefan Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. Civ. Rts. L.J. 67. Gun control laws were often specifically enacted to disarm and facilitate repressive action against these groups. Id.

More recently, facially neutral gun control laws have been enacted for the alleged purpose of controlling crime. Often, however, the actual purpose or the actual effect of such laws has been to discriminate or oppress certain groups. Id.; *Ex Parte Lavinder*, 88 W.Va. 713, 108 S.E. 428 (1921) (striking down martial law regulation inhibiting possession and carrying of arms). As Justice Buford of the Florida Supreme Court noted in his concurring opinion narrowly construing a Florida gun control statute:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers

> in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers … . The statute was never intended to be applied to the white population and in practice has never been so applied … . [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and nonenforceable if contested.

Watson v. Stone, 148 Fla. 516, 524, 4 So.2d 700, 703 (1941) (Buford, J., concurring).

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor and other minorities. Present day enforcement of gun laws frequently targets minorities and the poor, and often results in illegal searches and seizures.

ARGUMENT

I. GUN CONTROL MEASURES HAVE BEEN AND ARE USED TO DISARM AND OPPRESS BLACKS AND OTHER MINORITIES

A. Gun Control in the Slave Codes

The development of racially-based slavery in the seventeenth century American colonies was accompanied by the creation of laws meting out separate treatment and granting separate rights on the basis of race. An early sign of such emerging restrictions, and one of the most important legal distinctions, was the passing of laws denying free blacks the right to keep arms. "In 1640, the first recorded restrictive legislation passed concerning blacks in Virginia excluded them from owning a gun." Lee Kennett and James LaVerne Anderson, *The Gun in America: The Origins of a National Dilemma* 50 (1975). "Virginia law set Negroes apart from all other groups ... by denying them the important right and obligation to bear arms. Few restraints could indicate more clearly the denial to Negroes of membership in the White community." W. Jordan, *White over Black: American Attitudes Toward the Negro, 1550-1812* 78 (1968).

In the later part of the 17th Century, fear of slave uprisings in the South accelerated the passage of laws dealing with firearms possession by blacks. In 1712, for instance, South Carolina passed "An act for the better ordering and governing of Negroes and Slaves" which included two articles particularly relating to firearms ownership and blacks. 7 Statutes at Large of South Carolina 353-54 (D.J. McCord ed. 1836-1873). Virginia passed a similar act entitled "An Act for Preventing Negroes Insurrections." 2 Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature, in the Year 1619, 481 (W.W. Hening ed. 1823).

The late Judge A. Leon Higginbotham, Jr. summarized a 1680 Virginia law:

> The 1680 statute would become the model of repression throughout the South for the next 180 years. The following provisions are illustrative of its codification of prejudice and the degree to which the statute attempted to make sure that blacks would be recognized as legally inferior:
>
> > 1680. Act X. Whereas the frequent meetings of considerable numbers of Negro slaves under pretense of feasts and burials is judged of dangerous consequence [it] enacted that no Negro or slave may carry arms, such as any club, staff, gun, sword, or other weapon, not go from his owner's plantation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on. And further, if any Negro lift up his hand against any Christian he shall receive thirty lashes, and if he be absent himself or lie out from his master's service and

> > resist lawful apprehension, he may be killed . . . .
>
> If blacks could not leave the owner's plantation without a certificate, their mobility was destroyed; if blacks could not carry arms, the potential to resist was reduced.

A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process, The Colonial Period* 39 (1978) (quoting Act X, 1680; Guild, *Black Laws*, p. 45.)

The slave codes of all of the Southern states prohibited slaves from keeping or bearing firearms. The District of Columbia was no exception. Washington, D.C. was originally created out of existing parts of Virginia and Maryland. Congress provided that Virginia and Maryland law was to govern in Washington. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103, 104. Thus, the slave codes of Maryland and, for a time, of Virginia, applied in Washington, D.C. The Virginia law which applied included a 1748 statute which provided that:

> No Negro or mulatto slave whatsoever shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive... Provided, that slaves living at any frontier plantation, may be permitted to keep and use guns, powder, shot, and weapons, offensive or defensive, by license from a justice of the peace of the county wherein such plantation lies. . . . No free negro or mulatto,

> shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead, with out first obtaining a license from the court of the county or corporation in which he resides, which license may, at any time, be withdrawn by an order of such court.

VA. CODE, ch. 3, §§ 7, 8 (1819).

Maryland law, which applied to its seceded portion of Washington D.C., included a statute enacted in 1715, which provided:

> No negro or other slave within this province shall be permitted to carry any gun, or any other offensive weapon, from off their master's land, without license from their said master; and if any negro or other slave shall presume to do, he shall be carried before a justice of peace, and be whipped, and his gun or other offensive weapon shall be forfeited to him that shall seize the same and carry such negro so offending before a justice of peace.

The General Public Statutory Law and Public Local Law of the State of Maryland, From the Year 1692-1839 Inclusive 31 (John D. Toy ed., 1840).

Jurist and abolitionist St. George Tucker summarized the badges of slavery: "To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly assaulted, are all offenses punishable by whipping." St. George Tucker, *A Dissertation on Slavery* 65 (1796).

Thus, in many of the antebellum states, free and/or slave blacks were legally forbidden to possess firearms. State legislation which prohibited the bearing of arms by blacks was held to be constitutional due to the lack of citizen status of the Afro-American slaves. *State v. Newsom*, 27 N.C. 250 (1844). *Cooper v. Mayor of Savannah*, 4 Ga. 68, 72 (1848). Legislators simply ignored the fact that the U.S. Constitution and most state constitutions referred to the right to keep and bear arms as a right of the "people" rather than of the "citizen." Stephen Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Go. Mason U. L. Rev. 1, 15 (1981).

Chief Justice Taney argued, in the infamous *Dred Scott* case, that the Constitution could not have intended that free blacks be citizens:

> For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operations of the special laws and from the police regulations which they [the states] considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, ... [A]nd it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold

> public meetings upon political affairs, and to keep and carry arms wherever they went.

Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 416-17 (1856) (emphasis added). In a later part of the opinion, Justice Taney enumerated the constitutional protections afforded to citizens by the Bill of Rights:

> Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

Id. at 450. Clearly, the Court viewed the right to keep and bear arms as one of the fundamental individual rights guaranteed to American citizens by the Bill of Rights; which blacks, who the Court claimed were not American citizens, could not enjoy.

B. Black Codes, Reconstruction and the Fourteenth Amendment: A Fundamental Individual Right to Keep And Bear Arms

After the Civil War, southern legislatures adopted comprehensive regulations, Black Codes, by which the new freedmen were denied many of the rights that white citizens enjoyed. These Black Codes often prohibited the purchase or possession of firearms by freedmen. The Special Report of the Anti-Slavery Conference of 1867 noted with particular emphasis that under the Black Codes, blacks were "forbidden to own or bear firearms, and thus were rendered defenseless against assaults." Reprinted in H. Hyman, *The Radical Republicans and Reconstruction* 219 (1967).

Mississippi's Black Code included the following provision:

> Be it enacted ... [t]hat no freedman, free negro or mulatto, not in the military ... and not licensed so to do by the board of police of his or her county, shall keep or carry firearms of any kind, or any ammunition, ... and all such arms or ammunition shall be forfeited to the informer ... .

1866 Miss. Laws ch. 23, §1, 165 (1865).

In response to the Black Codes and the South's deprivation of the civil rights of the freedmen, the U.S. Congress enacted a series of civil rights bills and the Fourteenth Amendment. The legislative histories of these acts and of the Fourteenth Amendment are replete with denunciations of the disarmament of blacks, and state the intent of the drafters to guarantee to the freedmen the individual right to keep and bear arms for personal self-defense. Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 256 (1983); Halbrook, supra, 4 Go. Mason U. L. Rev. at 21-26; Akhil Reed Amar, *The Bill of Rights* 264-266 (1998). The aforementioned intent was "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment." Amar, supra, *The Bill of Rights* 264. *See also*, Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear*

Arms, 1866-1876 (1998).

One of these civil rights acts was the Freedman's Bureau Act, which required that "laws ... concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens." 14 Stat 173, 176 (1866) (emphasis added).

In support of Senate Bill No. 9, which declared as void all laws in the former rebel states that recognized inequality of rights based on race, Senator Henry Wilson (R., Mass.) explained that: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them ... ." Cong. Globe, 39th Cong., 1st Sess. 40 (1865).

The framers of the Civil Rights Act of 1866 argued that the issue of the right to keep and bear arms by the newly freed slaves was of vital importance. Senator William Salisbury (D., Del.) stated that "[i]n most of the southern States, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power." Id. at 478. Representative Henry J. Raymond (R., N.Y.) explained that the rights of citizenship entitled the freedmen to all the rights of United States citizens: "He has a defined status: he has a country and a home; a right to defend himself and his wife and children; a right to bear arms; a right to testify in the Federal Courts ... ." Id. at 1266.

During the debate on the Fourteenth Amendment, Kansas Senator Samuel Pomeroy asked:

> And what are the safeguards of liberty under our form of Government? There are at least, under our Constitution, three which are indispensable--
>
> 1. Every man should have a homestead, that is, the right to acquire and hold one, and the right to be safe and protected in that citadel of his love
>
> . . . .
>
> 2. He should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete; and
>
> 3. He should have the ballot . . . .

Cong. Globe, 39th Cong., 1st Sess 1182 (1866).

The legislators were specifically concerned with the violation in the South of the freedman's right to keep and bear arms.

> Senator Howard . . . explicitly invoked "the right to keep and bear arms" in his important speech cataloguing the "personal rights" to be protected by the Fourteenth Amendment. Howard and others may have been influenced by the antebellum constitutional commentator William Rawle, who had argued in his 1825 treatise that the Second Amendment as written limited both state and federal government . . .

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1167 (1991) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

> [I]t is abundantly clear that the Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, the right to bear arms, trial by impartial jury . . . . The Freedman's Bureau had already taken steps to protect these rights, and the Amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866.

Eric Foner, *Reconstruction* 258-59 (1988) (emphasis added).

Within three years of the adoption of the Fourteenth Amendment in 1868, Congress was considering legislation to suppress the Ku Klux Klan. In a report on violence in the South, Representative

Benjamin F. Butler (R., Mass.) stated that the right to keep arms was absolutely necessary for protection. He noted instances of "armed confederates" terrorizing blacks, and "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms' which the Constitution expressly says shall never be infringed." H.R. Rep. No. 37, 41st Cong., 3rd Sess. 3 (1871).

The anti-KKK bill was originally introduced to the House Judiciary Committee with the following provision:

> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.

Cong. Globe, 42nd Cong., 1st Sess. 174 (1871) (emphasis added).

Representative Butler explained the purpose of this provision:

> Section 8 is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms,' .... This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks

> upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was especially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge ...; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were there in jail in that county.

H.R. Rep. No. 37, 41st Cong., 3rd Sess. 78 (1871).

The drafters of the civil rights acts and of the Fourteenth Amendment specifically intended to protect the individual fundamental right of the freedmen to keep and bear arms. Amar, supra, 100 Yale L.J. 1131. Amar, supra, *The Bill of Rights.* Halbrook, supra, 4 Go. Mason U. L. Rev. 1. Stephen Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms:" Visions Of the Framers of the Fourteenth Amendment,* 5 Seton Hall Const. L.J. 341-434 (1995).

> The [Reconstruction] Congressmen of this period were hardly interested in strengthening the state militias . . . or in reinforcing states' rights. The Congressional concern about the constitutional right to keep and bear arms was plainly a concern about the self-defense rights of individual citizens, especially freedmen.

David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359, 1453-54 (1998). As noted constitutional scholar Akhil Reed Amar commented, the focus of the Second Amendment had changed:

> In short, between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman. The Creation motto, in effect, was that if arms were outlawed, only the central government would have arms. In Reconstruction a new vision was aborning: when guns were outlawed, only the Klan would have guns. This idea, focusing on private violence and the lapses of local government rather than on the public violence orchestrated by central soldiers, is far closer to the unofficial motto of today's National Rifle Association, "When guns are outlawed, only outlaws will have guns."

Amar, supra, *The Bill of Rights*, at 266.

C. Post-Reconstruction

Even after the passage of the Civil Rights Act and the Fourteenth Amendment, southern states continued in their effort to disarm blacks. Some southern states reacted to the federal acts by conceiving a means to the same end: banning a particular class of firearms, in this case cheap handguns, which were the only firearms the poverty-stricken freedmen could afford. William Tonso, *Gun Control: White Man's Law*, Reason, Dec. 1985, at 23.

In the very first legislative session after white supremacists regained control of the Tennessee legislature in 1870, that state set the earliest southern postwar pattern of legal restrictions by enacting a ban on the carrying, "publicly or privately," of the "belt or pocket pistol or revolver." *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 172 (1871) (citing "An Act to Preserve the Peace and Prevent Homicide"). In 1879, the General Assembly of Tennessee banned the sale of any pistols other than the expensive "army or navy" model revolvers. *State v. Burgoyne*, 75 Tenn. 173, 174 (1881) (citing "An Act to Prevent the Sale of Pistols"). Don Kates, "Toward A History of Handgun Prohibition in the United States" in *Restricting Handguns: The Liberal Skeptics Speak Out* 14 (D. Kates ed. 1979).

In 1881, Arkansas followed Tennessee's law by enacting a virtually identical "Saturday Night Special Law," which again was used to disarm blacks. *Dabbs v. State*, 39 Ark. 353 (1882). Instead of formal legislation, other deep South states simply continued, in violation of the Fourteenth Amendment, to enforce the pre-emancipation statutes prohibiting the possession of firearms by blacks. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 14.

A different route was taken in Alabama, Texas, and Virginia: there, exorbitant business or transaction taxes were imposed in order to price handguns out of the reach of blacks and poor whites. An article in Virginia's university law review called for registration and a "prohibitive" sales tax on handguns as a way of disarming blacks. Comment, *Carrying Concealed*

Weapons, 15 Va. L. Reg. 391, 391-92 (1909).

In many jurisdictions, systems were emplaced where retailers would report to local authorities whenever blacks purchased firearms or ammunition. The sheriff would then arrest the purchaser and confiscate the firearm. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 14. Mississippi legislated this system by enacting the first registration law for retailers in 1906, requiring retailers to maintain records of all pistol and pistol ammunition sales, and to make such available to authorities for inspection. Id.

D. United States v. Cruikshank

Federal prosecutors, invoking the new civil rights laws, brought cases against KKK members and others who had violated the civil rights of freedmen. Many of these prosecutions involved charges that the defendants violated the Second Amendment rights of freedmen by confiscating the freedmen's firearms. *See* Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 Emory L.J. 921 (1984). One of these cases, arising out of the disarmament and murder of armed blacks in the Colfax courthouse (the "Colfax Massacre"), and a subsequent federal prosecution of Klansmen for violation of the freedman's civil rights under the Enforcement Acts, went to the Supreme Court. *See* 16 Stat. 140 § 6 (1870); *see also* 18 U.S.C. §§ 241-242 (1994). *United States v. Cruikshank*, 92 U.S. 542 (1875). The indictment in *Cruikshank* charged, inter alia, a conspiracy by Klansmen to prevent blacks from exercising their civil rights, including the right of assembly and the right to keep and bear arms for lawful purposes.

Cruikshank upheld the Klan's repressive actions against blacks in the South by holding the Enforcement Acts unconstitutional. *Cruikshank*, 92 U.S. 542. The Court held that because the rights of the victimized freedmen, including the right to free speech and the right to keep and bear arms, existed independently of the Constitution, and the first and second amendments guaranteed only that such rights shall not be infringed by the federal government, the federal government had no power to punish a violation of such rights by private individuals or the states. The Fourteenth Amendment offered no relief, the Court held, because the case involved a private conspiracy and not state action; the aggrieved citizens could seek protection and redress only from the state government and not from the federal government. Id. at 553-54.

Cruikshank signaled the end of reconstruction and, with the *Slaughterhouse Cases*, that century's defeat of the Fourteenth Amendment's attempt to make the Bill of Rights effective against state government abuses. "Firearms in the Reconstruction South provided a means of political power for many. They were the symbols of the new freedom for blacks .... In the end, white southerners triumphed and the blacks were effectually disarmed." Kennett and Anderson, supra, at 155. The *Cruikshank* decision gave the green light to the Klan, white militias and other racist groups to forcibly disarm the freedmen and impose white supremacy. George C. Rable, *But*

There Was No Peace: The Role of Violence in the Politics of Reconstruction 129 (1984).

E. Gun Control in the Twentieth Century

At the end of the 19th century, Southern states began formalizing firearms restrictions in response to an increased concern about firearms ownership by certain whites, such as agrarian agitators and labor organizers. In 1893, Alabama, and in 1907, Texas, began imposing heavy business/transaction taxes on handgun sales in order to resurrect economic barriers to ownership. South Carolina, in 1902, banned all pistol sales except to sheriffs and their special deputies, which included company strongmen and the KKK. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 14-15.

The Supreme Court of North Carolina, in striking down a local statute which prohibited the open carrying of firearms without a permit in Forsyth County, stated:

> To exclude all pistols, however, is not a regulation, but a prohibition, of arms which come under the designation of arms which the people are entitled to bear. This is not an idle or an obsolete guaranty, for there are still localities, not necessary to mention, where great corporations, under the guise of detective agents or private police, terrorize their employees by armed force. If the people are forbidden to carry the only arms within their means, among them pistols, they will be completely at the mercy of

these great plutocratic organizations.

State v. Kerner, 181 N.C. 574, 578, 107 S.E. 222, 225 (1921).

In the Northeast, the period from the 1870s to the mid-1930s was characterized by strong xenophobic reactions to Eastern and Southern European immigrants. Armed robbery in particular was associated with the racial stereotype in the public mind of the East and South European immigrant as lazy and inclined to violence and espousing anarchy. The fear and suspicion of these "undesirable" immigrants, together with a desire to disarm labor organizers, led to a concerted campaign by organizations such as the Immigration Restriction League and the American Protective Association, for the enactment of a flat ban on the ownership of firearms, or at least handguns, by aliens. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 15-16.

In 1911, New York enacted the Sullivan law. N.Y. PENAL LAW § 1897 (Consol. 1909)(amended 1911). "Of proven success in dealing with political dissidents in Central European countries, this system made handgun ownership illegal for anyone without a police permit." Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 15. The New York City Police Department thereby acquired the official and wholly arbitrary authority to deny or permit the possession of handguns; which the department used in its effort to disarm the city's Italian population. The Sullivan law was designed to:

> strike hardest at the foreign-born element .... As early as 1903 the authorities had begun to cancel pistol permits in the Italian sections of the city. This was followed by a state law of 1905 which made it illegal for aliens to possess firearms 'in any public place'. This provision was retained in the Sullivan law.

Kennett and Anderson, supra, at 177-78.

Most of the American handgun ownership restrictions adopted between 1901 and 1934 followed on the heels of highly publicized incidents involving the incipient black civil rights movement, foreign-born radicals, or labor agitators. In 1934, Hawaii, and in 1930 Oregon, passed gun control statutes in response to labor organizing efforts in the Port of Honolulu and the Oregon lumber mills. A Missouri permit law was enacted in the aftermath of a highly publicized St. Louis race riot. Michigan's version of the Sullivan law was enacted in the aftermath of the trial of Dr. Ossian Sweet, a black civil rights leader. Dr. Sweet had moved into an all white neighborhood and had been indicted for murder for shooting one of a white mob that had attacked his house while Detroit police looked on. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 18-19.

In its opening statement, in the NAACP's lawsuit against the firearms industry, the NAACP admitted the importance of the constitutional right:

> Certainly the NAACP of all organizations in this country understands and respects the

> constitutional right to bear arms. Upon the NAACP's founding in 1909 in New York City, soon thereafter it took up its first criminal law case [i]n Ossien, Michigan, where a black male, Mr. Sweet, was charged with killing a white supremacist along with several accomplices. The court, to rule out Mr. Sweet and his family to be pushed out of their home in Michigan, it was in that case that the presiding judge, to uphold Mr. Sweet's right to be with his family, coined the popular phrase "a man's home is his castle."

NAACP et al. v. Acusport, Inc. et al., Trial Tr. at 103, 99-CV-3999(JBW), 99-CV-7037(JBW) (E.D.N.Y. March 31, 2003). (The incident actually occurred in Detroit - not "Ossien" - Michigan in 1926. The NAACP and Clarence Darrow came to the defense of Dr. Ossian Sweet who had fatally shot a person in a white mob which was attacking his home because Dr. Sweet had moved into an all-white neighborhood. Furthermore, the phrase "a man's home is his castle," while certainly relevant to the Sweet case, first appears in an English 1499 case.)

After World War I, a generation of young blacks, often led by veterans familiar with firearms and willing to fight for the equal treatment that they had received in other lands, began to assert their civil rights. In response, the Klan again became a major force in the South in the 1910s and 1920s. Often public authorities stood by while murders, beatings, and lynchings were openly perpetrated upon helpless black citizens. And once again, gun control laws made sure that the victims of the Klan's violence were unarmed and did not possess the ability to defend themselves, while at the same time cloaking the often specially deputized Klansmen in the safety of their monopoly of arms. Id. at 19.

The Klan was also present in force in southern New Jersey, Illinois, Indiana, Michigan and Oregon. Between 1913 and 1934, these states enacted either handgun permit laws or laws barring alien handgun possession. The Klan targeted not only blacks, but also Catholics, Jews, labor radicals, and the foreignborn; and these people also ran the risk of falling victim to lynch mobs or other more clandestine attacks, often after the victims had been disarmed by state or local authorities. Id. at 19-20.

II. CURRENT GUN CONTROL EFFORTS: A LEGACY OF RACISM

Behind current gun control efforts often lurks the remnant of an old prejudice, that the lower classes and minorities, especially blacks, are not to be trusted with firearms. Today, the thought remains among gun control advocates: if the poor or blacks are allowed to have firearms, they will commit crimes with them. Even noted gun control activists have admitted this. Gun control proponent and journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was "passed not to control guns but to control Blacks." Robert Sherrill, *The Saturday Night Special* 280 (1972). "It is difficult to escape the conclusion that the 'Saturday night special' is emphasized because it is cheap and it is being sold to a particular class of people. The name is sufficient evidence - the reference is to 'nigger-town Saturday night.'" Barry Bruce-Briggs, *The Great American Gun War*, The Public Interest, Fall 1976 at 37.

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor, and other minorities. In many jurisdictions which require a discretionary gun permit, licensing authorities have wide discretion in issuing a permit, and those jurisdictions unfavorable to gun ownership, or to the race, politics, or appearance of a particular applicant frequently maximize obstructions to such persons while favored individuals and groups experience no difficulty in the granting of a permit. Hardy and Chotiner, "The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibitions" in *Restricting Handguns: the Liberal Skeptics Speak Out*, supra, at 209-10; Tonso, supra, at 24. In St. Louis,

> permits are automatically denied ... to wives who don't have their husband's permission, homosexuals, and non-voters .... As one of my students recently learned, a personal 'interview' is now required for every St. Louis application. After many delays, he finally got to see the sheriff who looked at him only long enough to see that he wasn't black, yelled 'he's alright' to the permit secretary, and

left.

Don Kates, *On Reducing Violence or Liberty*, 1976 Civ. Liberties Rev. 44,
56.

New York's infamous Sullivan Law, originally enacted to disarm Southern and Eastern European immigrants who were considered racially inferior and religiously and ideologically suspect, continues to be enforced in a racist and elitist fashion "as the police seldom grant hand gun permits to any but the wealthy or politically influential." Tonso, supra, at 24.

> New York City permits are issued only to the very wealthy, the politically powerful, and the socially elite. Permits are also issued to: private guard services employed by the very wealthy, the banks, and the great corporations; to ward heelers and political influence peddlers; ....

Kates, "Introduction," in *Restricting Handguns: the Liberal Skeptics Speak Out*, supra, at 5.

A. By Prohibiting the Possession of Firearms, the State Discriminates Against Minority and Poor Citizens

The obvious effect of gun prohibitions is to deny law-abiding citizens access to firearms for the defense of themselves and their families. That effect is doubly discriminatory because the poor, and especially the black poor, are the primary victims of crime and in many areas lack the necessary police protection.

African Americans, especially poor blacks, are disproportionately the victims of crime, and the situation for households headed by black women is particularly difficult. In 1977, more than half of black families had a woman head of household. A 1983 report by the U.S. Department of Labor states that:

> among families maintained by a woman, the poverty rate for blacks was 51%, compared with 24% for their white counterparts in 1977 ... . Families maintained by a woman with no husband present have compromised an increasing proportion of both black families and white families in poverty; however, families maintained by a woman have become an overwhelming majority only among poor black families .... About 60% of the 7.7 million blacks below the poverty line in 1977 were living in families maintained by a black woman.

U.S. Dept. of Labor, *Time of Change: 1983 Handbook on Women Workers* 118 Bull. 298 (1983).

The problems of these women are far more than merely economic. National figures indicate that a black female in the median female age range of 25-34 is about twice as likely to be robbed or raped as her white counterpart. She is also three times as likely to be the victim of an aggravated assault. Id. at 90. *See* United States Census Bureau, *U.S. Statistical Abstract* (1983). A 1991 DOJ study concluded that "[b]lack women were significantly more likely to be raped than white women." Caroline Wolf Harlow, U.S. Dept. of Justice, *Female Victims of Violent Crime* 8

(1991). "Blacks are eight times more likely to be victims of homicide and two and one-half times more likely to be rape victims. For robbery, the black victimization rate is three times that for whites . . . ." Paula McClain, *Firearms Ownership, Gun Control Attitudes, and Neighborhood Environments*, 5 Law & Pol'y Q. 299, 301 (1983).

The need for the ability to defend oneself, family, and property is much more critical in the poor and minority neighborhoods ravaged by crime and without adequate police protection. Id.; Don Kates, *Handgun Control: Prohibition Revisited*, Inquiry, Dec. 1977, at 21. However, citizens have no right to demand or even expect police protection. Courts have consistently ruled "that there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). Furthermore, courts have ruled that the police have no duty to protect the individual citizen. *DeShaney v. Winnebago County Dep't of Social Serv.*, 109 S.Ct. 998, 1004 (1989); *South v. Maryland*, 59 U.S. 396 (1855); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. App. 1983) (en banc); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981) (en banc); *Ashburn v. Anne Arundel County*, 360 Md. 617, 510 A.2d 1078 (1986).

The fundamental civil rights regarding the enjoyment of life, liberty and property, the right of self-defense and the right to keep and bear arms, are merely empty promises if a legislature is allowed to restrict the means by which one can protect oneself and one's family. This constitutional deprivation discriminates against the poor and minority citizen who is more exposed to the acts of criminal violence and who is less protected by the state.

Reducing gun ownership among law-abiding citizens may significantly reduce the proven deterrent effect of widespread civilian gun ownership on criminals, particularly in regard to such crimes as residential burglaries and commercial robberies. Of course, this effect will be most widely felt among the poor and minority citizens who live in crime-ridden areas without adequate police protection.

B. The Enforcement of Gun Prohibitions Spur Increased Civil Liberties Violations, Especially in Regard to Minorities and the Poor.

Constitutional protections, other than those afforded by the right to keep and bear arms, have been and are threatened by the enforcement of restrictive firearms laws. The enforcement of present firearms controls account for a large number of citizen and police interactions, particularly in those jurisdictions in which the purchase or possession of certain firearms are prohibited. Between 1989 and 1998, arrests for weapons carrying and possession numbered between 136,049 and 224,395 annually. FBI Uniform Crime Reports, *Crime in the United States Annual Reports(1989-1998)* Table: Total Arrests, Distribution by Age.

The most common and, perhaps, the primary means of enforcing present firearms laws are illegal searches by the police. A former Ohio prosecutor has stated that in his opinion 50% to 75% of all weapon arrests resulted from questionable, if not clearly illegal, searches. *Federal Firearms Legislation: Hearings Before the Subcomm. on Crime of the House Judiciary Committee*, 94th Cong. 1589 (1975) [hereinafter House Hearings]. A study of Detroit criminal cases found that 85% of concealed weapons carrying cases that were dismissed, were dismissed due to the illegality of the search. This number far exceeded even the 57% percent for narcotics dismissals, in which illegal searches are frequent. Note, *Some Observations on the Disposition of CCW Cases in Detroit*, 74 Mich. L. Rev. 614, 620-21 (1976). A study of Chicago criminal cases found that motions to suppress for illegal evidence were filed in 36% of all weapons charges; 62% of such motions were granted by the court. Critique, *On the Limitations of Empirical Evaluation of the Exclusionary Rule*, 69 NW. U.L. Rev. 740, 750 (1974). A Chicago judge presiding over a court devoted solely to gun law violations has stated:

> The primary area of contest in most gun cases is in the area of search and seizure ... . Constitutional search and seizure issues are probably more regularly argued in this court than anywhere in America ... . More than half these contested cases begin with the motion to suppress ... these arguments dispose of more contested matters than any other.

House Hearings, supra, at 508 (testimony of Judge D. Shields).

These suppression hearing figures represent only a tiny fraction of the actual number of illegal searches that take place in the enforcement of current gun laws, as they do not include the statistics for illegal searches that do not produce a firearm or in which the citizen is not charged with an offense. The ACLU has noted that the St. Louis police department, in the mid-1970s, made more than 25,000 illegal searches "on the theory that any black, driving a late model car has an illegal gun." However, these searches produced only 117 firearms. Kates, *Handgun Control: Prohibition Revisited*, supra, at 23.

In light of these facts, many of the proponents of gun control have commented on the need to restrict other constitutionally-guaranteed rights in order to enforce gun control or prohibition laws. A federal appellate judge urged the abandonment of the exclusionary rule in order to better enforce gun control laws. Malcolm Wilkey, *Why Suppress Valid Evidence?*,Wall Street J., Oct. 7, 1977, at 14. A police inspector called for a "reinterpretation" of the Fourth Amendment to allow police to assault strategically located streets, round up pedestrians en masse, and herd them through portable, airport-type gun detection machines. Detroit Free Press, Jan. 26, 1977, at 4. Prominent gun control advocates have flatly stated that "there can be no right to privacy in regard to armament." Norville Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* 69 (1970).

Florida v. J.L. involved a defendant who had been stopped, searched, and arrested by Miami police after an anonymous telephone caller claimed that one of three black males fitting the defendant's description was in possession of a firearm. Amongst other arguments, the State asked the Court to carve out a gun exception to the Fourth Amendment. The Supreme Court unanimously declined to create such an exception to the Fourth Amendment. *Florida v. J.L.*, 120 S.Ct. 1375 (2000).

Statistics and past history show that many millions of otherwise law-abiding Americans would not heed any gun ban. One should consider America's past experience with liquor prohibition. Furthermore, in many urban neighborhoods, especially those of poor blacks and other minorities, the possession of a firearm for self-defense is often viewed as a necessity in light of inadequate police protection.

Federal and state authorities in 1975 estimated that there were two million illegal handguns among the population of New York City. Selwyn Raab, *2 Million Illegal Pistols Believed Within the City*, N.Y. Times, Mar. 2, 1975, at 1, (estimate by BATF); N.Y. Post, Oct. 7, 1975, at 5, col. 3 (estimate by Manhattan District Attorney). In a 1975 national poll, some 92% of the respondents estimated that 50% or more of handgun owners would defy a confiscation law. 121 Cong. Rec. S189, 1 (daily ed. Dec. 19, 1975).

Even registration laws, as opposed to outright bans, measure a high percentage of non-compliance among the citizenry. In regard to Illinois' firearm owner registration law, Chicago Police estimated the rate of non-compliance at over two thirds, while statewide non-compliance was estimated at three fourths. In 1976, Cleveland city authorities estimated the rate of compliance with Cleveland's handgun registration law at less than 12%. Kates, supra, *Handgun Control: Prohibition Revisited*, at 20 n.1. In regard to citizens' compliance with Cleveland's "assault gun" ban, a Cleveland Police Lieutenant stated: "To the best of our knowledge, no assault weapon was voluntarily turned over to the Cleveland Police Department ... considering the value that these weapons have, it certainly was doubtful individuals would willingly relinquish one." Associated Press, *Cleveland Reports No Assault Guns Turned In*, Gun Week, Aug. 10, 1990, at 2.

In response to New Jersey's "assault weapon" ban, as of the required registration date, only 88 of the 300,000 or more affected weapons in New Jersey had been registered, none had been surrendered to the police and only 7 had been rendered inoperable. Masters, *Assault Gun Compliance Law*, Asbury Park Press, Dec. 1, 1990, at 1. As of November 28, 1990, only 5,150 guns of the estimated 300,000 semiautomatic firearms banned by the May 1989 California "Assault Gun" law had been registered as required. Jill Walker, *Few Californians Register Assault Guns*, Washington Post, Nov. 29, 1990, at A27.

These results suggest that the majority of otherwise law-abiding citizens will not obey a gun prohibition law; much less criminals, who will disregard such laws anyway. It is ludicrous to believe that those who will rob, rape and murder will turn in their firearms or any other weapons they may possess to the police, or that they would be deterred from possessing them or using them by the addition of yet another gun control law to the more than twenty thousand gun laws that are already on the books in the U.S. James Wright, Peter Rossi and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* 244 (1983).

A serious attempt to enforce a gun prohibition would require an immense number of searches of residential premises. Furthermore, the bulk of these intrusions will, no doubt, be directed against racial minorities, whose possession of arms the enforcing authorities may view as far more dangerous than illegal arms possession by other groups.

> As civil liberties attorney Kates has observed, when laws are difficult to enforce, "enforcement becomes progressively haphazard until at last the laws are used only against those who are unpopular with the police." Of course minorities, especially minorities who don't "know their place," aren't likely to be popular with the police, and those very minorities, in the face of police indifference or perhaps even antagonism, may be the most inclined to look to guns for protection - guns that they can't acquire legally and that place them in jeopardy if possessed illegally. While the intent of such laws may not be racist, their effect most certainly is.

Tonso, supra, at 25.

III. THE DISTRICT'S GUN CONTROL LAWS HAVE BEEN A DISASTER.

More than thirty years ago the District of Columbia enacted the multi-faceted Firearms Control Regulations Act. The Act prohibits the possession of a handgun that was not registered with city police prior to Sept. 24, 1976. D.C. CODE ANN. § 7-2502.02(a)(4). It also requires the registration of all privately owned firearms and that firearms kept at home be rendered useless for protection by being "unloaded and disassembled or bound by a trigger lock or similar device." D.C. CODE ANN. §§ 7-2502.01(a), 7-2507.02.

The purpose of the ban was to alleviate violent crime. Yet, statistics indicate that during the 30 year ban, violent crime in the District has not been reduced, despite a national decline. To the contrary, since the District of Columbia banned handguns in 1976, violent crimes, particularly those involving firearms, have increased. Ironically, murder had been declining in the District before the ban, but increased after the ban was imposed. From 1971, when the murder and non-negligent manslaughter rate was 37.1 per 100,000, this number steadily declined until in 1976, when it had been reduced to 26.8 per 100,000. Bureau of Justice Statistics: Reported Crime in the District of Columbia, http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm(select "District of Columbia," "Violent crime rates," and years "From: 1960 To: 2004"). After the handgun ban went into effect, the murder and non-negligent manslaughter rate immediately and dramatically increased to the point where, in 1991, the rate was

80.6 per 100,000; in other words, the effect of the handgun ban was that the murder rate tripled. Id. In comparison, the U.S. homicide rate rose only 12.64 % during that same period. Bureau of Justice Statistics: Reported Crime in United States-Total, http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm (select "United States - Total," "Violent crime rates," and years "From: 1960 To: 2004"). (The national murder and non-negligent manslaughter rate went from 8.7 per 100,000 in 1976 to 9.8 per 100,000 in 1991. Id.) Senator Hutchison recently declared that "[t]he murder rate in D.C. today is eight times higher than the rest of the country, even though violent crime has decreased to a 27-year low nationwide." Senator Kay Bailey Hutchison, at http://www.senate.gov/~hutchison/prl647.htm.

"Five years before the D.C. Council banned nearly all firearms in 1976, the District's murder rate fell from 37 to 27 per 100,000 people. In the five years after 1976, the murder rate rose to 35 per 100,000 people. Between 1976 and 1991, the D.C. homicide rate rose 200 percent. The national homicide rate during the same 15-year period rose just 12 percent. According to the FBI, the District has the highest violent crime rate in the nation of any city over 500,000 people. Its homicide rate is eight times higher than the rest of the country and four times higher than similarly sized Ft. Worth, Texas. The comparison is apt. Texas has some of the most constitutional gun laws in the country." *Repeal D.C. gun ban*, Wash. Times, May 21, 2005, at A12.

Studies for Congress, the Department of Justice (DOJ), the Congressional Research Service, the Library of Congress, the National Academy of Sciences (NAS), and the Centers for Disease Control and Prevention (CDC) have found no evidence that "gun control" reduces crime. "The fact is that there are perhaps 20,000 gun laws now in effect in this country. That these laws have had limited or no effect on the rate of violent crime is reasonably transparent."James Wright, Peter Rossi and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America*, 323 (1983). A 1998 Library of Congress study concluded that "it is difficult to find a correlation between the existence of strict firearms regulations and a lower incidence of gun-related crimes." Library of Congress, *Report for Congress: Firearms Regulations in Various Foreign Countries* 1, LL-98-3, 97-2010 (1998).

The Act makes no exception for cases of self-defense. The District of Columbia is the only jurisdiction in the U.S. that prohibits keeping firearms in an operable condition at home for defense against criminal attack. As a result, law abiding D.C. residents have been deprived of the right to defend themselves even in their own homes, and criminals have unleashed havoc throughout District neighborhoods at a rate unparalleled by any other city in the country.

Violent crime occurs faster than the police are able to react. And, in the District, unarmed citizens are at the mercy of violent attackers. Nation-wide, in 69.2% of all cases of violent crime, it took more than 5 minutes for the police to respond. Bureau of Justice

Statistics: Table 107. Personal property crimes, 2003, http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus/current/cv03107.pdf (last visited June 15, 2006). In 40.3% of all the violent crimes reported, it took police more than 11 minutes to respond. Id. Despite having the largest law enforcement presence for any American city, the District continues to be plagued by violent crime. "[T]he District has more officers per capita than any other city with a population of at least 500,000." Matthew Cella, *Police Response to 911s Slowing: D.C. Cops Take Minute More*, Wash. Times, May 10, 2004, at A1. Yet, the District's Metropolitan Police Department is doing worse than even the national average response time. The District's Metropolitan Police Department's average response time for the highest priority calls in fiscal year 2003 was 8 minutes and 25 seconds. Id. "D.C. Council member Kathy Patterson, Ward 3 Democrat and chairman of the Judiciary Committee, which oversees the police department, said the slower response times were disturbing. ...'Seconds matter when you're talking about 911 response,' she said." Id.

The case of Rebecca Griffin is illustrative. Ms. Griffin awoke to the screams of one of her daughters, a witness in an upcoming criminal trial, being bound and gagged by two kidnappers in her Washington, D.C., home. Although another daughter called the police, they, of course, did not appear until long after the fact. When Ms. Griffin and her other daughters tried to rescue the bound daughter, one of criminals attacked with a knife, slashing Ms. Griffin and one of the daughters. Fortunately, Ms. Griffin was able to break free and retrieve an unregistered .32 cal.

revolver and shoot the knife-wielding home invader. The other suspect fled. Brian Reilly, *Mother Shoots Intruder,* Wash. Times, December 14, 1994, at C3. The very idea that someone like Ms. Griffin should be charged with and prosecuted for possessing an unregistered handgun, possessing ammunition for an unregistered firearm, possessing a loaded firearm and carrying a pistol without a license in the home, and that she should be imprisoned for years, simply for protecting her children from knife-wielding violent criminals that had broken into her home, is unconscionable.

The right of defending one's life is one of the most basic rules of nature. (The right to defend oneself from a deadly attack is also a fundamental right. "The right to defend oneself from deadly attack is fundamental." *United States v. Panter,* 688 F.2d 268, 271 (5th Cir. 1982). In no place should this rule apply more than in one's home. "Inherent in the right to defend one's home, one's castle, is the right to have suitable and effective means to do so. In modern times, effective self-defense implies a handgun." David Caplan & Sue Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments - and the Castle Privacy Doctrine in the Twenty-First Century,* 73 U. Missouri-Kansas City School of Law 1073, 1105 (Summer 2005).

CONCLUSION

Gun control laws like the ones at issue in this case bear especially hard on the poor and minorities. Enforcement of gun control laws, like the ones at issue, will have a disparate impact upon minorities and the poor.

Judgment below should be upheld.

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In the

Supreme Court of the United States

DISTRICT OF COLUMBIA, et al.,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia

BRIEF OF CRIMINOLOGISTS, SOCIAL SCIENTISTS, OTHER DISTINGUISHED SCHOLARS AND THE CLAREMONT INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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February 8, 2008

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INTEREST OF THE AMICI CURIAE

Amici curiae include an institution and many distinguished scholars from various fields who are concerned about ensuring accuracy in the scholarship advanced in important matters of public policy such as those involved in this case.[1]

A. The Claremont Institute

The Claremont Institute is a nonprofit organization which seeks to promote scholarly analysis on important policy issues including gun control.

B. Distinguished Scholars

Frederick Bieber is a professor at Harvard Medical School who lectures on gun-shot wounds.

David Bordua is Professor Emeritus of Sociology at the University of Illinois at Champaign. He is the author or co-author of, among other works, *Firearms Ownership and Violent Crime: A Comparison of Illinois Counties*, in J. Byrne and R. Sampson (ed.), *The Social Ecology of Crime* (1986); *Gun Control and Opinion Measurement*, 5 Law & Pol'y Quarterly 345 (1983); and *Patterns of Legal Firearms Ownership: A Situational*

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 7 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The NRA Civil Rights Defense Fund made financial contributions to support the preparation of this brief.

and Cultural Analysis of Illinois Counties, 2 Law & Pol'y Quarterly 147 (1979).

Edwin Cassem is a professor at Harvard Medical School and co-author of *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda*, 62 Tenn. L. Rev. 513 (1995).

Raymond Kessler is a professor of criminal justice at Sul Ross State University. He has authored, among other works, *Enforcement Problems of Gun Control: A Victimless Crimes Analysis*, 16 Crim. L. Bulletin 131 (1980); *Gun Control and Political Power*, 5 Law & Pol'y Quarterly 381 (1983); and *The Ideology of Gun Control*, 12 Quarterly J. of Ideology 381 (1988).

Gary Mauser is Professor Emeritus at the Institute for Canadian Urban Research Studies, Simon Fraser University in Burnaby, British Columbia. He has authored or co-authored, among other works, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 Harv. J.L. & Pub. Pol'y 651 (2007); *Gun Control in the United States*, 3 Crim. L. Forum 147 (1992); *An Evaluation of the 1977 Canadian Firearms Legislation: Robbery Involving a Firearm*, 35 Applied Econ. 423 (2003), *On Defensive Gun Use Statistics*, 13 Chance [Magazine of the American Statistical Association] (2000).

Daniel Polsby is dean and professor of law at George Mason University. He has authored or co-authored, among other works: *Long Term Non-Relationship of Firearm Availability to Homicide*, 4 Homicide Studies 185 (2000); *American Homicide Exceptionalism*, 69 U. Colo. L. Rev. 969 (1998); *Firearms*

Costs, Firearms Benefits and the Limits of Knowledge, 86 J. Crim. L. & Criminology 207 (1995); *Of Holocausts and Gun Control*, 75 Wash. U. L.Q. 1237 (1998); and *Reflections on Violence, Guns and the Defensive Use of Deadly Force*, 49 Law & Contemp. Probs. 89 (1986).

Lawrence Southwick is Professor Emeritus at the State University of New York-Buffalo and has authored: *Self-Defense with Guns: The Consequences*, 28 J. Crim. Just. 351 (2000); *An Economic Analysis of Murder and Accident Risks for Police in the United States*, 30 Applied Econ. 593 (1998); and *Do Guns Cause Crime? Does Crime Cause Guns? A Granger Test*, 25 Atlantic Econ. J. 256 (1997).

Lance Stell is the Charles A. Dana Professor and Director of Medical Humanities at Davidson College. He is the author of *Self Defense and Handgun Rights*, 2 J.L. Econ. & Pol'y 265 (2006); *Gun Control*, in *A Companion to Applied Ethics*, R.G. Frey & C.H. Wellman (eds.) 192 (2003); *The Production of Criminal Violence in America: Is Strict Gun Control the Solution?*, 32 J.L. Med. & Ethics (2001); *Gun Control and the Regulation of Fundamental Rights*, Crim. Just. Ethics (2001); and *Guns, Politics and Reason*, 9 J. Am. Culture 71 (1986).

William Tonso is a professor of sociology at the University of Evansville. He edited *The Gun Culture and Its Enemies* (1989), and authored *Social Science and Sagecraft in the Debate Over Gun Control*, 5 Law & Pol'y Quarterly 325 (1983).

Walter E. Williams is the John M. Olin Distinguished Professor of Economics at George Mason University. A nationally syndicated columnist, he is the author of six books and numerous publications on various issues relating to economics and public policy, including gun control.

Additional *amici* are listed in the Appendix.

SUMMARY OF ARGUMENT

Handgun prohibition is simply not effective to produce good and valuable effects in society. Handgun prohibitions such as those enacted by the City Council of the District of Columbia ("the District") appear to be effective only at removing from law-abiding citizens the best means of protecting themselves, their loved ones and others from violent criminals. The District's 30-year social experiment with handgun prohibition has, if anything, illustrated this sad fact. Rather than becoming safer, our Nation's Capital has unfortunately become known as the "murder capital" of the United States, one of the most violent cities in the country. In light of the District's gun prohibitions, there is little that the residents can realistically do but hope that they do not become victims themselves.

This case involves various statistics and differing analyses of those statistics. But, in the end, the reality is that the District is claiming that its gun laws—the most restrictive gun prohibitions in the Nation—have been effective in reducing violent crime when, among other things:

- since the implementation of the 1977 ban, the District's murder rate has only *once* fallen below what it was in 1976;

- since 1977, there have been only *four years* when the District's violent crime rate fell below the rate in 1976; and

- in an incredible 15 years that the ban has been in place the District has ranked #1 or #2 in murders; in four of those years it was #4.

The District and its *amici* assert that the District's gun bans actually reduced violent crime notwithstanding the increased crime rates. However, the studies advanced in support of this position are fundamentally flawed and reach conclusions favorable to the District only through questionable selection of data and extremely unorthodox methodologies—such as ignoring large population changes, and counting only raw numbers of homicides (which incorrectly included justifiable homicides as well as murders) rather than per capita murder rates. Correctly analyzed, the District's crime statistics confirm that there is no real evidence that the handgun ban helped, and reason to believe that it may have hurt the District's residents.

Underlying the District's gun ban is the theory that the presence of more guns in a given society means there will be more violence and death. National and international data refute this; if anything they show that areas with more gun ownership often have lower violent crime or murder rates than those that forbid guns. Nor do such bans avert suicide, though they do cause the suicidal to turn to equally effective methods other than guns.

The District's policies are not backed by evidence justifying the need to divest law-abiding persons of the only reliable means of self-defense. This is especially true because those citizens virtually never commit violent crimes. The unique importance of firearms is that only they allow weaker people to resist predation by stronger ones:

> Reliable, durable, and easy to operate, modern firearms are the most effective means of self-defense ever devised. They require minimal maintenance and, unlike knives and other weapons, do not depend on an individual's physical strength for their effectiveness. Only a gun can allow a 110 pound woman to defend herself against a 200 pound man.

Linda Gorman & David B. Kopel, *Self-defense: The Equalizer*, 15 Forum for Applied Research & Pub. Pol'y 92, 92 (2000).

ARGUMENT

I. There Is No Evidence that the District's Gun Prohibitions Have Produced Good Results.

A. Following the enactment of the District's handgun ban, the District has not been made safer—indeed, the District has only become an even more dangerous place to live.

Contrary to the assertions of the District and its *amici*, there is simply no persuasive evidence that the District's handgun ban has reduced violent crime. Indeed, if there is anything to be discerned from the state of affairs in the District, it is that the handgun ban has made things worse, as murder and other violent crime has skyrocketed.

Over the five pre-ban years the murder rate fell from 37 to 27 per 100,000 population. *See* Appendix at 3a (FBI data on the District's murder rates since 1960[2]). In the five post-ban years the murder rate rose to 35. *Id.* Averaging the rates over the 40 years surrounding the bans yields a pre-ban DC rate (1960-76) of 24.6 murders. The average for the post-ban years is nearly double: 47.4 murders per 100,000 population. The year before the bans (1976), the District's murder rate was 27 per 100,000 population; after 15 years under the bans it had *tripled* to 80.22 per 100,000 (1991). *Id.*

After 1991, the homicide toll declined in the District and still "the percentage of killings committed with firearms remained far higher than it was when the ban was passed." Paul Duggan, "Crime Data Underscores Limits of D.C. Gun Ban's Effectiveness," *Washington Post*, Nov. 13, 2007, at B01.[3] In 2003 the Secretary of Defense noted that the District's murder rate was higher than Baghdad's. Robert Endorf, *The District of Columbia Gun Ban: Where the Seductive Promise of Gun Control Meets Reality*, 19 J. Firearms & Pub. Pol'y 43, 44 (2007). In 2006, even after a decade of drops in the murder rate, the District's murder rate "was more than five times higher than the national average, and more than double the rate in comparably sized cities." Nelson Lund,

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[2] 1960 is the first year for which this data is available.

[3] http://www.washingtonpost.com/wp-dyn/content/article/2007/11/12/AR2007111201818.html?sid=ST2007111300923

D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?, 18 Geo. Mason U. Civ. Rts. L.J. 229, 230 n.5 (2008) (citing FBI statistics on murder data from DC and other jurisdictions).

After the gun prohibitions, the District became known as the "murder capital" of America. Before the challenged prohibitions, the District's murder rate was declining, and by 1976 had fallen to the 15th highest among the 50 largest American cities. *See* Appendix at 4a. After the ban, the District's murder rate fell below what it was in 1976 *only one time*. *Id.* at 3a. In half of the post-ban years, the District was ranked the worst or the second-worst; in four years it was the fourth worst. *Id.* at 4a.

Nor is there evidence that the bans have reduced overall violent crime rates. From 1977 to 2006, there were only *four years* when the District's violent crime rate fell below the rate in 1976. *See* District of Columbia Crime Rates 1960-2006, http://www.disastercenter.com/crime/dccrime.htm (reporting data from FBI Uniform Crime Reports[4]). In 2006, the District's "overall violent crime rate was about triple the national average, and about fifty percent higher than in comparably sized cities." Lund, *supra*, at n.5.

It is theoretically possible that the gun bans had some small positive effect that has been continually overwhelmed by other, more powerful factors causing the murder and violent crime rates to climb. However, in light of this undisputed statistical evidence, the counter-evidence for any "positive effects" would have to be extraordinary. No such counter-evidence exists.

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[4] Regarding the FBI Uniform Crime Reports, see http://www.fbi.gov/ucr/ucr.htm.

B. Studies relied upon by the District and amici to try to explain away the District's substantial increase in murder during the handgun ban period are unreliable.

1. The Loftin study

The only evidence for the District's and *amici*'s claim that the District's handgun ban reduced murder is a study published in 1991 by Colin Loftin and others. Colin Loftin, *et al.*, *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991). However, the Loftin study—which compared statistics from two time periods: 1968-76 and 1977-87—contains many errors that render the study unreliable.

The fundamental error in the Loftin study is that, contrary to standard criminological practice, it utilizes only the *raw number* of "homicides" (as Loftin defined that term)[5] per month in the District rather than murder

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[5] The Loftin study's definition of "homicide" (from data from the National Center for Health Statistics) included civilian self-defense killings. *See* Loftin et al., at 1616 (defining "homicide" so as to include homicide by legal intervention with a firearm, which has its own ICD-9 code: E970). It is reasonable to assume that more defensive killings took place before the 1977 implementation of the ban on using any firearm for home defense. Accordingly, Loftin's reported decline in "homicide" may have partly reflected the disappearance of justifiable homicide against violent home invaders. By contrast, the FBI data concerns only criminal killings (murders and nonnegligent manslaughters), which we use here. *See* FBI Uniform Crime Reporting Methodology, http://www.fbi.gov/ucr/cius2006/about/table_methodology.html.

rates per year, which, as noted above, continued to rise during the handgun ban period. *See id.*

The extremely unorthodox methodology of using raw numbers rather than rates was buttressed by the Loftin study's use of the wrong before/after date. The study used October 1976 (the date the bans were enacted), and failed to consider the lawsuit which delayed the effective date of the ban until February 1977.[6] *See* Chester L. Britt, Gary Kleck & David J. Bordua, *A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment*, 30 Law & Soc'y Rev. 361, 374 (1996) (discussing the fact that the law became "fully effective" on February 21, 1977).

The Loftin study accurately reports that the raw number of "homicides" declined in the first few years after the ban. *But murder rates did not.* The Loftin study's incorrect use of raw numbers instead of murder rates obscures the more plausible reason behind the drop in raw numbers: a substantial decline in the District's population. During the Loftin study period, the District's population declined from 809,000 in 1968 to 622,000 in 1987. *See* http://www.disastercenter.com/crime/dccrime.htm. Murder rates rose after the ban.

The Loftin study acknowledges the possibility of population decline, but, rather than examine population estimates for the period, simply concludes based on vital statistics that there was no population decline. Loftin, et al., *supra*, at 1616. Yet population estimates for the District clearly show the large decline between the two study periods (1968-76 and 1977-87).

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[6] An injunction against the entire law was granted by the D.C. Superior Court in December 1976. The injunction was lifted by the District of Columbia Court of Appeals on February 4, 1977. *See McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978).

Moreover, again contrary to criminological practice, the Loftin study takes no account of other changes (e.g., large police personnel increases) which may also have impacted the total homicides.

However, even using Loftin's own data, when analyzed under correct criminological methodology (examining yearly murder rates per 100,000 (to correct for population changes)) the 25% number vanishes. Thus, when adjusted for population decline, the most that Loftin's own data shows is a drop in the *total* homicide rate of 33.0 per 100,000, to 31.2 per 100,000. This change (5.7%) is smaller than the one that the Loftin study authors themselves call statistically insignificant. *See* Loftin, et al., *supra*, at 1617 (stating that a decline of 7% in gun-related homicides and a 12% increase in gun-related suicides occurring outside the District was statistically insignificant).

Also, re-creating the Loftin study using the FBI's data on murder and non-negligent homicide rates (not the Loftin study's broader definition of homicide) reveals no significant change in the District's murder rate. Instead, the difference between the mean murder rate for 1968 through 1976 (33) and for 1977 through 1987 (30) is statistically insignificant. *See* Appendix at 3a.

Furthermore, the Loftin study is, in statistical terms, a "fragile" study. *See* Britt, et al., *supra*, at 375 (discussing "fragility"). That is, the Loftin study and its conclusions hold together only if certain variables are carefully chosen and not altered. If virtually any variable is adjusted even slightly, the study's conclusions are unsupported—or even contradicted. For example, using the correct "effective date," 1977 (the year that the injunction against the ban was lifted), makes the resulting pre-ban to post-ban change in murder rates insignificant. Adding one more year of data to either the beginning or end of the sample also makes the resulting change insignificant. *See id.* (demonstrating the fragility of the Loftin's study even using the study's incorrect "raw number" methodology). And if all available data is used (1960-2006), one would conclude, under Loftin's methodology, that the handgun ban caused a large and significant increase in the murder rate. *See* Appendix at 3a, 4a.

Among other issues, the "fragility" of the Loftin study and its incorrect "effective date" were part of a larger published debate concerning the reliability of the Loftin study. *See* Britt, et al., *supra* (criticizing the Loftin study); David McDowall, Colin Loftin & Brian Wiersema, *Using Quasi-Experiments to Evaluate Firearm Laws: Comment on Britt et al.'s Reassessment of the DC Gun Law*, 30 Law & Soc'y Rev. 381 (1996); Britt, et al., *Avoidance and Misunderstanding: A Rejoinder to McDowall et al.*, 30 Law & Soc'y Rev. 393 (1996). In 2004, the National Academy of Sciences rendered its verdict on the debate, finding the Britt, *et al.* critique (and other studies) to be sound, stating:

> Britt et al. (1996) ... demonstrate that the earlier conclusions of Loftin et al. (1991) are sensitive to a number of modeling choices. They demonstrate that the same handgun-related homicide declines observed in Washington, DC, also occurred in Baltimore, even though Baltimore did not

> experience any change in handgun laws. Thus, if Baltimore is used as a control group rather than the suburban areas surrounding DC, the conclusion that the handgun law lowered homicide and suicide rates does not hold. Britt et al. (1996) also found that extending the sample frame an additional two years (1968-1989) eliminated any measured impact of the handgun ban in the District of Columbia. Furthermore, Jones (1981) discusses a number of contemporaneous policy interventions that took place around the time of the Washington, DC, gun ban, which further call into question a causal interpretation of the results.
>
> In summary, the District of Columbia handgun ban yields no conclusive evidence with respect to the impact of such bans on crime and violence. The nature of the intervention—limited to a single city, nonexperimental, and accompanied by other changes that could also affect handgun homicide—make it a weak experimental design. *Given the sensitivity of the results to alternative specifications, it is difficult to draw any causal inferences.*

Charles F. Wellford, John V. Pepper & Carol V. Petrie (eds.), *Firearms and Violence: A Critical Review* 98 (National Academies Press 2005) (emphasis added; footnote omitted).

After the ban, how did the murder rate in the District change in relation to the murder rates in nearby

Virginia and Maryland? The District always had a higher murder rate relative to Maryland and Virginia. As the following graph indicates, before the ban, murder was declining in all three. After the ban, all three had generally stable murder rates for a decade until all three began rising—the District much more than the other two. The claim that the bans have succeeded simply does not square with the District's failure to reduce its murder rate even slightly relative to its neighbors. *See* graph, Appendix at 6a.

The reality is that one's chance of being murdered in the District has not dropped, but has continually gone up following the enactment of the gun ban. In only one of the 30 post-ban years has the District's murder rate been lower than its pre-ban 1976 rate. See Appendix at 3a. And, as to overall violent crime, in only *four* of the post-ban years was the District's rate below the pre-ban year 1976. *See* http://www.disastercenter.com/crime/dccrime.htm.

In response to the fact that the District's homicide rates continued to increase (sometimes drastically) during the handgun ban period, *amici* for the District argue that, "in the mid-1980s," "the entire nation experienced an increase in violent crimes during this period because of the emergence of the crack cocaine market and related gang activity." Brief of Professors of Criminal Justice as *Amici Curiae* in Support of Petitioners, at 14. However, this explanation ignores the fact that, as the attached graphs illustrate, *see* Appendix at 7a & 8a, the District's murder rate grew much worse relative to the 50 largest U.S. cities and to the United States as a whole. The crack epidemic and gang activity was national; but while murder in other cities rose, murder in the District skyrocketed.

Some other factors unique to the District must have been at work. It is possible that the District's gun law itself may have been a contributing factor in the increased crime. What is certain is that the Loftin study's conclusion that murder was reduced is unreliable.

2. The Kellermann study

The District and its amici claim that merely living in a house with a gun triples the chance of becoming a homicide victim, citing Arthur L. Kellermann, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993). *See* Cert. Petition at 25; Petitioners' Brief at 52; Brief of *Amici Curiae* American Public Health Ass'n, et al., at 14. Yet, though the Kellermann study analyzed over 400 homicides, "the authors did not document a single case in which the victim was killed with a gun kept in the victim's home." Gary Kleck, *Targeting Guns: Firearms and Their Control* 245 (1997). Apparently in over 95% of the cases the gun was brought to the home by the killer. *Id.* at 245-46.

It seems the decedents may have been unrepresentative of ordinary gun owners; their deaths may have stemmed from high risk career or personal relationship choices, not from their gun ownership. A national study of gun murders between acquaintances in homes finds "the most common victim-offender relationship was ... between persons involved in drug dealing, where both parties were criminals who knew one another because of prior illegal transactions." *Id.* at 236.

Moreover, the Kellermann study vastly underestimates the defensive benefits of guns in the home by acknowledging only instances when guns killed an intruder, even though the vast majority of defensive uses result in criminals fleeing rather than being shot. *See* Brief of *Amici Curiae* International Law Enforcement Educators & Trainers Ass'n, et al., at 15 (discussing defensive benefits). And, if they were shot, six times more criminals would survive than would die. Don B. Kates, *The Value of Civilian Arms Possession as Deterrent to Crime or Defense Against Crime*, 18 Am. J. Crim. L. 113, 135-36 (1991).

Furthermore, the Kellermann study is founded upon flawed assumptions as to causation, rendering the study unreliable and leading to absurd conclusions. For example: if a group of people who died in a particular year were compared with a group who did not die, it is highly probable that that comparison will reveal that many more of the decedents visited a hospital in that year. Under the Kellermann methodology, one would be allowed to erroneously conclude that hospitals cause death. *See* John R. Lott, Jr., *More Guns, Less Crime* 24 (Univ. of Chicago Press 2000) (2d ed.) (giving this example); *see also* Kleck, *Targeting Guns*, at 243-47; Gary Kleck, *Can Owning a Gun Really Triple the Owner's Chances of Being Murdered? The Anatomy of an Implausible Causal Mechanism*, 5 Homicide Studies 64-77 (2001).

Noting these problems with the Kellermann study, the National Academy of Sciences found that the Kellermann "conclusions are not tenable." Charles F. Wellford, John V. Pepper & Carol V. Petrie (eds.), *Fire-*

arms and Violence: A Critical Review 118-19 (National Academies Press 2005).[7]

II. Criminological Evidence from the United States and from Foreign Jurisdictions Discredits the Notion that "More Guns Equals More Murder."

The District's lack of evidence supporting its gun policies are not surprising, given the shaky foundations and erroneous assumptions underlying those policies. The primary pillar of the argument that gun prohibition produces good results is the notion that "more guns equals more murder." *See* Cert. Pet. at 22-29; Petitioners' Br. at 49-55; Brief of *Amici Curiae* American Public Health Ass'n, et al., at 8-20; Brief of Professors of Criminal Justice as Amici Curiae in Support of Petitioners, at 5. However, this notion is demonstrably untrue.

A. United States statistics show that increased gun availability does not increase the number of murders.

The United States has the most extensive data on gun ownership and murder. The earliest reliable gun ownership data begin right after WWII. In 1946 there were 34,400 civilian firearms per 100,000 Americans and the murder rate was 6.9 per 100,000 population; 60 years later in 2004, gun ownership had almost tripled (85,000 guns per 100,000). *See* Appendix at 1a. Yet the murder rate had actually *declined* to 5.5 per 100,000. *Id.* This evidence discredits the simplistic notion that increasing the civilian gunstock produces concomitant (or any) increases in murder.

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[7] *Amici* American Academy of Pediatrics, et al., rely on a later Kellermann study in asserting such a relationship between home gun ownership and homicide. AAP Br. at 9 (citing Arthur L. Kellermann, et al., *Injuries and deaths due to firearms in the home*, 45 J. Trauma, Injury, Infection, & Critical Care 263 (1998)). However, the 1998 study contains many of the same flaws. For example, in that study only 14.2% of the homicides studied involved the gun kept in the home where the homicide occurred. Additionally, "many these shootings almost certainly occurred in the home of the attacker and not of the victim...." These and other problems render the 1998 Kellermann just as unreliable as the 1993 study. *See* Kleck, *supra*, 5 Homicide Stud. at 69-71.

TABLE I[8]

Year	Guns per 1000 persons	Murders per 1000 persons
1946	344	0.069
1950	381	0.053
1960	431	0.051
1970	549	0.079
1980	738	0.101
1990	853	0.094
2000	885	0.055
2001	876	0.056
2002	867	0.056
2003	858	0.057
2004	850	0.055

These figures discredit the theory that predicts increased murder from an increase in guns. For example, the gunstock per 1000 persons rose from 627 to 858 over the 30-year period between 1974-2003, but the murder rate fell 41%. *See* Appendix at 1a.

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[8] *See* Appendix at 1a.

Additionally, according to the National Crime Victimization Survey, despite the increasing gunstock, nonfatal firearms crimes fell by over 50% since 1993.[9] Consideration of such data led one researcher to conclude that, while rising crime rates might cause frightened citizens to acquire guns, such rises in the civilian gunstock do not increase violent crime. Lawrence Southwick, *Do Guns Cause Crime? Does Crime Cause Guns? A Granger Test*, 25 Atlantic Econ. J. 256 (1997).

Professor Southwick's conclusions confirmed those of a study of gun ownership and crime over 170 American cities with widely varying levels of gun ownership; the study controlled for other factors in violence rates. The results showed that higher violence levels increased gun ownership; but increased gun ownership did not increase murder or other crimes. Gary Kleck & Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on City Violence Rates*, 9 J. Quant. Criminology 249-87 (1993); *see also* Lott, *More Guns, Less Crime*, *supra*, at 113-14 (reaching the same conclusion from data from states across the entire country).

Subsequently, the most extensive and sophisticated econometric analysis (covering 20 years in 50 states) of whether increased levels of gun handgun ownership, or of gun ownership in general, increases crime concluded: "The estimated net effect of guns on crime... is generally very small and *insignificantly different from zero*." Carlisle Moody & Thomas Marvell, *Guns*

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[9] *See* United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Nonfatal firearm-related violent crimes 1993-2005 http://www.ojp.usdoj.gov/bjs/glance/tables/firearm nonfataltab.htm.

and Crime, 71 So. Econ. J. 720, 735 (2005) (emphasis added).

B. The Duggan study relied on by the District and amici is fundamentally flawed.

To counter such evidence, the District and its *amici* cite a study by Mark Duggan for the proposition that "increases in gun ownership lead to increases in the number of homicides." Brief of Professors of Criminal Justice as *Amici Curiae* in Support of Petitioners, at 5 (quoting Mark Duggan, *More Guns More Crime*, 109 Pol. Econ. 1086, 1100-01 (2001)); *see also* Petitioners' Brief at 52; Cert. Pet. at 27; Brief of *Amici Curiae* American Public Health Ass'n, et al., at 15. However, the Duggan study is fundamentally flawed, as are these conclusions.

The Duggan study was not based on actual data about gun distribution evidence. That is, Duggan never measured whether any city had more guns or less guns. Instead, his study is based solely on the circulation of one magazine, *Guns & Ammo*.

What the Duggan study does not tell its readers is that, because of commitments to advertisers to guarantee certain levels of circulation during the 1990s, between 5% and 20% of *Guns & Ammo* copies were bought by the magazine itself and distributed free to doctors' and dentists' offices. The counties in which these self-purchases were made were where the magazine thought that crime rates were increasing. *See* Florenz Plassmann & John Lott, Jr., *More Readers of Gun Magazines, But Not More Crimes*, Soc. Sci. Research Network (July 2, 2002) (available at http://ssrn.com/abstract=320107). Because of the self-purchases, *Guns*

& Ammo is probably the only magazine that implies the relationship that Duggan finds. *See* John R. Lott, Jr., *The Bias Against Guns* 232-34 (2003).

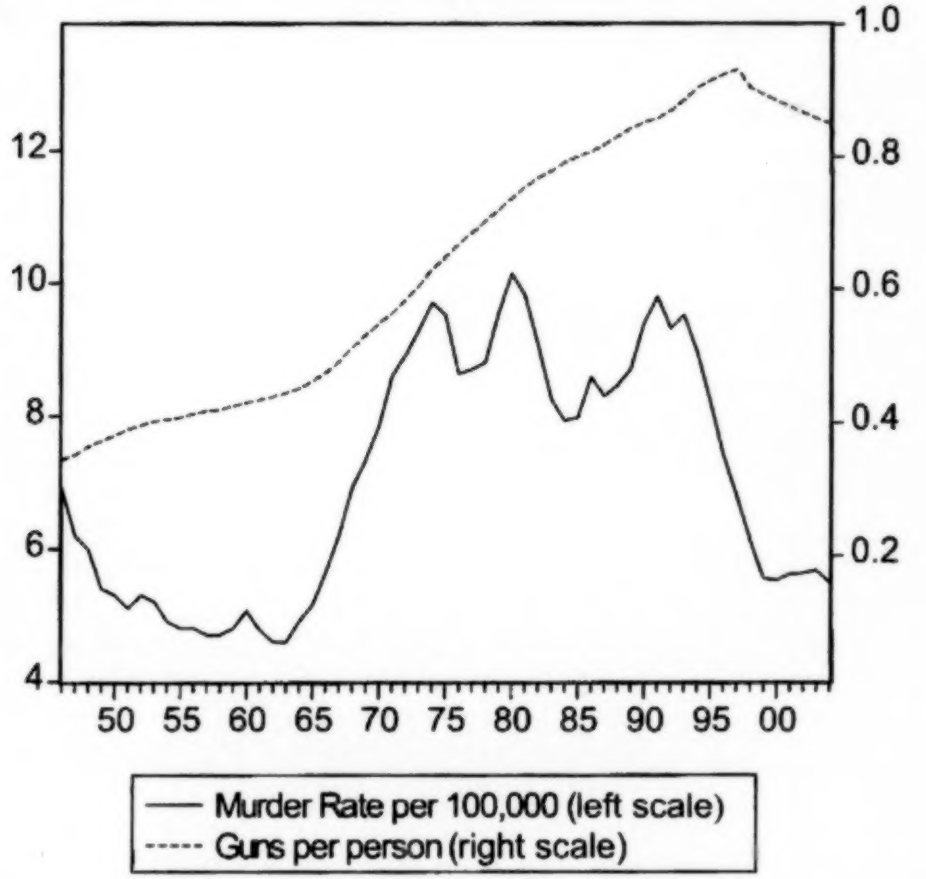
Simply put, the Duggan study is fundamentally unsound. The study stands in sharp contrast to a much more exhaustive econometric analysis of the subject, which concluded that gun ownership does not cause violence. Moody & Marvell, *supra*, at 726-30, 733-35. The Moody study so found after analyzing *actual* gun ownership survey data plus circulation data from the three more popular gun magazines. *Id.* *See also* Lott, *More Guns, Less Crime*, *supra*, at 113-14 (discussing survey gun ownership survey data indicating that the number of guns is inversely related to the amount of crime).

In sum, although American murder rates have fluctuated substantially since 1946, none of those fluctuations fulfilled the prediction that prodigious increases in guns would increase violence. As the standard text on the criminology of firearms states:

> The per capita accumulated stock of guns (the total of firearms manufactured or imported into the United States, less exports) has increased in recent decades, yet there has been no correspondingly consistent increase in either total or gun violence... About half of the time gun stock increases have been accompanied by violence decreases, and about half the time [they have been] accompanied by violence increases, *just what one would expect if gun levels had no net impact on violence rates.*

Kleck, *Targeting Guns*, *supra*, at 18 (emphasis added).

Gun Rates and Murder Rates in the United States
1946-2004



Source: Murder rate from FBI, Uniform Crime Reports; Guns per capita from Kleck, *Targeting Guns*, at 96-97 and BATF Annual Firearms Manufacture and Export Report, http://www.atf.gov/firearms/stats/index.htm. *See* Appendix at 1a.

C. *Foreign criminological evidence discredits the notion that more guns equals more murder.*

The evidence from foreign jurisdictions leads to the same conclusion as the United States data. In general, comparison of "homicide and suicide mortality data for thirty-six nations (including the United States) for the period 1990-1995" to gunstock levels shows "no significant (at the 5% level) association between gun ownership and the total homicide rate." Kleck, *Targeting Guns*, *supra*, at 254. Additionally, in a 2001 European study of 21 nations' data, "no significant correlations [of gunstock levels] with total suicide or homicide rates were found."[10]

A 2007 study compared gun ownership and murder in every European nation on which the data could be found. Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 Harv. J.L. & Pub. Pol'y 651-94 (2007). Again, nations with more guns did not exhibit higher murder rates. Indeed, the tendency is generally the opposite: murder rates for the seven nations having 16,000+ guns average out to 1.2 per 100,000 population while the murder rates for the nine nations having just 5,000 or fewer guns is well over three times higher, at 4.4 per 100,000. *Id.*; *see also* Appendix at 5a (table of European gun ownership and murder rates).

These national comparisons suggest that the determinants of murder are factors such as basic socioeconomic and cultural factors, and not the mere availability of guns.

Leading gun control advocates have admitted that "Israel and Switzerland [have] rates of homicide [that] are low despite rates of home firearm ownership that are at least as high as those noted in the U.S." Arthur L. Kellermann, et al., *The Epidemiologic Basis for the Prevention of Firearm Injuries*, 12 Annual Rev. Pub. Health 17, 28 (1991). *Cf.* Lott, *More Guns, Less Crime*, at 113 (making the same point about Finland and New Zealand as well as Israel and Switzerland). To the same effect, within Canada,[11] "England, America and Switzerland, [the areas] with the highest rates of gun ownership are in fact those with the lowest rates of violence." Joyce Lee Malcolm, *Guns and Violence: The English Experience* 204 (Harvard 2002).[12]

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[10] Quoted from the Abstract to Martin Killias, et al., *Guns, Violent Crime, and Suicide in 21 Countries*, 43 Canadian J. Criminology 429-48 (2001).

The non-relation of gunstock rates to murder is confirmed by studies of the effects of gun bans on murder and suicide in various jurisdictions. Some studies show no effect; in others *gun* deaths declined somewhat after gun bans—but this produced no net benefit—killings with other deadly instruments just rose to make up the difference. Kleck, *Targeting Guns*, *supra*, at 265-89 (collecting studies).

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[11] Philip C. Stenning, *Gun Control - A Critique of Current Policy*, 15 Pol'y Options 13 (1994).

[12] In fact, in the 1990s, English, Canadian and Australian violence rates escalated to twice American rates despite decades of increasingly restrictive controls. John van Kesteren, et al., in Esther Bouten, et al., *Crime Victimization in Comparative Perspective: Results from the International Crime Victims Survey, 1989-2000*, 13, 15-16 (2002).

III. Even National Gun Bans Fail to Reduce Violence.

The District officials who enacted the bans did not expect to reduce criminal activity; the bans were primarily intended to "start a trend, eventually leading to a federal handgun ban." Paul Duggan, "Crime Data Underscore Limits of D.C. Ban's Effectiveness," *Washington Post*, Nov. 13, 2007 (also noting that then-Councilman Marion Berry admitted that the bans would "not take one gun out of the hands of one criminal"). Yet the experience of other nations suggests that even a national handgun ban would not reduce homicide.

Consider Russia, where handguns have been banned to civilians for over 90 years, and this strictly enforced by methods forbidden to American police. Kates & Mauser, *supra*, at 650-51. The ban has been successful in the irrelevant respect that *gun* murders are rare in Russia. But other murder weapons are substituted—and the Russian murder rate has always been higher than gun-ridden America's. *Id.* In recent years Russia's murder rate has been nearly four times higher. *Id.*; *see* Appendix at 5a. Former Soviet nations like Belarus and Lithuania also ban handguns and their murder rates are two or three times higher than America's. *See* Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & Econ. 615, 625ff. (2001) (listing rates).

In England, violent crime steadily rose over decades of ever more restrictive controls, culminating in its 1997 handgun ban. Despite confiscation of hundreds of thousands of guns, by 2000 English violence rates far surpassed American. John van Kesteren, et al., in

Esther Bouten, et al., *Crime Victimization in Comparative Perspective: Results from the International Crime Victims Survey, 1989-2000*, 13, 15-16 (2002). Specifically, the number of deaths and injuries from gun crime in England and Wales increased 340 percent in the seven years from 1998 to 2005. David Leppard, "Ministers 'covered up' gun crime," the *Sunday Times* (London), Aug. 26, 2007.[13] The rates of serious violent crime, armed robberies, rapes and homicide have also soared. Today, English headlines resemble the melodramatic American headlines of the 1960s.[14]

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[13] http://www.timesonline.co.uk/tol/news/uk/crime/article 2328368.ece

[14] *See, e.g.*, "Violent Crime is Out of Control," Jul. 21, 2005, htp://uk.news.yahoo.com/050721/140/fntfz.html; "Police fear gun crime explosion," *Evening Standard* (London), Apr. 12, 2005, [http://www.thisislondon.com/news/londonnews/articles/17867375?source= Evening%20Standard]; "Gun Crimes Growing 'Like Cancer,'" *BBC News*, May 21, 2003; "Handgun Crime 'Up' Despite Ban," *BBC News*, Jul. 16, 2001; "[PM Blair] Pledge[s] to Tackle Soaring Street Crime," *BBC News*, Jul. 12, 2002; "Britain's Tough Gun Control Laws Termed Total Failure: Land of Hope and Gun-running," *Punch*, May 3-16, 2000; "Gun crime soars in Britain," *Reuters* (London), Jan. 9, 2003.

See also the following articles for the dates indicated a) from the *Times* (London), Jan. 16, 2000: "Killings Rise As 3 Million Illegal Guns Flood Britain."; Oct. 13, 2002: "Murder rate soars to highest for a century"; b) from the *Independent*: Jan. 15, 2002: "Police Move to Tackle Huge Rise in Gun Crime"; Dec. 27, 2002: "Firearms amnesty to tackle surge in gun crime" [http://news.independent.co.uk/uk/crime/story.jsp?story=364549]; c) from the *Telegraph* (London): Aug. 25, 1999: "[Home Secretary Jack] Straw Braced for 20% Increase in Crime Rate"; Jul. 17, 2001: "Gun crime rises despite Dunblane pistol ban"; Feb. 24, 2002: "Gun crime trebles as weapons and drugs flood British cities."

> When it had no firearms restrictions [19th and early 20th Century] England had little violent crime, while the present extraordinarily stringent gun controls have not stopped the increase in violence....
>
> Armed crime, never a problem in England, has now become one. Handguns are banned but the kingdom has millions of illegal firearms. Criminals have no trouble finding them and exhibit a new willingness to use them. In the decade after 1957 the use of guns in serious crime increased a hundredfold.

Joyce Lee Malcolm, *Guns and Violence: The English Experience*, 209, 219 (Harvard 2002).

It may be remarked that despite its burgeoning violence, England's murder rate is still far below America's. This is true; but when England allowed anyone to own handguns, and had guns laws vastly less restrictive than any modern American state, England's murder rate was minuscule—far below either its current rate or the contemporary American rate. Colin Greenwood, *Firearms Control: Armed Crime and Firearms Control in England and Wales*, Ch. 1 (1972) ("An Unrestricted Era"); Malcolm, *supra*, at 137.

The current difference between English and American murder rates reflects socio-economic and cultural differences, not any shortage of guns for English criminals. The 1997 handgun ban has proved unenforceable even over a relatively small island; England's National Crime Intelligence Service 2002 Report laments that while "Britain has some of the strictest gun laws in the world [i]t appears that *anyone who wishes to obtain a firearm [illegally] will have little difficulty in doing so.*" Don B. Kates, *The Hopelessness of Trying to Disarm the Kind of People who Murder*, 12 Bridges 313, 319 (2005) (quoting the NCIS) (emphasis added).

IV. Handgun Bans Do Not Reduce Suicide Rates.

"If there were a strong causal connection between firearms and suicide the United States would be a world leader in suicide... [but] the U.S. suicide rate is average for industrialized nations." James B. Jacobs, *Can Gun Control Work?* 6 (Oxford Univ. Press 2003).

The District's and *amici*'s claim that handgun bans reduce suicide is contradicted by local, national and international studies showing that nations with fewer guns do not have fewer suicides. Kleck, *Targeting Guns*, *supra*, at 254; *see* Killias, et al., *supra*. For instance, "if the Brady Act did have the effect of modestly reducing firearms suicides ... this effect was completely offset by an increase of the same magnitude in nonfirearm suicide" resulting in the same number of deaths. Jacobs, *Can Gun Control Work?*, *supra*, at 120. Nor, conversely, have vast increases in American gun ownership led to increased suicide. Kleck, *Targeting Guns*, *supra*, at 265. Some nations with more guns have higher *gun* suicide, but nations with fewer guns just have more suicide using other means. *See id.* at 265-89 (collecting studies). A World Health Organization report cites studies "conclud[ing] that removing an easy and favored method of suicide was not likely to affect substantially the overall suicide rate because other methods would be chosen." W.H.O., *Changing Patterns in Suicide Behavior* 20 (1982). And in suicide attempts "guns are not significantly more likely to end in death than those involving hanging, [car exhausts] or drowning." Kleck, *Targeting Guns*, *supra*, at 266.

The evidence indicates that people so determined on suicide that they would use a gun will find another instrument if guns are unavailable. And handgun bans just turn the suicidal to long guns: "handguns have no significant advantages over long guns for committing suicide[;] probably half of [American] gun suicides are committed with long guns...." *Id.* at 282. In Canada, where handguns are less common, "[n]inety percent of [gun suicides] are committed with long guns." Philip C. Stenning, *Gun Control - A Critique of Current Policy*, 15 Pol'y Options 13, 15 (1994).

In 2001, the largest study on youth suicides was performed, involving two surveys of 17,004 adolescents (12-18) and samples of national, state and county level cross-sectional data for various years from 1950 on. David Cutler, et al., *Explaining the rise in youth suicide* in J. Gruber (ed.), *Risky behavior among youths: An economic analysis* 219-269 (Univ. of Chicago Press 2001). That study found

> the most important explanatory variable [for juvenile suicide] is the increased share of youths living in homes with divorced parents. [This eclipses] ... either the share of children living with step-parents or the share of female-headed households.

Id. at 219.

The Cutler study found some evidence of a relationship between higher gun ownership and suicide, but that relationship disappears and is in fact reversed with the inclusion of a variable for the rate that people go hunting. *Id.* at 31-34. The higher suicide rate is related to higher rates that people in certain counties go hunting, not whether people own a gun. *Id.* The problem is that studies like those relied on by the District and their *amici*, which use very low numbers of sample cases, have confounded the fact that people in counties with a lot of hunters are also more likely to own guns.

The Cutler study authors were unable to discern whether the apparent hunting effect is due to some other cultural factors in areas with a lot of hunters, or whether it was due to hunting itself. In any case, an examination of gun ownership rates, omitting the hunting effect will cause a spurious positive correlation between suicide and gun ownership. *Id.*

From long before the bans—the District has *always* had among the nation's lowest suicide rates. This may be because of its very high African-American population. Differing population segments often have very different suicide rates for various reasons. African-Americans have a much lower suicide rate than whites.[15] Women commit suicide much less than men.[16] Indian women on the island of Fiji have a suicide rate several times higher than that of Fijian women. Kates & Mauser, *supra*, at 692-93.

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[15] Centers for Disease Control and Prevention, National Center for Health Statistics. Compressed Mortality File 1979-1998. CDC WONDER On-line Database, compiled from Compressed Mortality File CMF 1968-1988, Series 20, No. 2A, 2000 and CMF 1989-1998, Series 20, No. 2E, 2003. Accessed at http://wonder.cdc.gov/cmf-icd9.html on Jan 30, 2008 11:24:13 AM. White suicide rate: 13.1/100,000 per year. African-American suicide rate: 6.4/100,000 per year. Other races: 7.4/100,000 per year.

[16] *Id.* Male suicide rate: 19.5/100,000 per year. Female suicide rate: 5.0/100,000 per year.

As with murders, the Loftin study discussed above created the misimpression that the bans reduced District suicide because Loftin reported raw suicide data without considering the District's precipitously declining population. When the Loftin methodology is corrected to account for population changes, Loftin's own data show that there was a decline in gun suicide rates, and an *increase* in non-gun suicide rates—for a statistically insignificant decline of 11.4 per 100,000 to 11.2 per 100,000 (1.5%) in total suicide rates. *See* Loftin, *supra*, at 1617 (stating that a 12% increase in gun-related suicides outside the District was insignificant).

The evidence shows that several years before the bans, the District's gun suicide rate started declining; later, the non-gun rate began declining as well. In fact, the non-gun suicide drop was slightly greater after the bans. That greater drop in non-gun suicides continues to date. *See* graph, Appendix at 9a.

Obviously some factor other than the bans caused a suicide reduction that included both gun and non-gun suicides.

V. The District's Ban of Armed Home Defense Admits of No Implied Exception.

Apparently for the first time, the District now claims that its residents may keep long guns for defense in the home. Petitioners' Br. at 49, 54. This assertion was not made below where it would have been subject to discovery. Discovery would have revealed that the District has never (so far as we can find) announced this purported exception either to the public or to its police.

We leave to the Brief of *Amicus Curiae* Citizens Committee for the Right to Keep and Bear Arms (the "Errors Brief"), the refutation of this newly asserted exception. We note, however, that the District has made no attempt to outline what such an exception would entail. This is understandable because such an exception would be incoherent unless carefully drafted—a legislative, not a judicial, task. Consider at least seven different forms which such a defense might take:

> a) Despite the challenged ordinances, there is an implicit self-defense exception allowing a District resident to keep an un-trigger locked handgun loaded and assembled in her night stand; or
>
> b) Despite those ordinances there is an implicit exception allowing a District resident to keep an un-trigger-locked shotgun assembled and loaded by her bedside[17]; or
>
> c) There is an implicit exception allowing a woman who has been stalked, raped, or threatened with death by her ex-husband or someone else to keep an un-trigger locked handgun loaded and assembled in her night stand for self-defense; or
>
> d) There is an implicit exception allowing a woman who has been stalked, raped, or threat-

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[17] Note that these possible "exceptions" would nullify the ordinances.

ened with death by her ex-husband or someone else to keep an un-trigger-locked shotgun assembled and loaded for self-defense by her bedside; or

e) The obverse of (a)—(d): yes, it was illegal for her to have a handgun or a loaded shotgun, but now that she has shot an intruder with it, that shooting gives her a defense to prosecution for the gun law violations; or

f) There is an implicit exception allowing a woman who has been stalked raped or threatened by her ex-husband or someone else to assemble, load and unlock her shotgun if she spies him lurking outside her home; or

g) When a woman is attacked by a knife-wielding attacker in her home there is an implicit exception allowing her to go and assemble, load and unlock her shotgun.

We reiterate there is no exception in the challenged ordinances—and it is not the province of a court to define them. Compare Chicago: it has a handgun ban, Chicago Mun. Code § 8-20-050, but Illinois law specifies that self-defense use precludes prosecution. 720 Ill. Comp. Stat. 5/24-10 (West 2004). Moreover, law-abiding adult Chicagoans can keep loaded long guns for self-defense.

Also, New York City, famous for its restrictive gun laws, requires a license to possess a handgun, but it is undisputed that a licensed handgun may properly be used "for protection of person and property in the dwelling." *Archibald v. Codd*, 59 A.D.2d 867, 868, 399 N.Y.S.2d 235, 237 (1977).

And, as discussed in the Brief of *Amici Curiae* International Scholars at Section III, numerous countries—even those with stringent handgun regulation—allow the owning of handguns and other firearms for home self-defense.

VI. Whatever Benefits Gun Control Offers Can Be Accomplished By a Permit or Background Check System.

There are less drastic, but fully adequate, means to regulate guns at the District's disposal. For example, federal law conditions gun purchases on a background check to exclude juveniles, felons and the persons adjudicated mentally unfit.[18] Many states have their own supplementary background checks and also forbid gun ownership by juveniles, felons and the deranged.[19] The efficacy of such provisions is confirmed by two facts: First, almost without exception murderers and gun criminals have life histories of violence, felony, psychopathology and/or substance abuse.[20] The whole corpus of research shows that

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[18] *See* Jacobs, *supra*, at ch.2.

[19] *Id.*

[20] Kates & Mauser, *supra*, 30 Harv. J.L. & Pub Pol. at 885-70 (collecting studies); Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. Colo. L. Rev. 1081, 1089 (1998) (life-threatening criminals/murderers "almost always have a long history of involvement in criminal behavior"); Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*,

> the vast majority of persons involved in life-threatening violence have a long criminal record with many prior contacts with the justice system... There are some life-threatening violent offenders who have n[ever previously] been apprehended and charged, but there is no evidence to suggest that their violence is the result of some unique or different set of causal factors.

Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. Colo. L. Rev. 1081, 1093 (1998).

Second, over the past decade 48 states have issued permits to carry concealed handguns for lawful protection to about five million Americans; most of those states have been issuing under statutorily standardized criteria by which an adult with a clean record and safety training can obtain a permit.[21] These permit-holders' subsequent histories show virtually no crime, contrary to the mythology that ordinary people commit violent crimes if given access to guns. Lott, *More Guns, Less Crime*, *supra*, at 219-22.

Liberal gun carry permit issuance under objective standards has not resulted in the thousands of murders that the District's theory predicts. *See id.* In every state

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73 Fordham L. Rev. 589 (2004) (gun misuse is concentrated among people with arrest records).

[21] *See* David Kopel, "Nebraska is 40th State to Enact Shall Issue Licenses for Defensive Handgun Carrying," *The Volokh Conspiracy*, Apr. 1, 2006, http://volokh.com/archives/archive_2006_03_26-2006_04_01.shtml#1143873304.

where they were considered, these laws were opposed in editorials claiming that ordinary people commit most murders and predicting that if enacted the laws would vastly increase murder.[22] To the contrary, the laws' enactments have been followed by an outpouring of news articles with titles like: "Records Say Licensed Gun Owners Are Least of Florida's Crime Problem";[23] "Michigan Sees Fewer Gun Deaths—With More Permits";[24] "Gun Permits Surge, But Not Violence";[25] "Gun Law: Concealed Weapons Advocates Were Right: Crime Didn't Go Up in North Carolina";[26] "CCW Law Fares Well So Far: Officials Satisfied with Controversial Gun Permits";[27] "Concealed Weapons Owners No Trouble";[28] "Pistol Packing and Proud of It";[29] "Handgun Law's

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[22] *See, e.g.*, Editorial: "Turning Florida Into the Wild West," *Daytona Beach Evening News*, Apr. 10, 1985; Editorial: "Johnson Bill is Deadly Plan," *Tallahassee Democrat*, Feb. 17, 1987.

[23] *Tallahassee Democrat*, Nov. 4, 1990.

[24] Dawson Bell, *Detroit Free Press*, Jan. 6, 2008 [http://www.freep.com/apps/pbcs.dll/article?AID=/20080106/news06/801060602/1008]

[25] *Detroit News*, Mar. 21, 2002.

[26] *Chapel Hill Herald*, May 6, 1997, at 4 ("I am glad I was wrong. I haven't had a single report of a licensed concealed weapon being used to commit a crime.").

[27] *Detroit Free Press*, Jan. 2, 2002.

[28] *Gainesville Sun*, Nov. 4, 1990 (quoting a state legislator who led opposition to the new law as stating: "My fears have not been borne out.").

[29] *Roanoke Times*, May 19, 2002.

First Year Belies Fears of 'Blood in the Streets'";[30] "Gun-Toting Kentuckians Hold Their Fire";[31] "Police Say Concealed Weapons Law Has Not Brought Rise in Violence."[32] *See, e.g.*, Alan Bartley & Mark Cohen, *The Effect of Concealed Weapons Laws: An Extreme Bound Analysis*, 36 Econ. Inquiry 258 (1998) (demonstrating that right-to-carry laws reduce violent crime).

Gun possession by ordinary people does no harm because responsible law-abiding adults virtually never commit violent crimes.[33] All that gun controls can usefully do is forbid guns to criminals, juveniles and the deranged. If such laws fail it is not because they are too narrow but because those against whom the laws are aimed do not obey laws.

Confirming this fact are two recent general studies of gun control. In 2005, the U.S. National Academy of Sciences released its evaluation based on review of 253 journal articles, 99 books, 43 government publications and some empirical research of its own. Wellford, et al., *Firearms and Violence: A Critical Review, supra*, at 98. The Academy could not identify *any* gun control that had reduced violent crime, suicide or gun accidents. The same conclusion was reached in a 2003 evaluation by the Centers for Disease Control's then-extant studies. *First*

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[30] *Texas Lawyer*, Dec. 9, 1996, at 2.

[31] *Cincinnati Enquirer*, Jun. 16, 1997, at A1.

[32] *Palm Beach Post*, Jul. 26, 1988, at A1.

[33] *See* Lott, *More Guns, Less Crime*, at 219-22.

Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws (CDC 2003).[34]

CONCLUSION

In this case, the facts simply do not fit the rhetoric behind the District's gun ban. Such bans do not produce good results. Rather, such bans irrationally strip law-abiding citizens of the most effective means of defending themselves and their loved ones—and, if the evidence indicates anything, it is that criminals take full advantage.

Amici respectfully submit that the judgment of the Court of Appeals was correct and should be affirmed.

Respectfully submitted,

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February 8, 2008

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[34] http://cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm.

APPENDIX

Guns per 1000 persons and the murder rate per 100,000 persons in the United States from 1946-2004

Year	Guns	Murder rate	Year	Guns	Murder rate
1946	344	6.90	1973	606	9.29
1947	352	6.20	1974	631	9.71
1948	364	6.00	1975	649	9.52
1949	373	5.40	1976	669	8.63
1950	381	5.30	1977	686	8.70
1951	390	5.10	1978	703	8.81
1952	396	5.30	1979	721	9.56
1953	402	5.20	1980	738	10.14
1954	405	4.90	1981	755	9.81
1955	408	4.80	1982	769	9.07
1956	413	4.80	1983	780	8.26
1957	417	4.70	1984	792	7.93
1958	420	4.70	1985	801	7.98
1959	425	4.80	1986	809	8.58
1960	431	5.06	1987	819	8.30
1961	435	4.78	1988	832	8.46
1962	439	4.59	1989	845	8.71
1963	445	4.59	1990	853	9.40
1964	452	4.90	1991	859	9.80
1965	463	5.15	1992	871	9.32
1966	476	5.65	1993	887	9.52
1967	492	6.20	1994	905	8.96
1968	513	6.92	1995	916	8.22
1969	532	7.33	1996	925	7.41
1970	549	7.85	1997	933	6.80
1971	565	8.60	1998	905	6.15
1972	584	8.92	1999	894	5.56

Year	Guns	Murder rate
2000	885	5.52
2001	876	5.62
2002	867	5.63
2003	858	5.68
2004	850	5.49

Source: Murder rate from FBI, Uniform Crime Reports; Guns per capita from Kleck, *Targeting Guns*, *supra*, at 96-97, and BATF Annual Firearms Manufacture and Export Report, http://www.atf.gov/firearms/stats/index.htm.

Murder rates in the District of Columbia from 1960-2006

Year	Murder Rate	Year	Murder Rate	Year	Mur-der Rate
1960	10.6	1976	27.0	1992	74.1
1961	11.3	1977	28.2	1993	76.3
1962	11.5	1978	28.2	1994	67.7
1963	11.9	1979	27.5	1995	62.0
1964	16.5	1980	31.3	1996	69.4
1965	18.6	1981	35.0	1997	53.0
1966	17.8	1982	30.6	1998	46.0
1967	22.5	1983	28.9	1999	42.3
1968	25.1	1984	27.6	2000	41.9
1969	37.7	1985	23.2	2001	40.6
1970	29.3	1986	30.4	2002	46.8
1971	36.6	1987	35.3	2003	44.7
1972	32.9	1988	58.5	2004	35.8
1973	36.5	1989	69.5	2005	35.4
1974	38.4	1990	78.0	2006	29.1
1975	33.1	1991	80.2		

Source: FBI Uniform Crime Reports, various years

The District of Columbia's Murder Rate Rankings Compared to the 50 Largest United States Cities 1976-2005

YEAR	RANK
1976	15th
1977	9th
1978	9th
1979	10th
1980	12th
1981	8th
1982	12th
1983	8th
1984	9th
1985	15th
1986	11th
1987	4th
1988	1st
1989	1st
1990	1st

YEAR	RANK
1991	1st
1992	1st
1993	2nd
1994	2nd
1995	2nd
1996	1st
1997	1st
1998	1st
1999	1st
2000	2nd
2001	4th
2002	2nd
2003	2nd
2004	4th
2005	4th

Source: Data compiled from FBI Uniform Crime Reports; http://www.disastercenter.com/crime/dccrime.htm.

European Gun Ownership & Murder Rates[35]

[both rates given are per 100,000 population for the year 2002 unless that year is unavailable]

NATION	MURDERS	Gun Ownership Rates
Russia	20.54	4,000
Moldova	07.81	1,000
Slovakia	02.63	3,000
Romania	02.50	300
Macedonia	02.29	16,000
Hungary	02.22 [2003]	2,000
Finland	01.98 [2004]	39,000
Poland	01.79 [2003]	1,500
Slovenia	01.79	5,000
Cz. Republic	01.69	5,000
France	01.65 [2003]	30,000
Denmark	01.21 [2003]	19,000
Greece	01.12 [2003]	11,000
Switzerland	00.99 [2003]	16,000
Germany	00.93 [2003]	30,000
Luxembourg	00.90	0
Norway	00.81 [2001]	36,000
Austria	00.80 [2002]	17,000

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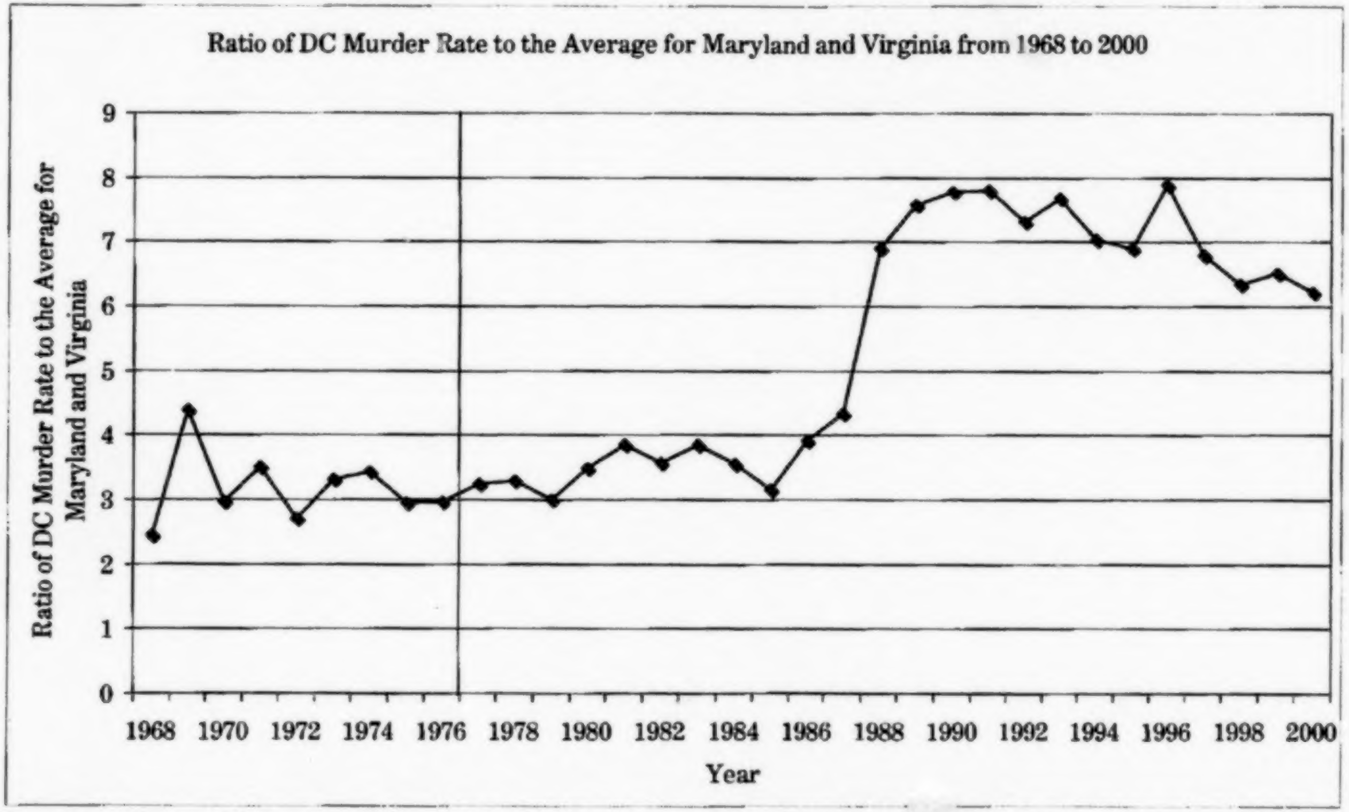
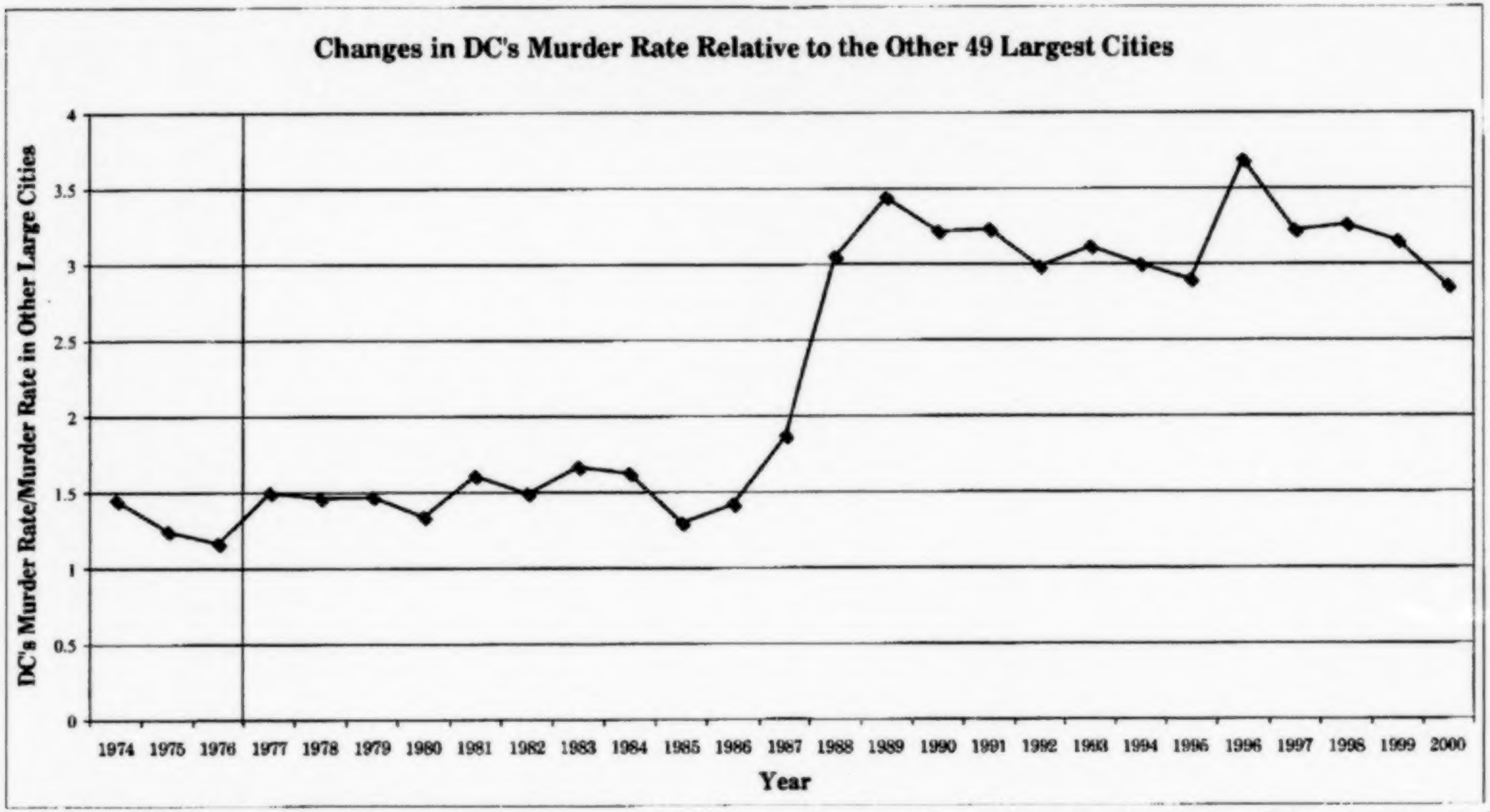
[35] This table, which covers all European nations for which we have data on both gun ownership and murder rates, combines Tables 1 and 3 from Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 Harv. J.L. & Pub. Pol'y 651 (2007). It differs because we have corrected that article's Table 1 whose listing for Luxembourg was erroneous because of a misprint in an Interpol report.



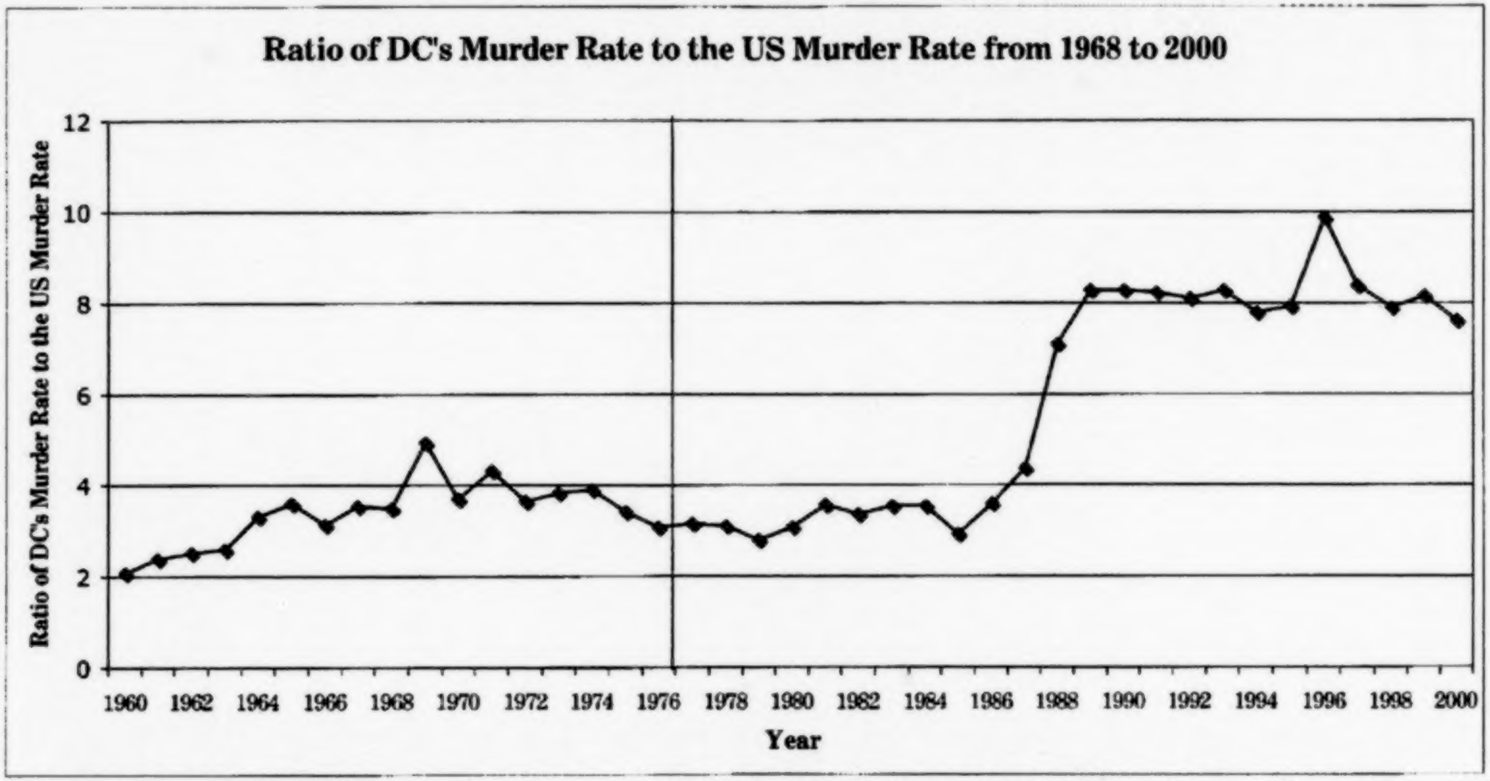
Ratio of DC Murder Rate to the Average for Maryland and Virginia from 1968 to 2000

Source: FBI Uniform Crime Reports; *see also* United States Crime Rates 1960-2006, http://www.disastercenter.com/crime/uscrime.htm (reporting data from FBI Uniform Crime Reports).



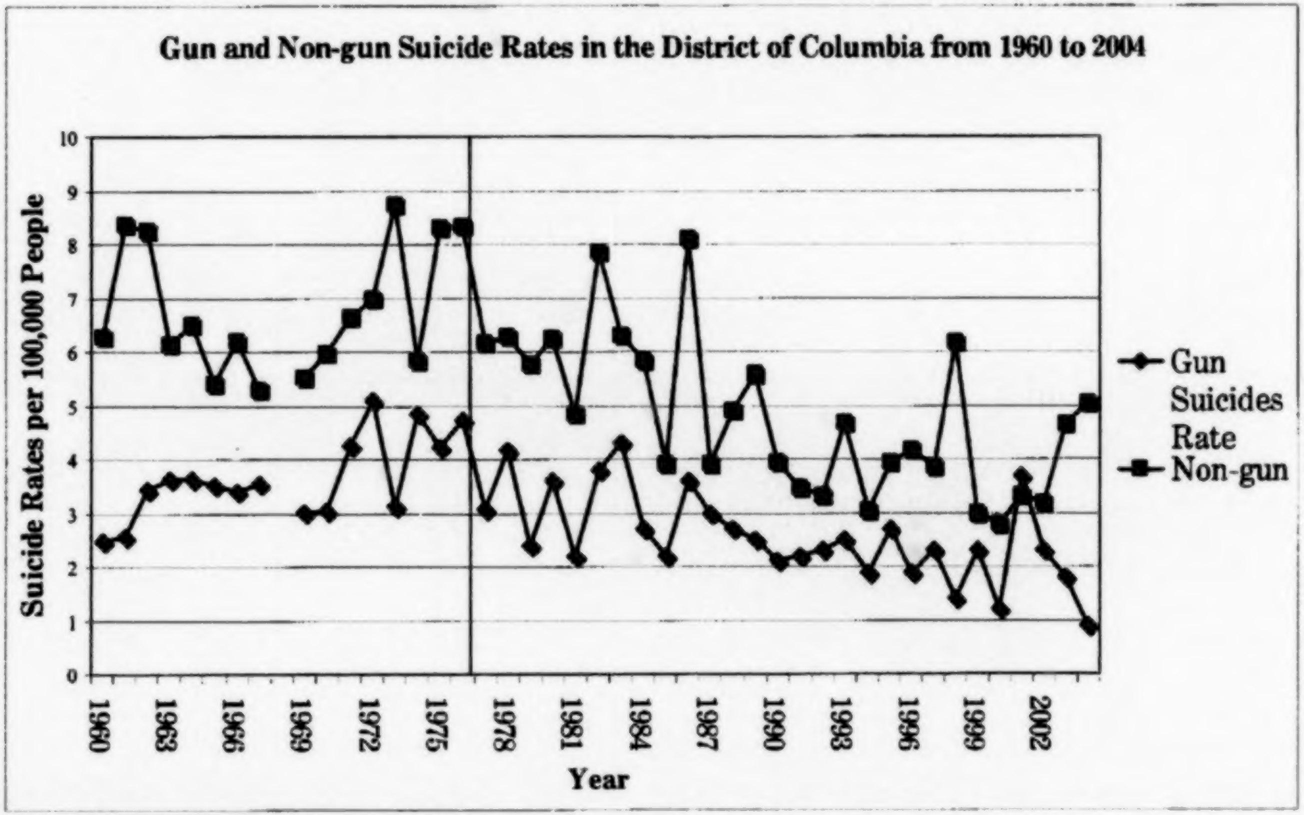
Changes in DC's Murder Rate Relative to the Other 49 Largest Cities

Source: FBI Uniform Crime Reports; *see* http://www.disastercenter.com/crime/uscrime.htm (US rates), and http://www.disastercenter.com/crime/dccrime.htm (DC rates).



Ratio of DC's Murder Rate to the US Murder Rate from 1968 to 2000

Source: FBI Uniform Crime Reports; *see* http://www.disastercenter.com/crime/uscrime.htm (US rates), and http://www.disastercenter.com/crime/dccrime.htm (DC rates).



Gun and Non-gun Suicide Rates in the District of Columbia from 1960 to 2004

Source: National Center for Health Statistics, Vital Statistics of the United States, Volume II Mortality, various years and http://wonder.cdc.gov/mortSQL.html.

ADDITIONAL AMICI CURIAE

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BRIEF

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IN THE

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DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMICI CURIAE DC APPLESEED CENTER FOR LAW AND JUSTICE, D.C. CHAMBER OF COMMERCE, D.C. FOR DEMOCRACY, D.C. LEAGUE OF WOMEN VOTERS, FEDERAL CITY COUNCIL, AND WASHINGTON COUNCIL OF LAWYERS IN SUPPORT OF PETITIONERS

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BRIEF FOR AMICI CURIAE DC APPLESEED CENTER FOR LAW AND JUSTICE, D.C. CHAMBER OF COMMERCE, D.C. FOR DEMOCRACY, D.C. LEAGUE OF WOMEN VOTERS, FEDERAL CITY COUNCIL, AND WASHINGTON COUNCIL OF LAWYERS IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici are a broad and diverse group of organizations dedicated to improving the lives of the citizens of the District of Columbia (the "District").[1] These organizations represent leaders of the District's legal community, business community, and nonprofit community. All these organizations are strongly committed to an effective, accountable local government in the District, and believe that substantial deference should be paid by the Court to decisions made by locally-elected leaders on important local issues such as public safety. Amici therefore have a strong interest in this case, which involves the validity of an important and longstanding measure undertaken by the District's locally-elected government in order to protect the safety of its citizens. In the event this Court recognizes a new Second Amendment right to keep and bear arms that is not linked to militia service, amici urge the Court to accord substantial deference to the policy decisions of elected officials in the District and elsewhere who seek to protect public safety in a manner reflective of local conditions and local concerns. This brief sets out amici's views concerning how that deference should be accorded and why the District's policy decisions should be upheld in this case.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, their members, or their

Amicus The DC Appleseed Center for Law and Justice ("DC Appleseed") is a nonprofit organization dedicated to solving pressing public policy problems facing the District of Columbia area. To advance this mission, DC Appleseed works with volunteer attorneys, business leaders, and community experts to identify those problems, conduct research and analysis, make specific recommendations for reform, and advocate effective solutions. DC Appleseed's projects include working with broad coalitions, issuing re-

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counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

ports, participating in regulatory proceedings, bringing lawsuits, managing public education campaigns, and meeting with and/or testifying before governmental decision-makers.

Founded in the Spring of 2004, amicus D.C. For Democracy is the District's largest unaligned progressive group of activists, community leaders and everyday voters working for positive change in our local government and recognition in America's legislature. Through its grassroots based efforts, D.C. for Democracy strives to promote wider political empowerment; higher levels of government integrity, performance, and transparency; socially progressive positions and fiscally responsible candidates; and a voting voice in America's national legislature.

Amicus the D.C. Chamber of Commerce ("Chamber") is the premier business organization in the District, representing more than 2,000 member organizations. Since its incorporation in 1938, the Chamber has worked aggressively to expand the economy in the District by attracting new jobs and creating economic opportunities for all District residents. It focuses on issues that impact the District's future growth and community development.

Ever since its founding at the start of the last century, amicus the District of Columbia League of Women Voters ("DCLWV") has been a non-partisan grassroots organization dedicated to the informed and active participation of citizens in government. DCLWV's advocacy on both national and local levels has targeted public safety as a primary goal.

Amicus the Federal City Council ("Council") is a non-profit, non-partisan organization that works for the improvement of the Nation's Capital. It is composed of and financed by two hundred of the Washington, D.C. area's top business, professional, educational, and civic leaders. The Council is dedicated to assisting the District in making fundamental structural improvements to its economic, physical, and social welfare systems.

Since 1971, amicus the Washington Council of Lawyers has been the metro area's only voluntary bar association dedicated exclusively to promoting public interest practice of law and pro bono service. Its members represent every sector of the Washington legal community—lawyers and pro bono coordinators from law firms and law schools, lawyers from public interest groups, government agencies and congressional offices, as well as law students and members of law-related professions.

SUMMARY OF THE ARGUMENT

Although the District of Columbia has made a compelling showing that the Second Amendment does not guarantee a private right to keep and bear arms unrelated to service in a militia, amici assume for the purposes of this brief that such a right exists. Amici urge the Court, if it finds such a right, to accord substantial deference to the decisions of elected officials who must decide how to regulate the availability and use of weapons in the interests of public safety and according to the particular needs, concerns, and conditions of their own communities.

Even assuming that the court of appeals was correct that the Second Amendment provides a private right to keep and bear arms unrelated to actual or prospective membership in a militia, this Court should nevertheless conclude that the right must be subject to reasonable regulation, with legislatures having wide latitude to enact public safety regulations while appropriately preserving the ability of individuals to safely defend themselves and their families in their homes. It should not be the business of the federal courts to micromanage the myriad different kinds of laws that regulate the possession, use, and safe-handling of firearms and other weapons in furtherance of public safety.

Furthermore, under any appropriate conception of reasonableness, the District's regulation of the private right to keep and bear arms here is reasonable. There is not, and cannot be, an unlimited individual right to keep and bear any kind of arms for any purpose. Thus, any right to keep and bear arms that is divorced from militia service must necessarily be limited to legitimate uses, such as for self-defense in the home or for hunting, and must also be subject to reasonable public safety regulation. Although the District's law prohibits one kind of arms (handguns), as that law has been authoritatively interpreted it is reasonable because it preserves the ability of individuals to engage in legitimate self-defense in the home using other kinds of arms such as rifles or shotguns, provided they are lawfully owned and stored in a safe manner (*i.e.*, with trigger locks) that prevents unauthorized access by children or others.

ARGUMENT

I. ANY PRIVATE RIGHT TO KEEP AND BEAR ARMS MUST BE SUBJECT TO REASONABLE REGULATION IN FURTHERANCE OF PUBLIC SAFETY.

The District has explained in its own brief why the right to keep and bear arms under the Second

Amendment should be related to service in a well-regulated militia, and amici will not address that issue here. In the event, however, that the Court determines that there is a Second Amendment right unrelated to service in a militia, the Court will be required to determine the standard of review applicable to that right. Unlike the areas where the Court has properly accorded heightened scrutiny to alleged infringements of constitutional rights—such as content-based speech restrictions and racial classifications under the First and Fourteenth Amendments—the customary deference accorded to legislatures is warranted here in light of the language of the Second Amendment and the nature of the right it protects.

It is beyond dispute that the Second Amendment does not afford an unrestricted, unlimited right to possess and use any type of weaponry, at any time, or for any reason. Rather, as with other seemingly absolute rights afforded by the Constitution, the private right to keep and bear arms must necessarily be subject to reasonable public safety regulation. All governments—including the District by delegation from Congress—have an inherent police power that may be exercised to protect public safety. In determining whether any given exercise of that police power is consistent with the Second Amendment, the Court should accord substantial deference to the public safety determinations of elected officials.

A. In Reviewing Regulations Under The Second Amendment, The Court Should Accord Substantial Deference To Local Officials' Exercise Of Their Police Powers.

States and localities have "traditionally * * * had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996). That includes the District, whose local elected officials have been granted Congress's plenary police powers.[2] This Court has never viewed any constitutional provision as absolute, particularly when balanced against exercises of the police power intended to protect the safety of the citizenry. The Second Amendment should be no exception. Instead, because of the unique nature of the right protected and the competing—and undisputed—governmental need to preserve public health and safety, the traditional deference to reasonable exercises of the police power should apply in this context as well.

The Constitution abounds with rights that, while phrased in seemingly absolute terms, are subject to reasonable restrictions in furtherance of public safety. For example, although the Free Exercise Clause provides that "Congress shall make no law * * * prohibiting the free exercise" of religion, the Constitution affords religious practices no exemption from otherwise valid laws of general applicability. *See Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 878-79 (1990). While the Contracts Clause provides that "[n]o state shall * * * pass any * * * Law impairing the Obligation of Contracts," States may nonetheless vary contract terms under reasonable exercises of the police power. *See Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 445 (1934). And even the otherwise exacting Free Speech Clause permits "reasonable restrictions on the time, place, or manner of protected speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Thus, as this Court noted long ago, just as other amendments are not absolute, neither is the Second Amendment. *See Robertson* v. *Baldwin*, 165 U.S. 275, 281-82 (1897) (the Amendment "is not infringed by laws prohibiting the carrying of concealed weapons").

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[2] *See Berman* v. *Parker*, 348 U.S. 26, 31-32 (1954) ("The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs" including "what traditionally has been known as the police power"); District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 87 Stat. 774, 302 (1973) ("[T]he legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act"). This delegation of legislative authority is subject to Congressional veto, which was not exercised with respect to the statutes at issue here.

Laws passed pursuant to the police power are generally entitled to substantial deference. As this Court has noted,

> safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field.

Bibb v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (Commerce Clause challenge); *see also Mani-*

gault v. *Springs*, 199 U.S. 473, 480 (1905) ("While [the police] power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with.") (Contracts Clause challenge).

Such deference is particularly appropriate under the Second Amendment, given its language and the nature of the right protected. The plain language of the Amendment itself refers to a "well regulated" militia. Even if the right is not limited to the militia context, it is inconceivable that the Framers who established a right to keep and bear arms to ensure the existence of "well regulated" militia would at the same time prohibit reasonable regulation of weapons in private hands. Just as militia members in possession of arms protected by the Amendment must be well regulated, so too must private citizens in the event the Court holds that they have rights unrelated to militia service.

There is no basis under the Second Amendment for the near-fatal strict scrutiny that is applied, for example, to content-based restrictions under the Free Speech Clause of the First Amendment. Such laws are subjected to the most demanding scrutiny because mere words are almost always inherently benign and because all such regulation is thus inherently suspect. In other words, courts will exercise exacting review of content-based regulations affecting speech (as well as racial classifications under the Equal Protection Clause) because there is almost always no legitimate basis for such regulations. By contrast, the very conduct protected by the Second Amendment is inherently injurious and laws regulating weapons should therefore be given the customary deference applied to all public safety regulations. Indeed the defining characteristic of any arms is the capacity to injure or kill human beings, which is precisely what the police power seeks to prevent.

While there are legitimate uses for weapons—such as for self-defense in the home or hunting—there are also numerous illegitimate uses that are gravely harmful to public safety. As the Court has already noted, there is no constitutional right to carry concealed weapons. *Robertson*, 165 U.S. at 281-82. And to state the obvious, there is no right to keep and bear weapons of mass destruction, to keep and bear arms in order to commit crimes, or to keep arms in an unsafe manner susceptible to misuse by children, felons, or the mentally ill. Given the vast number of ways in which weapons are injurious if used unsafely or for illegitimate purposes, there should be no doubt that legislatures may subject the right to keep and bear arms to reasonable public safety regulation. Thus, while the Court properly subjects content-based speech restrictions and racial classifications to the most demanding scrutiny, the nature of the right at issue here makes it qualitatively different.

The Court's Contracts Clause jurisprudence, while seemingly unrelated, is also instructive. The Contracts Clause is a facially absolute prohibition against any laws that impair the obligations of contract. This Court has long recognized, however, that an absolutist interpretation is incompatible with the nature of the right itself and with the myriad ways in which States may need to affect contractual obligations. "[T]he police power * * * is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault*, 199 U.S. at 480. Thus, the "absolute language of the Clause must leave room for 'the "essential attributes of sovereign power," * * * necessarily reserved by the States to safeguard the welfare of their citizens.'" *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978) (citations omitted). Because of these concerns, the Court has adopted a reasonableness test under that Clause: "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977).

A similar result should obtain here. As long as an exercise of police power that bears on the possession, use, or safe storage of weapons is reasonable, it should pass muster under the Second Amendment. The United States has recently advocated such a standard. *See* Brief for the United States in Opp'n at 20 n.3, *United States* v. *Emerson*, 536 U.S. 907 (2002) (No. 01-8780) (Second Amendment rights are "subject to reasonable restrictions"). Furthermore, reasonableness has been the standard under which local regulations of weapons have always been judged.

B. The Right to Keep And Bear Arms Has Always Been Subject to Reasonable Regulation.

Reasonable government regulation of the right to bear arms has been a feature of Anglo-American law for more than 600 years. *See*, *e.g.*, Statute of Northampton, 2 Edw. 3, c.3 (1328) (prohibiting the carrying of arms "before the King's Justices, or other of the King's Ministers" or in fairs or markets); William Blackstone, 1 *Commentaries* *139 (1765) (private right to bear arms is "subject to due restrictions"). Indeed, before the adoption of the Second Amendment, individual colonies regulated the right to bear arms in numerous ways. The Bill of Rights was "not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well recognized exceptions arising from the necessities of the case." *Robertson*, 165 U.S. at 281. Hence, as the right to keep and bear arms had from time immemorial been subject to reasonable regulation in the public safety interest, the Framers of the Second Amendment could not have intended otherwise.

For example, before adoption of the Second Amendment, Massachusetts barred the possession of loaded firearms in "any Dwelling House, Stable, Barn, Out-house, Ware-House, Store, Shop, or other Building" within the boundaries of Boston. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. Pennsylvania conditioned the right to bear arms, including the storage of ammunition, upon the taking of a loyalty oath. 1778 Pa. Laws 123, 126, § 5. New York prohibited the use of firearms in certain locations and on certain occasions. Act of April 22, 1785, ch. 81, 1785 N.Y. Laws 152. Some localities even had the rough equivalent of modern day gun registration laws. *See*, *e.g.*, 1776 Mass. Acts 18, § 9 (mandating that "an exact List" of the members of the state militia and the members' "equipments" be kept).

State regulation of the private right to bear arms only increased after adoption of the Second Amendment in 1791. *See* Saul Cornell & Nathan DiDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 505-06 (2004). The purpose of this increased regulation was to preserve public safety. For example, states enacted laws that prohibited the carrying of concealed weapons,[3] criminalized the sale of easily concealed weapons,[4] and limited the locations where firearms could be discharged.[5]

Reasonableness continues to be the standard employed today by the states in reviewing regulations on the possession, use, and safe storage of weapons. Many state constitutions expressly guarantee a nonmilitia right to keep and bear some type of arms for self-defense. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. Law & Pol. 191, 192 (2006). Courts in those jurisdictions, however, consistently review legislation governing the use, possession, and ownership of arms under a reasonable regulation standard.[6] These courts recognize that the right to keep and bear arms is not absolute, but rather is subject to the reasonable exercise of police power to protect public health, safety, and welfare. *See*, *e.g.*, *Benjamin*, 662 A.2d at 1233 (collecting cases); *Mosby* v. *Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (same).

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[3] Act of Mar. 18, 1859, 1859 Ohio Laws 56; Act of Feb. 2, 1838, ch. 101, 1838 Va. Acts 76; Act of Oct. 19, 1821, ch. 13, 1821 Tenn. Pub. Acts 15.

[4] Act of Dec. 25, 1837, 1837 Ga. Laws 90; Act of Jan. 27, 1838, ch. 137, 1838 Tenn. Pub. Acts 15.

[5] Act of Dec. 3, 1825, ch. CXXCII, 4, 1825 Tenn. Priv. Acts 306.

[6] *See, e.g.*, *Hoskins* v. *State*, 449 So. 2d 1269, 1270 (Ala. Crim. App. 1984); *City of Tucson* v. *Rineer*, 971 P.2d 207, 213 (Ariz. Ct. App. 1998); *Robertson* v. *City & County of Denver*, 874 P.2d 325, 329-30 (Colo. 1994); *Benjamin* v. *Bailey*, 662 A.2d 1226, 1233-34 (Conn. 1995); *State* v. *Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *Posey* v. *Commonwealth*, 185 S.W.3d 170, 180 (Ky. 2006); *People* v. *Swint*, 572 N.W.2d 666, 676 (Mich. Ct. App. 1997); *Heidbrink* v. *Swope*, 170 S.W.3d 13, 15 (Mo. Ct. App.

These decisions recognize and embody the deference that is owed to all public safety regulation. As one court explained in upholding an ordinance banning assault weapons, "unless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative discretion. Local authorities are presumed to be familiar with local conditions and to know the needs of the community." *Arnold*, 616 N.E.2d at 172-73 (internal quotation and citation omitted). *See also Posey*, 185 S.W.3d at 175-76 (in reviewing weapons regulations, courts "must always accord great deference to the legislature's exercise of [] so-called 'police powers,' unless to do so would 'clearly offend[] the limitations and prohibitions of the constitution.'") (citation omitted).

Even those jurisdictions that have interpreted state constitutions as guaranteeing a "fundamental" right to keep and bear arms have nevertheless reviewed firearms legislation under a reasonableness standard. *See Arnold*, 616 N.E.2d at 171-72; *State* v. *Cole*, 665 N.W.2d 328, 336-37 (Wis. 2003) (rejecting strict or intermediate scrutiny and noting that "[i]f this court were to utilize a strict scrutiny standard,

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2005); *State* v. *LaChapelle*, 451 N.W.2d 689, 690 (Neb. 1990); *State* v. *Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987); *Arnold* v. *City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *Mosby*, 851 A.2d at 1044; *State ex rel. West Virginia Div. of Natural Res.* v. *Cline*, 488 S.E.2d 376, 380-81 (W.Va. 1997); *Cole*, 665 N.W.2d at 338; *State* v. *McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986).

Wisconsin would be the only state to do so"); *see also* *Robertson*, 874 P.2d at 329 (finding it unnecessary to determine whether Colorado Constitution guarantees a fundamental right to bear arms and applying reasonableness standard).

Under that standard, the critical inquiry is whether the legislation unreasonably infringes upon the right protected. This is a more searching inquiry than "rational basis" review, which asks only whether the legislature had a rational reason for its action. *See Mosby*, 851 A.2d at 1044 ("The test for determining the constitutionality of a ban on handguns is * * * whether the statute is a reasonable limitation of the right to bear arms, rather than a reasonable means of promoting the public welfare."). The reasonableness standard does not focus solely on whether the legislature has a legitimate purpose for its action, because that will almost always be true. *See Benjamin*, 662 A.2d at 1234 ("The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of a mere rational reason for restricting legislation."). Instead, it focuses on the level of intrusion upon the right protected. *See Cole*, 665 N.W.2d at 338.

Recognizing the limits of their institutional competence as compared to that of legislatures, state courts considering state constitutional rights to keep and bear arms have almost always held that restrictions on weapons are reasonable. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 717-18 (2007). This includes laws that ban entire categories of weapons, such as assault weapons, or that prohibit certain people (such as felons) from owning firearms. *Id.* at 720-21. *See also* *Robertson*, 874 P.2d at 333 (law banning assault weapons did not "significantly interfere" with the right to bear arms guaranteed by Colorado Constitution); *Posey*, 185 S.W.3d at 181 (felon possession ban did not "unduly infringe upon the right to bear arms" under the Kentucky Constitution).

The substantial deference afforded by courts to state and local legislatures under the reasonableness standard is unsurprising given (1) the fundamental interests those legislatures have in protecting the health and safety their citizenry and (2) the ability of those elected officials to balance safety concerns against private interests. The interest of the District's legislature in striking that balance and in having its judgment on the issue paid deference is no less important than it was in the cited state cases.

The consistency of these state court pronouncements should prove a persuasive benchmark for this Court's consideration of the question presented in this case. Thus, if this Court recognizes a right to bear arms unrelated to militia service, it should follow this well-marked path and hold that reasonableness is the appropriate level of scrutiny in this case. *See, e.g.*, *Harmelin* v. *Michigan*, 501 U.S. 957, 966 (1991) (reviewing state constitutions as aid in interpreting Eighth Amendment prohibitions of cruel and unusual punishment); *Benton* v. *Maryland*, 395 U.S. 784, 795-96 (1969) (examining state constitutions to interpret Fifth Amendment guarantee against double jeopardy).

C. Deference Is Warranted In Light Of The Myriad Different Ways In Which The Possession, Use, And Safe Handling Of Weapons May Be Regulated In The Interests Of Public Safety.

Were this Court to conclude that there is a private right to keep and bear arms that is not subject to reasonable regulation, it would open the floodgates to challenges of numerous weapons regulations. It would also place the federal courts in the unenviable position of determining which of those laws were narrowly tailored to serve a compelling governmental interest based on the often highly specific facts of each law and the interests of each jurisdiction. The Court should refrain from adopting any such standard. To do so would require the courts to violate fundamental principles of federalism and separation of powers by second-guessing difficult public safety issues that should be left to the judgment of elected officials—provided those judgments are reasonable.

Localities, including the District, should not be foreclosed from "experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise * * *." *United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). This includes firearms regulation, which has traditionally been left to each locality to determine according to its own particular needs and conditions. For example, as Justice Kennedy noted in *Lopez*,

> [w]hile it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about

> how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

Id. at 581. The District's elected officials have chosen one path that recognizes the District's particular circumstances as a densely populated urban area plagued with gun violence, while other localities have gone in different directions.

Indeed, state and local governments nationwide have enacted a broad range of statutes and ordinances governing the types of permissible arms;[7] places where arms are prohibited;[8] who has the right to keep and bear arms;[9] carrying of concealed arms;[10] safe storage of arms;[11] safe transport of

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[7] *See, e.g.*, Ala. Code § 13A-11-53 (banning brass knuckles and slingshots); Ariz. Rev. Stat. Ann. §§ 13-3101, 13-3102 (banning grenades, mines, automatic firearms, nunchakus, etc.); Colo. Rev. Stat. § 18-12-102; Fla. Stat. § 790.221 (banning machine guns and short-barreled rifles and shotguns); Ga. Code Ann. §§ 16-11-122, 16-11-123 (banning rocket launchers, short-barreled rifles and shotguns, machine guns, etc.); Ind. Code § 35-47-5 (banning machine guns, throwing stars, sawed-off shotguns, etc.); Md. Code Ann. § 4-303 (banning assault pistols); Tex. Penal Code Ann. § 46.05 (banning explosive weapons, machine guns, short-barreled firearms, silencers, switch-blade knives, knuckles); Wis. Stat. § 941.24 (banning switch-blade knives); Chicago Mun. Code § 8-20-050 (banning machine guns, sawed-off shotguns, short-barreled rifles, and certain handguns); Denver Mun. Code § 38-130 (banning assault weapons); L.A. Mun. Code ch. V, art. 5 § 55.16 (banning sale of ultra-compact firearms).

[8] *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 13-3101, 13-3102 (school grounds, election polling places); Colo. Rev. Stat. § 18-12-105.5 (public school grounds); Idaho Code Ann. § 18-3302D (school property); Ind. Code § 35-47-9-2 (school property and buses); Md. Code Ann. § 4-102 (school property); N.M. Stat. Ann. §§ 30-

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7-2.4, 30-7-3 (university premises and licensed liquor establishments); S.D. Codified Laws § 22-14-23 (courthouses); Tex. Penal Code Ann. § 46.03 (various public places); Wash. Rev. Code § 9.41.300 (certain public places); Wis. Stat. § 941.237 (places where alcohol may be consumed); L.A. Mun. Code ch. V, art. 5 § 55.06 (use of bow and arrows prohibited except on established target ranges).

[9] *See, e.g.*, Colo. Rev. Stat. § 18-12-108 (restrictions on possession by felons); Fla. Stat. § 790.23 (same); Idaho Code Ann. §§ 18-3302, 18-3316 (restricting possession by felons, mentally ill, drug addicts, etc.); Ky. Rev. Stat. Ann. § 527.040 (banning possession by felons); Neb. Rev. Stat. § 28-1204 (banning possession of revolvers by minors); Neb. Rev. Stat. § 28-1206 (banning possession by felons); Nev. Rev. Stat. § 202.360 (same); N.J. Stat. Ann. § 2C:39-7 (banning possession by felons and persons with mental disorders); S.D. Codified Laws § 22-14-15 (restrictions on possession by felons); Tex. Penal Code Ann. § 46.04 (same).

[10] *See, e.g.*, Ala. Code § 13A-11-50; Ariz. Rev. Stat. Ann. § 13-3112; Cal. Penal Code § 12050; Colo. Rev. Stat. § 18-12-105; Fla. Stat. § 790.01; Georgia Code Ann. § 16-11-126; Ind. Code § 35-47-2-1; Me. Rev. Stat. Ann. tit. 25, § 2001-A; Md. Code Ann. § 4-203; Neb. Rev. Stat. § 28-1202; N.J. Stat. Ann. § 2C:39-5; S.D. Codified Laws § 22-14-9; Wash. Rev. Code § 9.41.050; Wis. Stat. § 941.23; Chicago Mun. Code § 8-20-010; Denver Mun. Code § 38-117; L.A. Mun. Code ch. V, art. 5 § 55.01; L.A. Mun. Code ch. V, art. 5 § 55.10; N.Y.C. Admin. Code § 10-131.

[11] *See, e.g.*, Conn. Gen. Stat § 52-571g (strict liability for improperly stored loaded firearms); Conn. Gen. Stat. § 53a-217 (criminal negligence liability for same); Del. Code Ann. tit. 11, § 1456 (same); Fla. Stat. § 790.174 (same); Haw. Rev. Stat. § 134-6 (firearms must be stored in container); Iowa Code § 724-22 (criminal liability for unauthorized access by minors); Md. Code Ann. § 4-104 (prohibiting storage of loaded firearms in areas accessible to minors); Minn. Stat. § 609.666 (criminal liability for minor's access to loaded and unsecured firearm); Nev. Rev. Stat. § 202.300 (same); N.H. Rev. Stat. Ann. § 650-C:1 (same); N.J. Stat. Ann. § 2C:58-15 (criminal liability for

arms;[12] and types of permissible ammunition and accessories.[13] Although the Second Amendment has never been incorporated against the states, *United States* v. *Cruikshank*, 92 U.S. 542 (1876), this variety of weapons laws shows the vast universe of regulations subject to significant federal court challenge—and significant federal court involvement—if the Court does not accord the traditional deference to reasonable regulation enacted in response to specific facts and circumstances.

Moreover, federal law already provides numerous restrictions of its own. These include prohibitions on possession or transport of firearms or ammunition by felons, fugitives, those under indictment, drug users, the mentally ill, illegal aliens, persons dishonorably discharged from the Armed Forces, persons subject

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minor's access to unsecured firearms); Tex. Penal Code Ann. § 46.13 (criminalizing unsecured storage of firearms in areas accessible to minors); Wis. Stat. § 948.55 (same).

[12] *See, e.g.*, Haw. Rev. Stat. § 134-6 (firearms must be transported unloaded and in container); 720 Ill. Comp. Stat. 5/24-1 (same); Md. Code Ann. § 4-203 (handguns must be unloaded when transported except under certain circumstances); Mass. Gen. Laws ch. 140, § 131C (same); Minn. Stat. § 624.714 (forbidding transport of firearms without license); Minn. Stat. § 97B.045 (hunting firearms must be transported in gun case or in trunk and unloaded); Va. Code Ann. § 15.2-915.2 (localities may enact laws prohibiting transport of loaded firearms).

[13] *See, e.g.*, Ala. Code § 13A-11-60 (banning brass or teflon-coated ammunition); Cal. Penal Code § 12520 (banning silencers); Fla. Stat. § 790.31 (banning armor-piercing or exploding ammunition); Ga. Code Ann. § 16-11-122 (banning silencers); Ind. Code § 35-47-5-11 (banning armor piercing ammunition); Md. Code Ann. § 4-305 (banning detachable magazines with capacity of 20 rounds or more); Tex Penal Code Ann. § 46.05 (banning armor-piercing ammunition); Chicago Mun. Code § 8-20-165 (banning laser sight accessories).

to restraining orders, domestic abusers, or minors. *See* 18 U.S.C. § 922. Federal law also imposes significant licensing, reporting and other restrictions on firearms dealers, importers, and manufacturers. *Id.* In addition, there are significantly enhanced federal penalties for the use of firearms in certain crimes. *Id.* §§ 924(a)–924(o). Firearms may not be sold, mailed, or shipped interstate to another person except by and between licensed dealers. *Id.* § 922(a)(2). While being transported by vehicle, firearms must be unloaded and in the trunk or a locked container. *Id.* § 926A. Federal law prohibits the carrying of firearms on aircraft or common carriers, even for self-defense purposes. *Id.* § 922. It is illegal to manufacture or sell armor-piercing handgun ammunition. *Id.* And federal law also places significant restrictions on the possession of machine guns, sawed-off shotguns, bombs, rockets, missiles, and mines, as well as nuclear materials and chemical weapons. *Id.* §§ 229, 831, 842, 922, 922(a)(4).

It should not be the business of federal courts to micromanage the myriad different ways that firearms and other weapons may be regulated pursuant to the police power. But the adoption of a strict or even intermediate scrutiny standard in this case would invite such micromanagement and open the floodgates of federal courts nationwide to numerous challenges to weapons control laws. Federal judges would be tasked with scrutinizing whether each law is narrowly tailored to advance a compelling interest by the least restrictive means available, *see, e.g.*, *Bernal* v. *Fainter*, 467 U.S. 216, 219 (1984), or whether the law involves important interests that are furthered by substantially related means, *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). In contrast, a reasonableness standard that is deferential to legislative bodies would leave accountability and discretion for weapons regulation where it belongs—in the hands of elected officials who are more familiar with the needs and views of their communities and are therefore better able to strike the necessary balance in response to those needs and views.

This includes the elected officials of the District, who have the principal responsibility for determining the needs and problems facing the District's own population. It is undisputed here that the District enacted its handgun ban and safe-storage laws pursuant to its police power to protect public safety. The District considered evidence indicating that murders, robberies, and assaults were more likely to be committed with a handgun. Pet. App. 102a. Based on this evidence, the District concluded that handguns were uniquely dangerous and that it was necessary to prohibit the possession and use of such guns, while still permitting access to other weaponry if licensed and stored safely. *Id.* at 104a. Similarly, it is undisputed that the District's safe-storage provisions were based on its evaluation and due consideration of the risks and benefits of such regulation. *See, e.g.*, Evening Council Sess. Tr. 21:1-15, 26:15-15, 28:12-21, 32:8-25 (Jun. 15, 1976). The District was presented with evidence regarding the efficacy and desirability of safe-storage laws as well as empirical evidence regarding the harms improperly stored firearms may cause. *Id.* at 21:5-8, 42:11-18.

Consequently, the District concluded that the laws it ultimately enacted were in the public interest and that alternative means would not suffice to protect public safety. Pet. Br. 4-5; Pet. App. 103a-04a. It does not matter that the District could have made a different choice or that the results obtained may not have met the District's original hopes and expectations. It is equally irrelevant that the evidence relied upon by the District is not uniformly accepted by social scientists. *See Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1636 (2007) (legislative determinations entitled to deference in the absence of expert consensus). What matters is that the District's elected officials, as shown below, enacted a reasonable regulatory scheme designed to protect public safety that still leaves substantial room for individuals to defend themselves in their homes.

II. THE STATUTES AT ISSUE STRIKE A REASONABLE BALANCE BETWEEN THE EXERCISE OF THE POLICE POWER AND ANY LEGITIMATE PRIVATE RIGHT TO SELF-DEFENSE IN THE HOME.

A. There Is No Unlimited Right To Keep And Bear Any Arms For Any Purpose.

Any determination as to whether a particular weapons regulation is reasonable must begin with an understanding of the nature of the private right protected. Because no constitutional right is absolute, any private right under the Second Amendment must be tethered to a right to keep and bear arms for a legitimate purpose. As noted above, there is obviously no private right to keep and bear arms for a criminal purpose. Nor can there be a right to keep or bear any type of arms, regardless of whether that arm could be considered a lineal descendent of weaponry available in 1791. For example, today's artillery is descended from the artillery used in the 18th century, but no one could seriously contend that the

Second Amendment guarantees the right to have a rocket launcher in one's backyard.

Thus, many states have concluded that there is generally no right to use a spring gun, even for the purposes of self-defense.[14] Similarly, there is of course no right to keep and bear weapons of mass destruction, or missiles and explosives.[15] Further, a number of jurisdictions forbid the use of several less-common kinds of weapons in self-defense, such as throwing stars,[16] brass knuckles,[17] nunchakus,[18] and even sling-shots.[19]

In fact, the common law has always imposed restrictions on the right of self-defense, including that it be exercised reasonably. *See, e.g.*, *Beard* v. *United States*, 158 U.S. 550, 564 (1895) (defendant's use of self-defense appropriate only when there exists "reasonable grounds to believe, [it] was necessary to save his own life or to protect himself from great bodily injury"); *Benjamin*, 662 A.2d at 1232 (noting that "[t]he common law principle permitting one to use deadly force in self-defense has long been restricted by the general rule of reason") (citation omitted); *Eckman* v. *State*, 209 N.W. 715, 716 (Wis. 1926) ("the law limits the right of self-defense to necessity as it reasonably appears to defendant at the time"). If the Second Amendment protects a private right to keep and bear arms premised upon the right to self-defense, the Framers must be presumed to have understood the inherent problems with such a right and that the common law had always imposed reasonable limits upon it.

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[14] *See, e.g.*, 720 Ill. Comp. Stat. 5/24-1; Iowa Code §§ 704.4, 708.9; Kan. Stat. Ann. § 21-4201; Mich. Comp. Laws § 750.236; Minn. Stat. § 609.665; Mo. Rev. Stat. § 571.030; Nev. Rev. Stat. § 202.255; Or. Rev. Stat. § 166.320; S.C. Code Ann. § 16-23-450; Wis. Stat. § 941.20.

[15] *See, e.g.*, 18 U.S.C. §§ 229, 831, 842, 922(a)(4); Ga. Code Ann. § 16-11-123; Tex. Penal Code Ann. § 46.05.

[16] Ind. Code § 35-47-5.

[17] Ala. Code § 13A-11-53; Tex. Penal Code Ann. § 46.05.

[18] Ariz. Rev. Stat. Ann. §§ 13-3101, 13-3102.

[19] Ala. Code § 13A-11-53.

Thus, any private right to keep and bear arms must be limited to a legitimate purpose that does not threaten public safety. As the Second Amendment itself makes clear, this would include service in a well-regulated militia. And assuming that the right is not limited to just that purpose, other legitimate uses would include hunting, collecting, and the ability of individuals to defend themselves and their families in their homes. Only the latter interest—self-defense in the home—is implicated by this case, because there is no contention that the laws at issue infringe on any other legitimate use of arms.

Accordingly, assuming that the Second Amendment protects a private right unrelated to militia service, the question is whether the challenged laws unreasonably restrict the ability of District residents to defend themselves and their families in the home. As next shown, they do not.

B. The District's Regulation Is Reasonable Because It Restricts Access To Only One Category Of Weapons While Still Permitting Use Of Other Firearms In Self-Defense If Safely Stored.

As authoritatively interpreted by the District itself, the laws at issue here effectively prohibit private possession and use of only one kind of weaponry—handguns—while permitting ownership and legitimate use of other weapons, including shotguns and rifles, provided they are registered and safely stored. This regulatory scheme is reasonable in relation to any private right that may be protected by the Second Amendment, because it reasonably permits individuals to exercise the ability to defend themselves and their families in the home.

The court of appeals thought the District's laws unreasonable because they entirely prohibit one kind of arms. Pet. App. 53a. But that cannot be correct. As noted above, there are numerous legitimate laws that entirely prohibit particular kinds of weapons that, in the judgment of local elected officials, are subject to abuse or misuse.[20] Banning an entire class of arms that might otherwise have been available for self-defense falls within the broad police power of state and local governments. *See Arnold*, 616 N.E.2d at 173 ("police power includes the power to prohibit"). As a result, numerous courts considering state constitutional provisions protecting the right to keep and bear arms have upheld laws prohibiting entire classes of arms as reasonable regulations of that right.[21]

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[20] Under the court of appeals' *per se* rule, all of these kinds of prohibitions would contravene the Second Amendment, as would the District's own bans on sawed-off shotguns, machine guns, and short-barreled rifles—prohibitions that Respondent has chosen not to challenge.

[21] *See, e.g.*, *State* v. *Swanton*, 629 P.2d 98, 99 (Ariz. Ct. App. 1981) (nunchakus); *Benjamin*, 662 A.2d at 1235 (assault weapons); *Robertson*, 874 P.2d at 333 (same); *Kalodimos* v. *Village of Morton Grove*, 470 N.E.2d 266, 277-79 (Ill. 1984) (operable handguns); *Commonwealth* v. *Davis*, 343 N.E.2d 847,

In evaluating the reasonableness of such legislation, courts consider various factors, including the weapons that remain available to the citizenry for self-defense; whether the banned weapons are commonly used for criminal purposes; and whether such weapons have particularly dangerous characteristics. *See Benjamin*, 662 A.2d at 1234 (collecting cases in support of each factor). There is not and should not be any bright line rule that prohibitions of particular classes of weapons are *per se* infringements of the right to keep and bear arms. *See id.* at 1235 ("the purposes served by the constitutional right to bear arms are not integrally linked to the particular means by which they are achieved"); *Robertson*, 874 P.2d at 331 ("the trial court erred in holding that restricting the types of weapons that may be used in exercising the right to bear arms in self-defense constitutes a *per se* violation of that right").

For several reasons, the District's ban on handguns does not effectively disarm the District's citizenry or infringe upon the right to bear arms in self-defense. First, the District's reasoned determination that handguns are particularly likely to injure public safety is entitled to substantial deference. Handguns pose unique dangers to public health and safety, as they: (1) are the weapon of choice for criminals; (2) often escalate domestic violence to murder; (3) often result in the accidental death of children; (4) are easily concealable; and (5) facilitate suicides. Pet.

849-50 (Mass. 1976) (short-barreled shotguns); *People* v. *Brown*, 235 N.W. 245, 247 (Mich. 1931) (blackjacks); *State* v. *LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990) (machine guns, short-barreled rifles, and short-barreled shotguns); *Morrison* v. *State*, 339 S.W.2d 529, 531-32 (Tex. Crim. App. 1960) (machine guns).

Br. 53; Pet. App. 101a-02a. All these factors support the reasonableness of the District's decision to prohibit this one kind of weaponry. *See Benjamin*, 662 A.2d at 1234. Legislatures, not courts, are tasked with determining the needs and conditions of their own communities, including whether the dangers of certain weapons outweigh their legitimate benefits. And there is ample evidence to support the conclusion that the D.C. Council reached in the case of handguns. *See, e.g.*, Craig Perkins, U.S. Dep't of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime* 2 (Sept. 2003) (noting that 87% of all guns used in crime are handguns); Colin Loftin *et al.*, *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991) (observing that decline in firearm related homicides and suicides coincided with passage of D.C. handgun ban).

Second, the District's laws reasonably allow for the exercise of the lawful right to self-defense in the home, which is the only legitimate interest conceivably implicated by this case. As other courts reviewing the constitutionality of statutory bans on classes of arms have determined, such a law should be found reasonable if it "continues to permit access to a wide array of weapons." *Benjamin*, 662 A.2d at 1235; *see also Robertson*, 874 P.2d at 333 (finding that a ban on assault weapons does not unreasonably infringe upon the right to bear arms as "there are literally hundreds of alternative ways in which citizens may exercise the right to bear arms in self-defense"). The court of appeals erred in failing to fully consider the District's argument that a statutory ban on handguns permits residents countless ways to exercise their Second Amendment rights, including with other kinds of firearms. Pet. App. 53a. (finding that argument "frivolous").

As the District has noted, handguns constitute only about one-third of the Nation's firearms. *See* Marianne Zawitz, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearms, Crime, and Justice: Guns Used in Crime* 2 (July 1995). Thus, despite the ban on this small subset of firearms, the District's citizens continue to have access (subject to federal restrictions) to the remaining two-thirds of other firearms for self-defense purposes, provided they are registered and safely stored with trigger locks or similar devices. This includes rifles and shotguns.

Although Respondent, as the plaintiff, bore the burden of proof, he produced no record evidence that any right to self-defense in the home could not be reasonably exercised through the weaponry permitted by the District. Nor could such a contention be sustained, given that rifles and shotguns are routinely used for purposes of self-defense in the home. In fact, "[f]or home defense, a shotgun is superior to a handgun in terms of being able to stop a violent intruder as quickly as possible" and a shotgun "can usually be purchased for less than the cost of a handgun of comparable quality." Firearms Tactical Institute, *Tactical Brief # 10: Shotgun Home Defense Ammunition* (October 1998) (http: http://www.firearmstactical.com/briefs10.htm).

Nor is there any basis to hold that the District's safe-storage requirement, D.C. Code § 7-2507.02, unreasonably burdens any private right to bear arms for self-defense in the home. In enacting that provision, the District determined that locked guns can be ready for use in under a minute. Evening Council Sess. Tr. 42:11-18, 49:8-16 (Jun. 15, 1976). Indeed, the District's safe-storage law is hardly uncommon. As already noted, numerous other states require, through legislation or the common law, that firearms be safely stored and impose criminal and/or civil liability for the failure to do so. *See supra* note 11. The public safety rationale for these laws is obvious and compelling: preventing unauthorized access to dangerous weapons by children and others not entitled to use them.

Contrary to Respondent's assertion and the court of appeals' conclusion, the existence of a trigger lock or similar device, as required by District law for long guns kept in the home, does not guarantee only the right to keep and bear "a useless hunk of metal and springs." *See* Opp. Cert. 19; Pet. App. 55a. Respondent apparently contends, contrary to the District's interpretation of its own law, that the law does not permit removal of the trigger lock even when necessary for self-defense. Such an unreasonable reading of this statute is contrary to long-standing principles of District law, *see Wilson* v. *United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (recognizing exigent circumstances exception to general law), and violates the principle that statutes are to be read to avoid constitutional issues. *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems" courts should construe the statute in a manner to "avoid such problems unless such construction is plainly contrary to [legislative] intent"). Indeed, since Respondent has never attempted to register a long gun, and since there is no actual or even speculative threat that he would ever be prosecuted for using such a gun in self-defense if it has been stored with a trigger lock, Respondent lacks standing to challenge the District's authoritative interpretation of its own laws.

Respondent has conceded that the District could, consistent with the Second Amendment, require safe-storage of firearms in a child-proof safe. *See* Opp. Cert. at 21. Having made that concession, Respondent is now quibbling only with the means of safe-storage selected by the District. That quibble is not a basis for the Court to conclude that any private right to keep and bear arms is unconstitutionally infringed. In the end, Respondent has failed in his own burden to show that he has no effective means of self-defense in the home. The existence of an alternative means of exercising the right demonstrates that there is no unconstitutional infringement. *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 51, 53-54 (1986). Citizens in the District have effective, alternative means of self-defense and the District is bound by its assertions that it will not prosecute its citizens for assembling, loading, or unlocking their firearms in the proper exercise of their right to self-defense. Pet. 7 n.2; Pet. App. 55a.

Finally, there has been no showing that the District's registration and licensing requirements are unreasonable burdens upon any private right to keep and bear arms. The District merely requires its residents to obtain a registration permit to possess or control firearms, D.C. Code § 7-2502.0, and a license in order to carry concealed or concealable weapon, D.C. Code § 22-4504(a). Such requirements are commonplace[22] and commonsense limitations that ensure public safety by preventing unsuitable persons such as minors, felons, or the mentally ill from possessing dangerous weapons. In fact, many states specifically require their citizens to obtain licenses to carry handguns or concealed weapons—including those states that expressly recognize a private right to keep and bear arms.[23] Such laws have been routinely upheld by courts as reasonable regulations of that right,[24] and there is no basis upon which this Court should conclude otherwise with respect to the District's registration and licensing laws.

The record before this Court is clear that the District has enacted statutes that reasonably regulate the private right to keep and bear arms based on reasoned legislative choices. While the District's laws restrict the private right to keep and bear one kind of weapon, they preserve the ability of individuals to engage in legitimate self-defense in the home using other kinds of weapons provided they are lawfully owned and safely stored. Such laws should not be second-guessed by this Court. Rather, the Court should defer to the reasonable, delicate judgment of local elected officials in enacting these laws.

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[22] *See, e.g.*, Cal Penal Code § 12801; Haw. Rev. Stat. §§ 134-2, 134-3; 720 Ill. Comp. Stat. 5/24-3; Md. Code Ann., Pub. Safety §§ 5-123, 5-133; Mass. Gen. Laws ch. 140, §§ 123, 131; Mich. Comp. Laws § 28.422; Minn. Stat. §§ 624.713-14, 624.714; Neb. Rev. Stat. §§ 69-2403, 69-2404; N.Y. Penal Law § 400.00.

[23] *See, e.g.*, Ala. Code § 13A-11-73; Cal. Penal Code § 12025; Fla. Stat. § 790.06; Ga. Code Ann. § 16-11-126; Haw. Rev. Stat. § 134-9; Md. Code Ann., Pub. Safety § 5-303; Mass. Gen. Laws ch. 140, § 131; Mich. Comp. Laws § 28.422; Minn. Stat. § 624.714; Neb. Rev. Stat. § 28-1202; N.Y. Penal Law § 400.00; Ohio Rev. Code Ann. § 2923.12; Tex. Penal Code Ann. § 46.15; Va. Code Ann. § 18.2-308; Wis. Stat. § 941.23; Wyo. Stat. Ann. § 6-8-104 .

[24] *See, e.g.*, *Klein* v. *Leis*, 795 N.E.2d 633, 636-38 (Ohio 2003); *Cole*, 665 N.W.2d at 341; *McAdams*, 714 P.2d at 1238.

CONCLUSION

For the foregoing reasons, and those set forth in the briefs of petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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R2 41 pap No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR AMICI CURIAE DISABLED VETERANS FOR SELF-DEFENSE AND KESTRA CHILDERS IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE[1]

Amicus Disabled Veterans for Self-Defense is an unincorporated association of disabled veterans, most of whom flew combat missions in the Air Force, Marine Corps, or Navy, over Vietnam. Most of these were shot down, captured, and held as prisoners of war (POWs) for as long as seven years and ten months. All of the POWs are rated as 70% disabled or higher by the Department of Veterans Affairs; most are 100%. The disabilities of the POWs were, for the most, incurred as a result of torture. Two, Col. George "Bud" Day, and Col. Leo Thorsness, were awarded the Congressional Medal of Honor after repatriation. All of the POWs have received at least one award of the Purple Heart. As a result of their own disabilities, the members of Disabled Vets are aware of the vulnerability of disabled people. They would like the disabled of the District of Columbia to have the same security which they have in their homes.

Amica Curia Kestra Childers is a wheel chair bound woman who enjoys shooting and shares the concerns of the other Amici over the vulnerability of the elderly and disabled in the District of Columbia.

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[1] Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the clerk. Counsel of Record for Petitioners and Respondent were notified, in writing, seven days prior to the filing of this brief, of the intent of Amici Curiae to file a brief in support of Respondent. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Other than counsel for the amici curiae, the NRA Civil Rights Defense Fund has made a contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici believe that the Second Amendment protects an individual right. The Framers were influenced by moral philosophers who asserted that the right to self-defense was inalienable. The common law, at the time of the Revolution, held that the right of self-defense was inalienable, and that the right to have arms was necessary in order to protect this right. Decisions of this Court have supported the right to self-defense, including self-defense with arms. Finally, there are humanitarian and prudential reasons for the Second Amendment to be construed to protect an individual right.

ARGUMENT

I. Moral Authority.

In a study of the influence of English and European thinkers on the Framers, an author counted the number of authors who, between 1760 and 1805, were cited at least 16 times by the Framers.[2] Dutch jurist Hugo Grotius, number ten on the list, said that self-defense was ". . .the law of all known nations."[3] Montesquieu, the most frequently cited author, asked, "Who does not see that self-defense is a duty superior to every precept?"[4] The right of self-defense was recognized in the laws given to Noah: "Whoso sheddeth man's blood, by man shall his blood be shed."[5]

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[2] Donald Lutz, *The Relative Influence of European Writers on Late Eighteenth Century America*, The American Political Science Review 78 (1984): 194, table 3.

[3] Hugo Grotius, *The Law of War and Peace*, Book One, Chap. III, §2 (Walter J. Black, Inc., Louise R. Loomis, trans., 1949) (1625).

The Roman jurist, Marcus Tullius Cicero, number eleven on the list, asserted that the right of self-defense is based upon natural law, which cannot be changed:

> True law is right reason in agreement with nature; it is the universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for

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[4] M. De Secondat, Baron De Montesquieu, *The Spirit of Laws*, Book XXVI, Chap. VII, at 173 (The Classics of Liberty Library, 1994) (1751).

[5] King James version, Genesis 9:6.

> he is the author of this law, its promulgator, and its enforcing judge.[6]

In his defense of T. Annius Milo, he said that there is an unwritten law which allows self-defense, a natural law:

> Therefore, o judges, this is not a written law, but a natural-law, which we have not learned, received by tradition, or read but have taken imbibed and extracted from nature herself, in which we were not instructed, but for which we were made, we are not taught but are imbued with it so that, if our life should be endangered by any snares, if by violence, and by weapons either of robbers or of enemies, every means of saving life would be honorable. *For the laws are silent, and inoperative, in contests with arms in hand, nor do the laws command that they be waited for when on him who might wish to wait for the enforcement of the laws . . .(a) great calamity or even death might be inflicted before the law could be enforced.* (*Emphasis added*)
>
> Although the law itself very wisely and in some measure tacitly gives the power of defending, which does not allow a man be killed, but forbids anyone to be with a weapon for the purpose of killing a man; so that as the cause for carrying a weapon, and not the weapon itself, is inquired into, he who made

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[6] Marcus Tullius Cicero, *III De Re Publica*, xxii, (Harvard University Press, Clinton Walker Keyes trans. 1977).

> use of a weapon for the purpose of defending himself would be judged to have had the weapon not for the purpose of killing a man.[7]

Grotius, like Cicero, based his work on natural law. Grotius says that under the law of nature self-defense is justified. Even though tribunals have been established, a tribunal may not be available if it would require a person to risk life or limb to wait before his cause may be heard by the tribunal, such as when he is under attack.[8]

John Locke, the third most cited thinker, after Montesquieu and Blackstone, also supports the right of self-defense because when one is violently attacked, reliance on the law could lead to injury or death, for which the law offers no remedy.[9]

Montesquieu echoes Grotius and Locke, that one may resort to self-defense when any reliance upon recourse to the law would lead to injury or death if the threat is immediate:

> Among citizens the right of natural defence does not imply a necessity of attacking. Instead of attacking they need only have recourse to proper tribunals. *They cannot*

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[7] M. Cicero, *Selected Orations,* "Pro T. Annius Milone,"(The Translation Publishing Co., Inc., F.H. Dewey, trans. 1961).

[8] *Id.*, Book Two, Chap. 1, §3.

[9] John Locke, *An Essay Concerning the True, Original, and End of Civil Government,* Chap. III, §19, at 179 (Classics of Liberty Library 1992)(1692).

> *therefore exercise this right of defence, but in sudden cases, when immediate death would be the consequence of waiting for the assistance of the laws.*[10] (Emphasis added).

The Italian philosopher Cesare Beccaria is number six on the list of most cited thinkers. He addressed the subject of laws forbidding arms:

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with impunity, and which, if strictly obeyed, would put an end to personal liberty – so dear to men, so dear to the enlightened legislator – and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than prevent than to prevent homicides, for an unarmed man may be attacked with greater

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[10] M. de Secondat, Baron de Montesquieu, *The Spirit of Laws*, Book X, Chap. II, at 165 (The Classics of Liberty Library, 1994) (1751).

> confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.[11]

II. Legal Authority – the Common Law.

In construing the Constitution, this Court has said:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Thirteen States, were born and brought up on the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when the came to put their conclusions in the form of fundamental law in a compact draft, they expressed the in terms of the common law, confident that they could be shortly and easily understood. *Ex parte Grossman*, 267 U.S. 87, 108-109 (1925).

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[11] Clayton E. Cramer, *For the Defense of Themselves and the State*, at 28 ((Praeger 1994), citing Cesare Beccaria, *On Crimes and Punishment*, 87-88 (Bobbs-Merrill Co., Henry Palolucci, trans. 1963)(1767).

The common law was learned from William Blackstone's *Commentaries on the Laws of England.* Professor Joyce Lee Malcolm had the following to say about the influence of Blackstone, whose influence was second only to Montesquieu, on the Framers:

> The first volume of William Blackstone's *Commentaries on the Laws of England* did not appear in Britain until 1765 and the fourth and last volume until 1769, yet nearly 2500 copies had been sold in America by the start of the American Revolution in 1775. Blackstone's work not only sold well but was regarded immediately as authoritative. Blackstone's views on the right of individuals to be armed are of importance, therefore, for penetrating the minds of the American Framers.[12]

Blackstone asserted that there are absolute rights. He defines these as the rights which one would have in a state of nature.[13] Blackstone recognized three absolute rights: personal security,[14] personal liberty[15] and private property.[16] He explains that the primary end of government is to secure these absolute rights of individuals.[17]

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[12] Malcolm, *To Keep and Bear Arms*, supra, note 20, at 141.

[13] I, William Blackstone, *Commentaries on the Laws of England*, 119 (University of Chicago Press 1979) (1765-1769).

[14] *Id.*, at 125.

[15] *Id.*, at 130.

[16] *Id.*, at 134.

> The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.[18]

Blackstone says that the common law recognizes "auxiliary rights," which are rights which pertain to men because they are necessary to sustain those rights with which they are endowed by their Creator. These include" (1) the powers of parliament (i.e., the right to be represented),[19] (2) the limitation of the king's prerogatives (constitutionally limited government),[20] (3) access to the courts for justice,[21] (4) the right to petition the king for redress of grievances:[22]

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 Wm.& M. st. 2, c.2, and it is indeed a public allowance under due

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[17] *Id.*, at 120.

[18] *Id.*, at 130.

[19] *Id.*, at 136.

[20] *Id.*, at 137.

[21] *Id.*

[22] *Id.*, at 138.

> restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[23]

Here Blackstone refers to a provision in a law passed shortly after William and Mary came to the throne in 1688 as a result of the "glorious" revolution. The English Bill of Rights was passed to restore the natural rights of Englishmen which had been taken away by the Stuart kings, natural rights which are "the birthright of the people of England."[24] These rights include the right to arms for self-defense:

> That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law. . .[25]

Blackstone says that the common law recognizes that an immediate threat cannot wait for legal redress:

> For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. *It considers that the future process of law is by no means an adequate remedy for injuries accompanied by*

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[23] *Id.* at 139.

[24] *Id.*, at 124.

[25] 1 W.&M. st. 2, c.2

> *force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose on violence with another. Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.*[26] (*Emphasis added*).

The moral authorities most frequently cited by the Framers asserted that there is a law of nature which permits one to save his life at the expense of the life of an unlawful attacker if the threat is immediate. The common law agreed. At the time of the ratification of the Bill of Rights, the states were still under the common law. Lawyers, including those who drafted the Bill of Rights, were instructed in the common law by Blackstone. Blackstone taught that the common law regarded the right to life as an absolute right which no law could extinguish, and that there was an auxiliary right necessary to assure that the right to life could be enjoyed, i.e., the right to arms.

One Justice of this Court, in a dissenting opinion, said of our common law heritage:

> The freedom of thought, of speech, and of the press; the right to bear arms; exemption from military dictation; security of the person and of the home; the right to a speedy and public trial by jury; protection against oppressive bail and cruel punishment, are, together with

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[26] III *Commentaries*, 3-4.

exemption from self-incrimination, the essential and inseparable features of English liberty. *Brown v. Walker*, 161 U.S. 591, 635-636 (1896), Justice Field, dissenting.

III. Independence.

Prior to the American Revolution, the First Continental Congress, on October 14, 1774, passed a Declaration of Rights which is similar in style to the English Bill of Rights. Included in the declaration was a list of 10 resolutions in which the Congress asserted that the inhabitants of the colonies were entitled to be governed by the English common law and by English statutes in effect at the time, which included the English Bill of Rights.[27] The English Bill of Rights included a right to arms for self-defense. Certainly, the right to keep functional firearms, including handguns, in the home, was protected under the common law.[28]

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[27] It is interesting to note that the Resolution against standing armies in the colonies is almost identical with the provision against the same in the English Bill of Rights:

> That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law (English Bill of Rights, immediately preceding the provision on the right to arms).
>
> That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law. (The ninth unanimous Resolution in the Declaration of Rights).

On July 6, 1775, after Lexington and Concord, after General Gage had declared martial law in Boston on June 12 of that year, Congress issued the Declaration of the Causes and Necessity of Their Taking Up Arms. In the Declaration the Congress states, as one of the reasons for taking up arms, that Gage had disarmed the people of Boston and seized their weapons.[29] Finally, one year after the Declaration of Causes, the Continental Congress concluded that it was forced to declare independence.

It would seem strange if the authors of the Bill of Rights were to insist upon protecting other rights against government interference yet exclude from that protection the auxiliary right which is necessary to protect the most fundamental of all rights, the right to life. Recall that the confiscation of private arms was listed as one of the causes for taking up arms against the Crown. Recall that the Declaration of Right asserted that we are entitled to the protection of the laws of England, including the right to arms for self-defense, which was declared to be our birthright which was restored by act of parliament. Would they have written such amendments to protect against oppressive government, having recently experienced oppressive government, without protecting the auxiliary right which is necessary to protect the one right without which no other right may be enjoyed? Of course, as we have said, contemporary thinkers believed that this right had been secured in the Second Amendment.

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[28] Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, at n. 104. (1982). The authors noted that keeping a gun in the home is a "liberty which was allowed by the common law." *Rex v. Gardiner*, 95 Eng. Rep. 386, 388 (K.B. 1738)

"[T]he mere having a gun was no offense ... for a man may keep a gun for the defense of his house and family ..." *Mallock v. Eastley*, 87 Eng. Rep. 1370, 1374 (K.B. 1744). "[A] gun may be kept for the defense of a man's house." *Wingfield v. Stratford*, 96 Eng. Rep. 787. (K.B. 1752).

[29] 1,778 muskets, 973 bayonets, 634 pistols and 38 blunderbusses were seized. See, Richard Frothingham, *History of the Siege of Boston*, (3rd ed. Little, Brown and Company 1872).

At the time Madison wrote the Second Amendment, there was a right of the people to keep and bear arms for self-defense. This right was believed, by the Framers, to be a right inalienable. Every word of the Constitution, and the articles of amendment, was written, approved, and ratified by men who believed this.

IV. The Right of Self-Defense.

Judge Isaac C. Parker was U.S. District Judge for the Western District of Arkansas.[30] The jurisdiction of this court was not the Western part of the state of Arkansas, but the territory that is now the state of

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[30] The information on Judge Parker came from David Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 Am.J. of Crim. Law 294 (2000).

Oklahoma which at that time was Indian territory. From 1893 to1896 there were 12 self-defense cases decided in the United States Supreme Court, 11 of these from the court of Judge Parker. In one of the cases Judge Parker was affirmed, and in ten cases he was reversed. All of these were cases in which the defendant had been sentenced to death. Of those who were retried, not one resulted in capital punishment, with some being acquitted entirely. There were several principles established in these cases: flight from the scene of the crime may not be taken as evidence of guilt, *Alberty v. United States*, 162 US 499 (1896); it is not unreasonable, in the face of credible threats, to arm oneself, *Gourko v. United States*, 153 US 183 (1894); *Thompson v. United States*, 155 US 271 (1894); *Beard v. United States*, 158 US 550 (1895); when a defendant uses deadly force, the fact that he had received credible threats is relevant and should be admitted in evidence, *Wallace v. United States*, 162 US 466 (1896).

This line of cases finally led to a decision in 1921 in which Justice Oliver Wendell Holmes famously stated:

> Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in

> immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not succeeded the bounds of lawful self defence. That has been the decision of this Court. *Beard v. United States*, 158 U.S. 550, 559 (1895). Detached reflection cannot be demanded in the presence of an uplifted knife (italics added). Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him. *Brown v. United States*, 256 US 335, 343 (1921), citing Rowe v. United States, 164 U.S. 546, 558 (1896).

The right of self-defense is so fundamental that it has been asserted as a defense in prosecution of a felon in possession of a firearm, in violation of 18 U.S.C. §922(g). In every Federal Circuit where the issue has been considered, it has been approved. *United States v. Leahy*, 473 F.3d 401, 409 (CA1 2007); *United States v. Agard*, 605 F.2d 665, 667 (CA2 1979); *United States v. Paolello*, 951 F.2d 537, 540-41 (CA3 1991); *United States v. Mooney*, 497 F.3d 397, 403 (CA4 2007); *United States v. Panter*, 688 F2d. 268, 271 (CA5 1982); *United States v.. Singleton*, 902 F.2d 471, 472 (CA6 1990); *United States v. Gomez*, 92 F.3d 770, 774-775 (CA9 1996); *United States v. Vigil*, 743 F.2d 751, 756 (CA10 1984); *United States v. Deleveaux*, 205 F.3d 1292, 1297 (CA11 2000).

VI. D.C. Code §§7-2502.02(a)(4), 22-4504(a), and 7-2507.02 Violate the Second Amendment Rights of Individuals Who Are Not Affiliated With Any State-Regulated Militia, But Who Wish to Keep Handguns and other Firearms for Private Use in Their Homes.

A. The Collective Right Interpretation is Wrong.

If, as Appellants assert, the Second Amendment was written to protect the right of the states to have a militia, that raises interesting questions. One must surmise that with the legal talent present at the founding, someone would have noticed that the amendment only prevents the Federal Government from interfering with state militias by interfering with the arming of same. Surely someone would conclude that a clever mind, determined to achieve an end, would find that if only one road were blocked, another way could be found to arrive at the promised land. Wouldn't the amendment be more effective if it merely forbid interference with the militias?

The application of the collective rights interpretation could lead to unanticipated results. If the purpose of the Second Amendment is to protect state militias from being interfered with or abolished by the federal government, what does this say about federal gun laws?[31]

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[31] For a discussion of this prospect, see see G.H. Reynolds & D.B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 Wm. & Mary L. Rev. 1737 (1995).

The National Firearms Act (NFA)[32] imposes a tax upon the manufacturer and transfer of certain classes of firearms, including machine guns and other weapons useful for military purposes. In the one case in which there was a challenge to the NFA based on the Second Amendment, the defendant had been discharged in the lower court after asserting that possession of a short-barreled shotgun was protected by the Second Amendment. The Supreme Court observed that there was no evidence in the record that a short-barreled shotgun had military utility:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *United States v. Miller*, 307 US 174, 177 (1939).

Does this mean that if military utility can be established for a weapon it would not be covered by the National Firearms Act? When the authorities in the State of Maryland attempted to tax the Bank of the United States, which had been incorporated by

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[32] 26 U.S.C. §5801, et seq.

Congress, the Supreme Court made the following observation:

> The power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. *M'Cullock v. Maryland*, 17 US 316 (1819).

If, as the collective right theorists assert, the states are to have the power to create and continue their militias, the purpose of the amendment would be defeated if the federal government were able to tax the articles which individuals must furnish for themselves if they are to serve in the militia. After all, this author is aware of no state militia that furnishes the necessary equipment to every able-bodied citizen. Now, as at the time of the founding, a member of the militia would be required to furnish his own firearm.

One may also ask, if the Supreme Court were to decide for the collective rights interpretation, will the Treasury Department be required to return the taxes that have been collected since the enactment of the NFA? Will federal courts be required to grant petitions for habeas corpus by individuals who have been convicted of violation of federal firearms laws?

But the Supreme Court has already decided that the tax is valid, *Sonzinsky v. United States*, 300 US 506 (1937). Does that mean that the Court has inclined toward an individual right interpretation?

It has also been argued that the militia system has fallen into disuse and the provisions of the Amendment have no current application.[33] While mindful that there are those who disfavor foreign citations, an apt rejoinder is to be found in the decision of an English Court:

> The *(English, ed.)* Bill of Rights still remains unrepealed, and *no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying an infringement of its provision. Bowles v. Bank of England,* 1 Ch. 57, 84-85 (1913) (*emphasis added*).

The militia is not gone. The United States Code, at 10 U.S.C. §311, still defines the unorganized militia as all able bodied males between the ages of 17 and 45 who are not members of the National Guard or Naval Militia. The militia has been called out as recently as World War II. When the National Guard was called up and shipped overseas, the governor of Maryland activated the militia to guard critical infrastructure and to prepare the meet a possible invasion. "Before the end of 1943, 15,000 'Maryland Minute Men,' as these men were designated, manned home guard stations."[34] Militia were activated in neighboring Virginia as well. In both cases the militia members were required to supply their own arms and their own ammunition.[35] Given the threat of terrorism, no longer theoretical, it is not inconceivable that state militias may be called out in the event of a catastrophe. The militia has not fallen into desuetude.

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[33] Dennis Henigan, *The Right to Be Armed: A Constitutional Illusion*, S. F. Barrister, Dec. 1989.

[34] Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, 197 (1982).

It is also argued that the prefatory language regarding a militia, restricts the meaning of the operative clause. One researcher has found that at the time of the Bill of Rights, up until Rhode Island's Constitution of 1842, there were dozens of constitutional provisions with a prefatory clause justifying the operative clause.[36] In each case, he points out that the prefatory language does not restrict the operative clause.

B. The Second Amendment Protects an Individual Right.

1. Contemporaries thought that the Second Amendment Protected an Individual Right.

This was the understanding of every competent authority at the time of the ratification of the Bill of Rights and thereafter, until sometime in the mid Twentieth Century. It was the understanding of the 1st Congress. This Court has said of the 1st Congress:

> It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution,

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[35] *Id.*, at 198.

[36] Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev., no. 3, 793 (1998). The provisions are found in the Appendix, pp. 814-821.

> led also in the organization of the government under it. It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument. This construction was followed by the legislative department and the executive department continuously for 73 years, and this, although the matter in the heat of political differences between the executive and the Senate in President Jackson's time, was the subject of bitter controversy, as we have seen. *This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the Framers of our government and Framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.* (*Emphasis added*, ed.). *Powell v. McCormack*, 395 U.S. 486, 547 (1969).[37]

While it was the 2nd Congress, not the 1st, during debate of the passage of the Militia Act of 1792, there was a suggestion that people unable to afford their own arms be provided arms by the government. This was opposed because it would give the federal government the ability to disarm those whom it had armed. When the bill finally passed, on May 8, 1792, it provided that every able bodied white male had to provide himself a "good musket or firelock."[38]

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[37] See, also, *Stuart v. Laird*, 1 Cranch, 299, 309; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 351; *Cohen v. Virginia*, 6 Wheat. 264, 420; *Prigg v. Pennsylvania*, 16 Pet. 544, 621 (10 L. Ed. 1060); *Cooley v. Board of Wardens, etc.*, 12 How. 299, 315; *Burrow-Giles Lithographing Company v. Sarony*, 111 U.S. 53,57; *Ames v. Kansas*, 111 U.S. 449, 463-469; *The Laura*, 114 U.S. 411, 416; *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297: *McPherson v. Blacker*, 146 U.S. 1, 28; *Knowlton v. Moore*, 178 U.S. 41, 56; *Fairbank v. United States*, 181 U.S. 283, 308; *Ex parte Grossman*, 267 U.S. 87, 118.

2. The Colonial Experience Gave The Framers Cause to Protect an Individual Right.

In *Boyd v. United States*, 116 U.S. 616 (1886) the issue was an order, issued by a U.S. District Court, that appellant produce certain papers which, if they contained information which the customs officials believed that they contained, would tend to incriminate the appellant. A statute required precisely that. This Court found that the statute under which the papers were ordered to be produced was unconstitutional. In its decision this Court made a digression to discuss the leading case on search and seizure among the English speaking people, *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). In that decision Lord Camden ruled that general warrants, which were issued by the Secretary of State and named neither the place to be searched nor the things to be found, were illegal. Justice Bradley explained the reason for the decision:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes

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[38] Stephen P. Halbrook, *That Every Man Be Armed*, fn. 160 (University of New Mexico Press, 1984).

> the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment. *Boyd*, *supra*, at 630.

Justice Bradley expressed the opinion that the Fourth and Fifth Amendments were written with the full knowledge of the *Entick* decision and that the Entick language could be reliably used to define the reasonableness of a search and seizure. Thus, he opines that the authors of those amendments could not have agreed to the law in question in Boyd:

> The struggles against arbitrary power in which they had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve such insidious disguises of the old grievance which they had so deeply abhorred.[39]

If the writs of assistance were in the minds of the Framers of the Bill of Rights when they wrote the Fourth and Fifth Amendments, one might think that the confiscation of firearms by General Gage was also in their minds. One notes that in the Declaration of the Causes and Necessity of Their Taking Up Arms the Continental Congress listed Gage's confiscation of arms as one of the causes, but not the writs of assistance, oppressive though they were.

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[39] *Id.*

Nor was Gage's action the only move to disarm colonists. Stephen Halbrook recalls that as early as 1671, Governor Berkely of Virginia, pursuant to the Game Act,[40] began attempting to disarm Virginians. This continued after the suppression of Bacon's Rebellion of 1676, until the abdication and flight of James II and the advent of William and Mary.[41] Halbrook reports that by the mid 1770's there were numerous newspaper accounts of the seizure of arms, especially arms in American ships arriving from other countries.[42] Using Justice Bradley's reasoning, these grievances, the seizures of arms, including an attempt 100 years before the Revolution, should have been in the minds of the Framers as well.

Amici believe that the fifth auxiliary right is protected in the Second Amendment. Remember that the Second Amendment was written by men whose sixth most frequently cited thinker, Beccaria, had argued passionately for an individual right to arms. As noted above, the courts of the United States have recognized a right to self-defense, including self-defense with arms. At the time the Amendment was drafted there was a right of the people to keep and bear arms in all of the states, with exceptions for slaves, Indians, and freedmen in some jurisdictions. If the collective right interpretation is correct, that means that there were two rights of the people, the one that everyone enjoyed as an auxiliary right of one subject to the common law, and the right to have arms while serving in the militia. One might well ask why Madison did not specify which one he meant if there were two.

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[40] 22 Car.II c. 25 (1670).

[41] Halbrook, *That Every Man Be Armed*, at pp. 55-57.

[42] *Id.*, at 63.

CONCLUSION

This Court Should Affirm the Judgment of the Court of Appeals for the D.C. Circuit. Amici realize that the language of the Second Amendment can be construed in two ways. However, Amici believe that this Court should affirm the judgment of the Circuit Court for several reasons.

Affirming the judgment would construe the Second Amendment to protect an individual right. If there was any authority, contemporaneous with the ratification of the Bill of Rights which did not believe that this was the intent of James Madison when he wrote it, of the Congress when they offered it for ratification, or the states when they ratified it, we have not found it.

The rights of Englishmen under the common law are protected in the Constitution and the Bill of Rights. The three absolute rights are protected in the due process clauses of the Fifth and Fourteenth Amendments. The first auxiliary right is protected in Article I of the Constitution. The second auxiliary right is protected by the Tenth Amendment. The third auxiliary right is protected by Article III of the Constitution and by the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments. The fourth auxiliary right is protected by the First Amendment. Where is the fifth auxiliary right? This Court has observed that ". . . the rights of life and personal liberty are natural rights of man." *United States v. Cruikshank*, 92 U.S. 542, 543 (1875). Not one of the rights which were so carefully protected in the Bill of Rights could be enjoyed unless one's life were first preserved. The confiscation of privately owned firearms in Boston was listed, in the Declaration of July 6, 1775, as one of the causes impelling us to take up arms. Would such men, under such circumstances, have left the fifth auxiliary right unprotected? All contemporary authorities appear to have thought not. They thought that it was protected in the Second Amendment.[43]

Affirming the judgment would change very little in America. Most Americans who are not part of the organized militia already have the right to keep and bear functional firearms, including handguns, in their homes. The decision we seek from this Court would merely strengthen the protection of this right.

However, for residents of the District of Columbia, and any other jurisdiction which prohibits private ownership of handguns, it will make a large difference in a number of ways. First, the current situation creates a safety hazard which the District Government appears not to have considered.

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[43] See, e.g., 1 Wiilliam Blackstone, *Commentaries on the Laws of England*, 300, 2 Blackstone, at 143, notes 40,41 (St. George Tucker, ed., Lawbook Exchange, Ltd., 1996)(1803) 143, nn. 40,41; William Rawle, *A View of the Constitution*, at 110 (Walter D. Kennedy and James R. Kennedy, eds , Land & Land Publishing,1993) (1825); Joseph Story, *On the Constitution of the United States*, §§450,451(Classics of Liberty Library, 1994) (1840); Thomas M. Cooley, *The General Principles of Consitutional Law in the United States of America*, Chap. XIV, sect. IV (Andrew C. McLaughlin, ed.,Little, Brown and Company, 1898).

As noted above, in every federal Circuit in which a convicted felon sought to offer a defense of justification for possession of a firearm in violation of 18 U.S.C. §922(g), it has been recognized. In the Fourth Circuit, for example, in *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989), the Court established a four prong test for justification in the face of such charges. The defendant must produce evidence which would allow the factfinder to conclude that he (1) was under unlawful and present threat of death or serious bodily injury; (2) did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm. These are, essentially, the same criteria which one who is not a prohibited person would have to show to justify shooting a dangerous attacker.

As things stand now, a District resident may keep a rifle or shotgun in his home. It would be unlawful to keep one's firearm fully assembled and loaded, but the government may not check to see if one is complying with the requirements of D.C. Code §7-2507.02 without probable cause. The District authorities will never know that one is in violation unless one actually shoots an intruder in self-defense. In that case, if the shooting is justified, one must assume that the violation of the D.C. Code will also meet the criteria for justification.

While this means that a D.C. resident would run very little risk of prosecution for keeping a loaded rifle in his home, society would be much better off if he could keep a loaded handgun instead:

> Consider penetration: even the .44 magnum, the most powerful of all handguns, penetrates no more than thirteen inches in wood, while revolvers in the far more commonly owned .32 to .38 calibers range from two to seven inches in penetration.[44]

The reason for the difference in penetration is relative velocity. A 158 grain bullet from a .38 special revolver will leave the muzzle at 755 feet per second.[45] A 150 grain bullet from a .30-06 hunting rifle, will leave the muzzle at 2920 feet per second.[46] The relative dangers are obvious, a handgun would be much better suited for home defense.

The District of Columbia is a densely populated urban environment.[47] A rifle or shotgun is much more likely to have an accidental discharge as a handgun for a number of reasons. But assume that there is a justified shooting. The problem of over penetration still endangers innocents with a rifle far more than with a handgun. Further, a rifle or shotgun would be awkward to use for home defense because of the size. If awkward for a healthy person, it may approach impossible in a confined space for a person who is bound to a wheel chair.

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[44] Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 262 (1983), citing D.Grennell & M. Willliams, Law Enforcement Handguns Digest 194-195 (1972) as to handgun penetration and Lattimer & Lattimer, *The Kennedy-Connally Single Bullet Theory*, 50 Intl. Surgery 524-525 (1968).

[45] *NRA Firearms Fact Book*, 262 (National Rifle Association, 3rd. ed, 1989).

[46] *Id.*, at 265.

[47] http://quickfacts.census.gov/qfd/states/11000.html

If District residents were permitted to have functional handguns in their homes, it is unlikely that this would lead to an increase in violent crime. The people who are inclined to commit violent crimes already have handguns. To see how honest people in the District will respond to having the right to keep and bear a functional handgun in their homes, we can look at jurisdictions in which there is a state constitutional right to arms for self-defense.

The constitutions of New Hampshire,[48] South Dakota[49] and Vermont[50] each protects a right to have arms for self-defense. During the five years 2002-2006, according to the F.B.I. UNIIFORM CRIME REPORTS, there were 208 homicides in these states.[51] Their combined population, as of July 1, 2007, was 2,733,296. During that same period the District of

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[48] New Hampshire Constitution, Article 2-a.

[49] South Dakota Constitution, Article VI, § 24.

[50] Vermont Constitution, Ch. I, art. 16.

[51] http://www.fbi.gov/ucr/ucr.htm

Columbia, population 588,292, had 1,099 homicides.[52] The rate per 100,000 population during this five year period, for the three states, was 1.54. For the District of Columbia, it was 38. One might safely conclude that if the honest people living in the District were allowed to have functional firearms, including handguns, in their homes, this would be unlikely to increase the rate of violent crime. One speculates that the prediction of Cesare Beccaria, cited above, that disarming the honest emboldens the dishonest, might be proven to be correct.

There are, in the District of Columbia, people who are elderly or disabled, as are many members of the Amici, Disabled Vets, as well as Amica Kestra Childers. A affirmation of the judgment would be a great help to give security to those of diminished physical capacity. On their behalf, Amici ask:

> *Suppose a strong and vigorous man strikes me with his fist, and I am a poor fellow who cannot stand up to him with a fist. May I defend myself with a sword?*[53]

For the reasons presented, Amici pray that this Court will affirm the judgment of the Circuit Court.

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[52] *Id.*

[53] Giovanni Da Legnano, *De Bello, De Represealiis et De Duello,* (Thomas Erskine Holland ed., James Leslie Brierly, trans. William S. Hein 1995 (1360), quoted by David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self Defense,* BYU Journal of Public Law (Forthcoming 2007).

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTEREST OF THE *AMICI CURIAE*

The Hons. Edward S. Berberian, Richard A. Brown, Daniel F. Conley, Richard A. Devine, Bonnie M. Dumanis, Michael O. Freeman, Kamala D. Harris, Paul L. Howard, Jr., Charles J. Hynes, Glenn F. Ivey, Robert M.A. Johnson, Robert T. Johnson, Robert M. Morgenthau, Thomas J. Orloff, P. David Soares, Jeffrey Tuttle, Craig T. Watkins, and Kym L. Worthy (collectively, the "District Attorneys") respectfully submit this *amici curiae* brief in support of Petitioners. Consent of Petitioners' counsel and Respondent's counsel has been obtained for the filing of this brief.[1]

Amici are elected District Attorneys, the highest law enforcement officials charged with the protection of, collectively, more than 27 million Americans residing in their jurisdictions. The District Attorneys individually and collectively place a high priority on the successful prosecution of criminals who commit gun-related offenses. They therefore have a compelling interest in the outcome of this appeal because an affirming opinion is likely to cast doubt upon the constitutionality of criminal gun laws *Amici* believe to be critical to public safety. Therefore, joining in this brief are the following elected law enforcement officials:

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* and their counsel made such a monetary contribution.

- The Honorable Edward S. Berberian is a career prosecutor and the elected District Attorney of Marin County, California. He represents a population of 250,000 residents.

- The Honorable Richard A. Brown was recently elected to his fifth term as District Attorney of Queens County in the City of New York. He represents the approximately 2.3 million residents in the County of Queens.

- The Honorable Daniel F. Conley is in his second term as District Attorney for Suffolk County in Massachusetts. Including the city of Boston, New England's largest city, he represents a population of approximately 690,000. Suffolk County operates a specially designated "Gun Court." He serves as Vice-President on the Board of Directors for the National District Attorneys Association.

- The Honorable Richard A. Devine is serving his third term as the elected State's Attorney for Cook County, Illinois, the nation's second largest state prosecutor's office. He represents the 5.3 million residents of the nation's second largest county, which includes the City of Chicago and its suburbs.

- The Honorable Bonnie M. Dumanis is the elected District Attorney of San Diego County, California. She represents the nation's sixth-largest county with a population of 3 million people.

- The Honorable Michael O. Freeman is serving his third term as the elected County Attorney of Hennepin County, Minnesota. He represents 1.2 million residents of Minnesota's largest county, which includes the City of Minneapolis and its suburbs.

- The Honorable Kamala D. Harris is serving her second term as the elected District Attorney of San Francisco County, California. She represents approximately 775,000 residents of the fourth-largest city in California.

- The Honorable Paul L. Howard, Jr. is serving his third term as the elected District Attorney of Fulton County, Georgia. He represents approximately 1 million residents, including the City of Atlanta, which has long been beset by gun violence.

- The Honorable Charles J. Hynes is serving his fifth term as District Attorney of Kings County (Brooklyn), New York. Brooklyn, with a population of approximately 2.5 million people, has a court specifically dedicated to the adjudication of felony-level gun cases.

- The Honorable Glenn F. Ivey is serving his second term as the elected State's Attorney for Prince George's County, Maryland. The County covers the eastern border of Washington, D.C. and has 860,000 residents.

- The Honorable Robert M.A. Johnson has been the prosecutor and corporate counsel for Anoka County, Minnesota since 1982. He represents a population of 320,000 residents and is the past president of the National District Attorneys Association.

- The Honorable Robert T. Johnson has been the District Attorney of Bronx County, New York since 1989. The Bronx, with a population of over 1.3 million, is one of the five counties contained within New York City.

- The Honorable Robert M. Morgenthau has served as the District Attorney for New York County since 1974. As the District Attorney for Manhattan, he represents more than 1.6 million people.

- The Honorable Thomas J. Orloff is serving his fourth term as the elected District Attorney of Alameda County, California, which includes the City of Oakland. He represents 1.5 million residents.

- The Honorable P. David Soares is the elected District Attorney of Albany County, New York. Elected in 2004, he represents 300,000 residents.

- The Honorable Jeffrey Tuttle was first elected District Attorney of Calaveras County, California in 2002. Now in his second term, he represents a population of 50,000 residents.

- The Honorable Craig T. Watkins is the elected District Attorney of Dallas County, Texas. He represents 2.3 million residents in the nation's ninth-largest city.

- The Honorable Kym L. Worthy is the elected Prosecuting Attorney of Wayne County, Michigan, which includes the city of Detroit. Elected in 2004, she represents approximately 2.2. million residents.

SUMMARY OF ARGUMENT

The District Attorneys respectfully submit that the three D.C. Code provisions at issue in this appeal do not violate the Second Amendment, thus necessitating a reversal of the lower court's decision. The District Attorneys do not focus on the reasons for the reversal, however, leaving these arguments to Petitioners and other *amici*. Instead, the District Attorneys urge the Court to consider the potentially negative, unintended, and wholly unnecessary consequences of an affirming opinion. In short, an affirmance could inadvertently call into question the well settled Second Amendment principles under which countless state and local criminal firearms laws have been upheld by courts nationwide.

For nearly seventy years, courts have consistently sustained criminal firearms laws against Second Amendment challenges by holding that, *inter alia*, (i) the Second Amendment provides only a militia-related right to bear arms, (ii) the Second Amendment does not apply to legislation passed by state or local governments, and (iii) the restrictions bear a reasonable relationship to protecting public safety and thus do not violate a personal constitutional right. The lower court's decision, however, creates a broad private right to possess any firearm that is a "lineal descendant" of a founding era weapon and that is in "common use" with a "military application" today. Under this vague standard, a vast range of criminal laws nationwide, including laws where possession of a firearm is an element of an offense, could be subject to a new round of constitutional challenges. As detailed below, regardless of their outcome, these challenges could create substantial uncertainty in the lower courts and strain the already slim resources of the courts and the criminal justice system. Significantly, while the courts struggle to determine the scope and application of the Second Amendment, prosecutors could be hindered in their ability to enforce criminal laws they have long understood to be valid and compromised in their continuing efforts to combat gun violence in their communities.

Indeed, Second Amendment challenges to criminal laws have already begun. A felon convicted of criminal firearm possession recently challenged a New York gun possession statute based on the D.C. Circuit's opinion below, saying he wanted to see "how far [he] could ride this pony." If upheld, such challenges could decriminalize a breathtakingly broad range of dangerous conduct. These future constitutional challenges can and should be avoided either through this Court's reversal of the decision below or through a narrow opinion that removes any confusion as to its scope, which should be limited to the discrete question presented. In addition to minimizing unnecessary constitutional attacks, a narrow opinion will allow prosecutors to continue enforcing violent crime laws without any uncertainty about their validity.

ARGUMENT

I. THE COURT SHOULD REVERSE THE DECISION BELOW

The District Attorneys respectfully join in the arguments set forth in Petitioners' brief. For all the reasons set forth by Petitioners, as well as the various reasons advanced by the *amici* in support of Petitioners, the three statutes at issue in the D.C. Code do not violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia.

II. THE COURT SHOULD LIMIT ITS OPINION TO THE NARROW QUESTION PRESENTED BY THE THREE D.C. STATUTES AT ISSUE

A. The Court Should Not Unintentionally Provoke Constitutional Challenges Of Criminal Gun Laws Nationwide By Introducing Uncertainty Into A Well Settled Area Of The Law

1. Gun Laws Have Been in Effect for Centuries

For centuries, jurisdictions throughout the nation have had criminal gun laws. In the eighteenth century, state statutes frequently provided for the confiscation of firearms from persons unwilling to take an oath of allegiance to the state, restricted the use of firearms within the context of militia obligations, and regulated the storage of gunpowder. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 506–

12 (2004). By the nineteenth century, when the supply and demand for handguns had increased dramatically, firearms laws became far more prevalent, with some states prohibiting the carrying of concealed weapons, the firing of a gun under certain circumstances, and the sale of weapons. Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 Stan. L. & Pol'y Rev. 571, 582–86 (2006); Cornell & DeDino, 73 Fordham L. Rev. at 514 & nn.182–83.

States and local governments have continued to modify criminal gun laws, tailoring them to meet the specific needs of each jurisdiction.[2] For example, many states have enacted enhanced criminal charges and penalties for felony crimes if the perpetrator possesses a firearm during the commission of those crimes.[3]

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[2] In addition, numerous states and local governments require a license and registration in order to possess a firearm. *See, e.g.*, Cal. Penal Code §§ 12800–12802; Conn. Gen. Stat. §§ 29-33, 29-36i; 430 Ill. Comp. Stat. 65/1–65/14; Iowa Code §§ 724.16–724.17; Md. Code Ann., Crim. Law § 4-203; Mass. Gen. Laws ch. 140, § 129C; N.Y. Penal Law § 400.00.

[3] *See, e.g.*, Ark. Code Ann. § 5-12-102 (robbery without gun punishable by 20 years in prison), § 5-12-103 (robbery with gun punishable by life in prison); Cal. Penal Code § 12022 (imposing additional prison terms for anyone "armed with a firearm in the commission" of specified felonies so long as the arming is not an element of the offense); La. Rev. Stat. Ann. § 14:95(E) (providing for enhanced sentence where offender "uses, possesses, or has under his immediate control any firearm, or other instrumentality customarily used or intended for probable use

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In addition, a number of states and local governments have determined that, to protect public safety, certain exceptionally dangerous firearms, including assault weapons, assault pistols, and/or handguns, should be banned altogether.[4] Some states have enacted an outright ban on carrying concealed weapons.[5]

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as a dangerous weapon, while committing or attempting to commit a crime of violence or while in the possession of or during the sale or distribution of a controlled dangerous substance"); Md. Code Ann., Crim. Law § 4-204 (enhancing sentence by 5 to 20 years for the use of a handgun during the commission of a crime of violence or any felony), § 5-621(b), (c) (same for using, wearing, carrying, or transporting a firearm during and in relation to a drug trafficking crime); Mass. Gen. Laws ch. 265, § 18B (minimum of five years for possessing a firearm in the commission of a felony); Mich. Comp. Laws § 750.88 (robbery without gun punishable by 15 years in prison), § 750.89 (robbery with gun punishable by life in prison); Nev. Rev. Stat. § 200.471 (involvement of gun increases assault from misdemeanor to felony).

[4] *See, e.g.*, Cal. Penal Code §§ 12275–12290 (banning assault weapons); Conn. Gen. Stat. §§ 53-202a–53-202o (banning assault weapons); Md. Code Ann., Crim. Law §§ 4-301–4-306 (banning assault pistols); Mass. Gen. Laws ch. 140, §§ 121, 123, 131M (banning assault weapons); N.Y. Penal Law §§ 265.00–.03, .08–.10 (banning assault weapons); Chi., Ill., Mun. Code §§ 8-20-030(h), 8-20-050(e) (banning assault weapons); Chi., Ill., Mun. Code §§ 8-20-040, 8-20-050(c) (banning handguns).

[5] *See, e.g.*, 720 Ill. Comp. Stat. 5/24-1(a)(4); Wis. Stat. Ann. § 941.23. Other states require a license to carry a concealed weapon. *See, e.g.*, Cal. Penal Code §§ 12025, 12050–12054, 12590; Fla. Stat. §§ 790.01, 790.015, 790.06; R.I. Gen. Laws §§ 11-47-8–11-47-18; Tex. Penal Code Ann. §§ 30.06, 46.035; Va. Code Ann. § 18.2-308.

2. Criminal Firearms Laws Have Withstood Repeated Second Amendment Challenges in State and Federal Courts

The federal and state courts have upheld state and local firearms laws, as well as criminal convictions thereunder, against Second Amendment challenges on three primary grounds. In holding the D.C. laws at issue to be unconstitutional, the decision below undermines each of these grounds, which also could be cast into doubt by an affirmance in this case.

First, courts nationwide have upheld criminal gun laws on the basis that the Second Amendment provides only a militia-related right to bear arms. *See, e.g.*, *Scott v. Goethals*, No. 3-04-CV-0855, 2004 WL 1857156, at *2 (N.D. Tex. Aug. 18, 2004) (affirming conviction under Texas Penal Code § 46.02 for unlawfully carrying a handgun because Second Amendment does not provide a private right to keep and bear arms); *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2003) (holding that California residents challenging constitutionality of California's Assault Weapons Control Act lacked standing because Second Amendment provides militia-related right to keep and bear arms); *State v. Brecunier*, 564 N.W.2d 365, 370 (Iowa 1997) (upholding firearm sentence enhancement because defendant "had no constitutional right to be armed while interfering with lawful police activity").

Second, courts have upheld state and local firearms laws on the basis that the Second Amendment applies only to federal legislation, not to legislation of the states or local governments. *See, e.g.*, *People v. Handsome*, 846

N.Y.S.2d 852, 854–55 (N.Y. Crim. Ct. 2007) (denying motion to dismiss criminal complaint, charging defendant with the unlawful possession of a firearm, because the "Supreme Court has repeatedly held [that the Second Amendment] limits only the power of Congress. . . . The right has never been found applicable to states, either directly or through the Fourteenth Amendment, and provides no bar to state regulation"); *Justice v. Town of Cicero*, No. 06 C 1108, 2007 WL 2973851, at *4 (N.D. Ill. Oct. 10, 2007) (upholding firearms registration ordinance because the "Second Amendment regulates only the activities of the federal government – not those of the states or their subdivisions").[6] Indeed, this Court has stated on at least two occasions that the Second Amendment limits the power only of the federal government, not the state or local governments. *Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("[The Second Amendment] is one of the amendments that has no other effect than to restrict the powers of the national government. . . ."); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (holding the same).

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[6] *See also Taylor v. Cuomo*, No. CV-07-2138(CPS), 2007 WL 3540351, at *5 (E.D.N.Y. Nov. 14, 2007) (upholding N.Y. Penal Law § 265.02(1), Criminal Possession of a Weapon in the Third Degree, against Second Amendment challenge), *reconsideration denied*, 2008 U.S. Dist. LEXIS 341 (E.D.N.Y. Jan. 3, 2008); *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005) (upholding New York's handgun licensing scheme); *Scott v. State*, No. 05-02-01023-CR, 2003 WL 21384652, at *2 (Tex. App. June 17, 2003) (upholding conviction under Texas Penal Code § 46.02 for unlawfully carrying a handgun); *Sklar v. Byrne*, 727 F.2d 633, 636–37 (7th Cir. 1984) (upholding prohibition of certain handguns in Chicago); *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 269–71 (7th Cir. 1982) (holding that prohibition of the possession of handguns within a village's borders does not violate the Second Amendment); *People ex rel. Darling v. Warden of City Prison*, 139 N.Y.S. 277, 283 (N.Y. App. Div. 1913) (upholding conviction for possession of pistol without permit); *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886) (upholding conviction for carrying concealed deadly weapon).

Third, courts have upheld state and local firearms laws as reasonable limitations to promote public safety. *See, e.g.*, *Britt v. State*, 649 S.E.2d 402, 408 (N.C. Ct. App. 2007) (upholding North Carolina law prohibiting possession of certain firearms by felons because "[o]ur case law has consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation") (internal quotation omitted); *Rohrbaugh v. State*, 607 S.E.2d 404, 413–14 (W. Va. 2004) (holding that West Virginia Code § 61-7-7, which barred persons convicted of a felony sexual offense from petitioning for restoration of firearms rights, did not violate the federal or West Virginia Constitutions because it was a "proper exercise of the Legislature's police power to protect the citizenry of this State and impose reasonable limitations on the right to keep and bear arms to achieve this end"); *Zieman v. City of Chicago*, No. 02 C 6616, 2004 WL 1793410, at *2 (N.D. Ill. Aug. 3, 2004) (upholding conviction for possessing unregistered firearms under § 8-20-040(a) of the Chicago Municipal Code because it was "rationally related to the state's police power").[7]

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[7] *See also State v. Blanchard*, 776 So.2d 1165, 1168–74 (La. 2001) (holding that Louisiana statute providing for enhanced sentence where individual has a firearm under his immediate control during the commission of a drug offense was a reasonable restriction for a legitimate state purpose); *People v. Bland*, 898 P.2d 391, 400 n.6 (Cal. 1995) (upholding enhanced sentence for

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3. An Affirmance of the Lower Court's Decision Could Generate Substantial Uncertainty and Spur a Wave of Second Amendment Litigation Nationwide

The lower court's sweeping reasoning undermines each of the principal reasons invoked by those courts that have upheld criminal firearms laws under the Second Amendment time and again. First, under the lower court's analysis, the Constitution protects a broad "individual" constitutional right, one that is not militia-related, to possess firearms. *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007). Second, according to the court below, this private right is nearly plenary, extending to the possession of any weapon that is a "lineal descendant" of a weapon used in colonial times, that is in "common use" and that has a "military application" today. *Id.* at 397–98. Third, the lower court applies these novel and poorly defined Second Amendment principles to invalidate local, rather than federal, legislation. *Id.* at 399–401. Finally, the court suggests that existing criminal firearms laws may be rescued with the same "sort of" legitimate "time, place or manner" restrictions that apply to free speech rights under the First Amendment. *Id.* at 399.

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being armed with assault rifle during the commission of drug offenses, and stating that "imposing an additional term of imprisonment when a person possesses cocaine base for sale and keeps an assault rifle handy to the stash of illegal drugs would not violate the Second Amendment to the federal Constitution"); *State v. Buzzard*, 4 Ark. 18 (1842) (holding that Arkansas statute, which prohibited possessing concealed weapons except when traveling, was a reasonable regulation that did not violate the Second Amendment).

Adopting the lower court's novel reasoning would likely result in great uncertainty about the constitutionality of a broad range of criminal firearms laws, further deluging already overburdened criminal courts.[8] Laws open to challenge could include, for example, (1) any criminal offense where possession of a firearm is an element, (2) bans on the possession of particular types of firearms, and (3) prohibitions on carrying concealed or loaded weapons. Criminal defendants, both present and future, may also challenge the heightened penalties imposed on certain crimes of violence, such as assault and robbery, where the defendant was carrying or had access to a firearm as compared to those who commit the same crime without a firearm.[9] Similarly, sentencing enhancements based on the possession of a firearm also would likely be challenged.[10]

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[8] It is uncontroverted that the lower courts have a backlog of civil and criminal cases. A 2002 Department of Justice survey of the 75 largest U.S. counties found that, on average, roughly 30% of felony cases were not yet adjudicated six months after arrest, and 13% were still not adjudicated after one year. U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2002, at 23 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf. In addition, criminal backlogs are significantly longer at the appellate level in many states. *See, e.g.*, Judicial Council of Cal., 2007 Court Statistics Report: Statewide Caseload Trends 1996-1997 through 2005-2006, at 17 (2007) (California – median time from notice of appeal to opinion over one year in 2005-2006), *available at* http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf; Admin. Office of the Courts, Arkansas Judiciary Statistical Supplement, Calendar Year 2006, at 11 (2007) (Arkansas – average time from end of trial to decision on appeal over one year in 2004-2006), *available at* http://courts.state.ar.us/06_calReport/2006_Annual_Report_Printable_Version.pdf.

Moreover, the test articulated by the lower court raises more questions than it answers. For example, the court's nod to "time, place or manner" restrictions only injects further uncertainty into the viability of long-standing criminal gun statutes, as the lower court does not cite any "time, place or manner" cases under the Second Amendment that could guide other courts in determining the constitutionality of existing criminal firearms laws. Indeed, this dicta underscores how little direction the lower courts will have when asked to decide whether particular firearm-related conduct is illegal or constitutionally protected.[11]

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[9] *See, e.g.*, Mass. Gen. Laws ch. 265, § 17 (minimum of five years for robbery while armed with a firearm), §18(a) (minimum of ten years for assault with intent to rob or murder while armed with a firearm); Mich. Comp. Laws § 750.88 (robbery without gun punishable by 15 years in prison), § 750.89 (robbery with gun punishable by life in prison); Ark. Code Ann. § 5-12-102 (robbery without gun punishable by 20 years in prison), § 5-12-103 (robbery with gun punishable by life in prison); Nev. Rev. Stat. § 200.471 (involvement of gun increases assault from misdemeanor to felony); Tex. Penal Code § 22.01 (assault if no gun involved), § 22.02 (higher charge of aggravated assault if gun involved).

[10] *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 9712; Wis. Stat. Ann. § 939.63.

[11] As discussed below, the consequences of this uncertainty will be even more severe for prosecutors and law enforcement, who would have to determine, *in the field*, whether particular

(Cont'd)

An affirmance of the lower court's unworkable test would likely cause state and local courts nationwide to struggle with the sheer number of these Second Amendment challenges. Recent data suggests that tens of thousands of such challenges could be brought, as in 2006 alone more than 157,000 robberies and 160,000 aggravated assaults were committed where a firearm was present at the crime. U.S. Dep't of Justice, F.B.I., Crime in the United States, 2006, at tbls. 21-22 (Sept. 2007), *available* at http://www.fbi.gov/ucr/cius2006/offenses/violent_crime/index.html.

4. Constitutional Challenges Have Already Begun, and More Are Being Planned

The District Attorneys' concern about the impact of renewed Second Amendment challenges is more than mere supposition. Criminal defendants have already invoked the lower court's decision in attacks on criminal gun laws nationwide, and others are openly planning to bring new constitutional challenges.

(Cont'd)
firearms-related conduct is criminal or constitutionally protected under this new regime. Without clear guidance, law enforcement could either refrain from acting, with negative consequences for public safety, or act in potential violation of a suspect's newly-minted constitutional rights. The possibility of a wave of related civil rights claims against prosecutors and law enforcement throughout the country, pursuant to 42 U.S.C. § 1983, is real.

Explicitly relying on the decision below, one repeat felony offender recently sought to set aside a guilty verdict in connection with unlawful possession of a firearm:

> [Petitioner] moves to have the verdict set aside and the charges dismissed because both the indictment and trial verdict violate his right to "bear arms" as guaranteed by the Second Amendment to the United States Constitution. . . .
>
> Put in simple terms [Petitioner] advances the proposition that *both* the authority of Congress to enact and the authority of this Court to adjudicate the possession of firearms by anyone, ***including a convicted felon***, are prohibited by Article I and the Second Amendment to the Constitution. . . .
>
> [A]mending the Constitution is precisely what Congress did ***in the enactment of every federal gun law since 1934, and that . . . is clearly prohibited.***

Motion to Set Aside the Verdict and Dismiss the Charges at 3, 10–12, *United States v. Lucky*, No. 05-CR-33 (D.G.T.) (E.D.N.Y. Dec. 7, 2007) (emphasis added). A multitude of similar constitutional challenges have been brought across the country. *See, e.g.*, *Andrews v. United States*, 922 A.2d 449, 455–56 (D.C. 2007) (considering argument by convicted murderer that related conviction arising from use of firearm during violent crime violated his individual Second Amendment rights as construed by the court below); *Handsome*, 846 N.Y.S.2d at 854–61 (considering argument that, based on reasoning of court below, state law prohibiting possession of weapon violated Second Amendment); Defendant Deshawn Gopie's Motion to Dismiss Count 5, *United States v. Gopie*, No. 07-60159-CR-Cohn/Snow, 2007 WL 3214410 (S.D. Fla. Aug. 13, 2007) (challenging indictment for knowing possession of a firearm in furtherance of a drug trafficking crime, citing opinion below as support); Appeal from the Judgment of the Superior Court of Plymouth County, *Tucci v. Wareham Police Dep't*, No. 2007-P-1409, 2007 WL 4101445, at *6–10 (Mass. App. Ct. Oct. 24, 2007) (citing opinion below as authority for claim that denial of application for firearm license violated individual right to keep and bear arms).

Members of the criminal defense bar have similarly expressed a plan – which necessarily would be emboldened by a broad affirmance of the decision below – to "see how far we can ride this pony." Joseph Goldstein, *Convicted Felon Tests Second Amendment*, N.Y. Sun, Dec. 27, 2007, at 2.

B. The Court Should Not Needlessly Hinder Prosecutors' Ability To Enforce Criminal Firearms Laws By Injecting Uncertainty About Their Constitutionality

An affirmance of the lower court's decision could adversely impact prosecutors' ability to enforce existing criminal firearms laws across the country. Until the opinion below, prosecutors have been able to enforce criminal firearms laws with the settled understanding — reinforced by a long line of cases—of their constitutionality. Relying on the unbroken line of cases upholding the constitutionality of these criminal laws, *Amici* have placed a high priority on the prosecution of gun crimes. They have not had to consider whether or not a criminal sentence could be enhanced based on the "lineage" of the firearm at issue. They have not had to determine whether the firearm involved in drug trafficking was in sufficiently "common use" today to enjoy some constitutional protection. They have not had to worry about whether the violated statute at issue satisfied the "sort of" time, place or manner restrictions that could support a conviction. An affirmance of the decision below could needlessly compromise prosecutors' ability to rely on and enforce current firearms laws, as well as disturb their allocation of resources to combating gun crimes.

The most immediate impact of an affirmance would be on negotiated dispositions of pending firearms charges.[12] At least ninety-five percent of all state felony convictions nationwide result from guilty pleas. U.S. Dep't of Justice, Felony Sentences in State Courts, 2002, at 8 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf; *see also* Judicial Council of Cal., 2007 Court Statistics Report, at 52 (97% of felony cases in California resolved before trial in 2005-06).[13] In each of these cases, prosecutors would be required to consider whether the statute or sentencing guideline at issue may be susceptible to attack. Prosecutors may be forced to offer more lenient pleas to account for the risk of a successful Second Amendment challenge, either by offering a lower sentence or not pursuing certain charges or sentence enhancements that otherwise could be pursued.[14] Even if prosecutors were confident that the statutes were not infirm, they could be forced to reduce a sentence simply due to a lack of sufficient resources to effectively defend against each such challenge.[15] Some defendants would take their chances at trial, hoping that an affirmance in this case would extend to the statute they violated.[16]

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[12] As an example of the prevalence of firearm cases, in 2007, there were over 800 gun crime cases in Bronx County, New York alone.

[13] The percentage of weapons-related cases that are plea bargained is comparable. U.S. Dep't of Justice, State Court Sentencing of Convicted Felons 2004, at tbl. 4.1 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm. This is also on par with state court systems nationwide. *See* U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2002, at 24 (in 75 largest U.S. counties, only approximately 4% of felony cases went to trial).

---

[14] Similarly, prosecutors could forgo bringing potentially suspect charges in the first instance, even before the plea bargaining stage, for fear of difficulty in obtaining a conviction. For example, they could charge a defendant for dealing drugs, but decide not to pursue enhancements for possessing a firearm while dealing drugs. Cal. Penal Code § 12022(a) ("[A]ny person who is armed with a firearm in the commission of a felony or attempted felony should be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless the arming is an element of that offense.").

[15] Criminal defendants who previously pleaded guilty to weapons possession or other felonies based on involvement of a firearm could receive windfall grounds to withdraw and/or challenge the constitutionality of their pleas. Prosecutors, who had previously relied on the constitutionality of gun laws in agreeing to the plea, would be forced to defend such appeals and habeas petitions, adding an additional burden to prosecuting the nation's most violent offenders.

[16] This additional incentive to bring cases to trial would create another significant burden on the lower courts. For

(Cont'd)

The impact of an affirmance on pending prosecutions would be especially troubling given the constitutional right articulated by the court below. Unlike decisions requiring additional proceedings that conform with the rule announced in the decision, *see, e.g., Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment requires exclusion of unconfronted "testimonial hearsay"), *and United States v. Booker*, 543 U.S. 220, 267 (2005) (addressing the constitutionality of federal sentencing guidelines), an affirmance in this context could suggest that the defendant's *conduct* was not criminal and that prosecution is, in fact, constitutionally barred. Projected over the tens of thousands of firearms prosecutions conducted annually in America, and the serious threat to public safety posed by many defendants' conduct involving firearms, a broad affirmance in this case could impair prosecutors' ability to protect public safety.

(Cont'd)

example, in a full year, less than 6,500 felony cases went to trial in California. Judicial Council of Cal., 2007 Court Statistics Report, at 52. Given that there were more than 19,000 arrests in 2005 on felony weapons charges in California alone, if even an additional 10 to 20% of such defendants opted for trial based on uncertainty about the constitutionality of charges, California's criminal justice system would be strained to the breaking point. *See* Cal. Dep't of Justice, Crime in California 2005, at 122 (2006), *available at* http://ag.ca.gov/cjsc/publications/candd/cd05/dataTables.pdf.

C. The Court Should Tailor Its Opinion To The Three D.C. Code Provisions At Issue

In an unbroken line of cases stretching back to 1885, the Court has repeatedly upheld the policy of judicial restraint in considering constitutional questions.[17] As the Court recently stated, "We have long 'rigidly adhered' to the tenet 'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' for '[t]he nature of judicial review constrains us to consider the case that is actually before us.'" *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 192 (2003) (citation omitted). The Court must "decide constitutional questions only when necessary to the disposition of the case at hand" and "such decisions will be drawn as narrowly as possible." *Sweatt v. Painter*, 339 U.S. 629, 631 (1950); *see also Air Courier Conference of Am. v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available.").

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[17] *See Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947) ("[C]onstitutional issues affecting legislation will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be applied."); *Coffman v. Breeze Corp.*, 323 U.S. 316, 324–25 (1945) ("[T]he Court will not pass upon the constitutionality of legislation . . . until it is necessary to do so to preserve the rights of the parties."); *Liverpool, N.Y. & Phila. Steam-Ship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (This Court "is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.").

In light of the negative and wholly unnecessary consequences to the enforcement of other jurisdictions' firearms laws that could result from an affirmance, the District Attorneys respectfully request that the Court exercise judicial restraint and explicitly limit its decision to the three discrete provisions of the D.C. Code on which it granted certiorari. This would avoid needless confusion and uncertainty about the continued viability and *stare decisis* effect of this Court's—and other courts'—prior Second Amendment jurisprudence. A narrow opinion also would help to discourage the inevitable flood of constitutional challenges that otherwise would ensue from the uncertainty engendered by an affirmance and provide the guidance necessary for the lower courts to properly analyze those challenges that are mounted. This also would allow the District Attorneys and other prosecutors to enforce the existing laws that are not before the Court today and to continue to protect public safety.

CONCLUSION

For all the foregoing reasons, *Amici* respectfully submit that the decision below should be reversed and that the Court's opinion be strictly limited to the narrow question presented.

January 11, 2008

Respectfully submitted,

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No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF therefore has a strong interest in protecting the right of individuals to keep and bear arms, as set forth in the Second Amendment.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that the Second Amendment guarantees an individual right to keep and bear arms. The right existed prior to the formation of our nation's government and the adoption of the Constitution. The Second Amendment protects this right, which by its plain terms belongs to "the people" and "shall not be infringed."

This conclusion is dictated by the Second Amendment's plain language, and in particular its specific reference to a right retained by "the people." The term is unambiguous and is used elsewhere in the Bill of Rights to protect the rights enjoyed by citizens in their individual capacities. This Court has made clear that "the people" protected by the Bill of Rights are the entire "class of persons who are part of [the] national community"—not, as Petitioners posit—a subset of such persons such as an organized, state-run militia.

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[1] This brief is filed in accordance with the global consent letters filed by Petitioners and Respondent with this Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

Petitioners' suggestion that the Second Amendment has an "exclusively military purpose" ignores the plain text of the amendment's operative clause, as well as this Court's construction of its terms. Moreover, it is based on a construction of the amendment's prefatory clause that is demonstrably wrong.

First, Petitioners assume that the Second Amendment's prefatory clause can alter its operative meaning. However, basic rules of grammar as well as this Court's settled precedent make clear that a prefatory clause cannot compel a result contrary to the meaning of a provision's operative language. Indeed, it is common for prefatory language to state a principle or purpose narrower than the operative language used to achieve it. In such situations, this Court has held that the operative language is controlling.

Second, Petitioners misconstrue the prefatory clause's plain meaning in arguing that it is intended to protect solely the States' right to form a militia. While the clause suggests that ensuring a well-regulated militia is one purpose of the right to keep and bear arms, it does not state that this is the exclusive purpose. Nor does it limit the right to "military purpose[s]" or otherwise exclude persons who are not members of an organized militia. To the contrary, the Founders understood the term "militia" to encompass "the people" at large. Indeed, that has been the consistent understanding of the term from the Founding Generation to the present day.

Accordingly, the text of the Second Amendment, its structure, and the historical record all demonstrate that the amendment guaranteed a fundamental, individual right. The court of appeals' decision so holding should be affirmed.

ARGUMENT

I. The Second Amendment Guarantees An Individual Right To Keep And Bear Arms.

The Second Amendment's operative language protects the "right" of "the people" to keep and bear arms. The Framers' choice of words is telling and, indeed, dispositive of the question before this Court. The text recognizes a "right," not a "power." It guarantees that right to "the people," not "the states" or state-organized militias. The actions protected by the right—"keep[ing] and bear[ing] arms"—are broadly defined and do not exclude private action. Taken together, these words indicate that the amendment protects a fundamental, individual right.

A. The Second Amendment's Operative Clause Guarantees "The People" The "Right" To Keep And Bear Arms.

The amendment's use of the word "right" is significant. There is not a single instance in which the Constitution confers a "right" to government. "Nor does it confer any 'right' restricted to persons in governmental service, such as members of an organized military unit." *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel 11 (Aug. 24, 2004), *available at* www.usdoj.gov/olc/secondamendment2.pdf ["OLC Opinion"]. Rather, the Constitution secures rights of individuals *against* government overreaching.[2] "By contrast, governments, whether state or federal, have in the Constitution only 'powers' or 'authority.'" *Id.* (citing U.S. CONST. art. I, § 1; art. I, § 8; art. II, § 1; art. III, § 1; amend. X). It would be a "marked anomaly" indeed if the word "right" in the Second Amendment departed from that term's uniform usage throughout the rest of the Constitution. *See id.*

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[2] Elbridge Gerry made this point during the First Congress: "This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government." 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1107 (1971) (Aug. 17, 1789). Likewise, this Court has explained that "the first 10 amendments" were intended "to embody certain guaranties and immunities which we had inherited from our English ancestors." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). The *Robertson* Court read the Second Amendment

Lest there be any doubt what the Framers intended by use of the term "right," they explicitly guaranteed the right to bear arms contained in the Second Amendment to "the people." "People" is the most instructive word in the amendment. The "people" hold the right—not organized, state-run military organizations, and not the states themselves. The term is also found in the First, Fourth, and Ninth Amendments, and "[i]t has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation." *See* Pet. App. at 18a.

Where the Framers intended to preserve the powers of the States they knew how to do so and used quite different language. The Tenth Amendment, for example, makes clear that the Framers were "perfectly capable of distinguishing between 'the people,' on one hand, and 'the states,' on the other." *Id.*; *see* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 51 (2000) ["AMAR, THE BILL OF RIGHTS"] ("[W]hen the Constitution means 'states,' it says so.").

While Petitioners suggest that individuals may exercise their Second Amendment rights "only as part of the state-regulated militia"—*i.e.,* an "organized and trained military force, led by state-chosen officers" (Pet. Br. at 14, 21), the amendment's text does not support this construction. This

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in pari materia with other Bill of Rights provisions to protect pre-existing rights from government overreaching.

Court has made clear that "the people" protected by the Second Amendment are the same people protected throughout the Bill of Rights:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people".... [This] suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

In particular, the Court has determined that "the people" has the same meaning in the First, Second, Fourth, and Ninth Amendments. It is beyond cavil that "the people" enjoy *individual rights* under those provisions. *See, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("The freedom of speech ... secured by the First Amendment ... [is] among the fundamental *personal rights* and liberties which are secured *to all persons* ....") (emphasis added); *Rakas v. Illinois*, 439 U.S. 128, 138 (1978) ("the 'rights assured by the Fourth Amendment are personal rights'") (citation omitted). If the phrase "the people" is interpreted consistently—as this Court instructed in *Verdugo-Urquidez*—one can only conclude that the Second Amendment protects the personal right of *individuals* to keep and bear arms.

Thus, both the plain language of the Second Amendment and the structure of the Bill of Rights make clear that the amendment protects the rights of individuals, rather than the states or state-run organizations. Indeed, it is a basic principle of interpretation that words or provisions "are known by their companions." *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps"). Where items in a list share an attribute, that fact "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994). "Every other provision of the Bill of Rights, excepting the Tenth, which speaks explicitly about the allocation of governmental power, protects rights enjoyed by citizens in their individual capacity." Pet. App. at 22a-23a. The court of appeals correctly concluded that "[t]he Second Amendment would be an inexplicable aberration if it were not read to protect individual rights as well." *Id.*

In sum, Petitioners' collectivist interpretation makes sense only if one ignores the plain meanings of the words "right" and "people," as each is consistently applied throughout the Constitution and the Bill of Rights; this Court's precedents interpreting those key terms; and the most basic canons of interpretation. Such a strained interpretation cannot stand when there is a natural reading that gives full effect to the text. The text means what it says: the "right" belongs to "the people."

B. The Right "To Keep And Bear Arms" Protects Private Conduct.

Petitioners' assertion that the Second Amendment's use of the phrase "keep and bear arms" evidences a "distinctly military cast" fares no better. *See* Pet. Br. at 15. Petitioners' contention that the phrase "bear arms" refers only to "using weapons in a military context" is belied by the plain meaning of those terms and their history. *Id.* at 15-16. And Petitioners' attempt to interpret the word "keep" as a mere corollary of the term "bear" would read the term out of the amendment altogether. *See id.* at 17 ("Securing their right to 'keep' those arms would ensure that they could 'bear' them.").

Once again, Petitioners' interpretation only works if the Court is willing to eschew the text's most natural meaning in favor of a strained and unnatural interpretation. Neither "keep" nor "bear" has an exclusively military construction. "Keep" meant much the same thing at the Founding that it means today. Samuel Johnson's dictionary defines "keep" as "to retain; not to lose," "to have in custody," to "preserve; not to let go." *See* JOHNSON'S AND WALKER'S ENGLISH DICTIONARIES COMBINED 540 (1830). Similarly, Noah Webster defined "keep" as "to hold" or "to have in custody." WEBSTER, AMERICAN DICTIONARY (unpaginated) (1828). Nothing about the word "keep" suggests an exclusively military use. To the contrary, the court of appeals correctly held that "the plain meaning of 'keep' strikes a mortal blow to the collective rights theory.... [It] is a straightforward term that implies ownership or possession ... by an individual for private use." Pet. App. at 26a-27a.

The phrase "bear arms" is no more limited to military use. The court of appeals correctly found that leading dictionaries, including the original Webster's, demonstrate that the primary meaning of "bear" was "to carry." *See id.* at 23a. Nor does the addition of the word "arms" restrict the term's meaning to exclusively military uses. To the contrary, at least ten states had contemporaneous constitutional provisions that used the phrase "bear arms" in a manner that included carrying arms for private purposes such as self-defense. *See United States v. Emerson*, 270 F.3d 203, 230 n.29 (5th Cir. 2001) (collecting contemporaneous provisions); *see, e.g.*, PA. CONST. art. I, § 21 (1790) ("The right of the citizens to bear arms in defense of themselves and the State shall not be questioned."); KY. CONST. art. 10, ¶ 23 (1792) ("the right of the citizens to bear arms in defense of themselves and the State, shall not be questioned"); OHIO CONST. art. VIII, § 20 (1802) ("the people have a right to bear arms for the defense of themselves and the State"). Indeed, "Pennsylvania, whose constitution of 1776 first used the phrase 'the right to bear arms,' did not even have a state militia." *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 134-35 (1999). It defies logic to read "bear arms" *only* in a military context, when the origins of the phrase did not have a military connotation at all.

Again, Petitioners' position would require this Court to endorse a completely unnatural reading of the amendment's unambiguous language and interpret a phrase used without a military context in 1776 to denote *solely* a military context in 1789. It would likewise require the Court to ignore the common definitions of the terms "keep" and "bear" and ascribe to them an intent inconsistent with their usage in contemporaneous provisions. In sum, Petitioners' construction is completely at odds with the amendment's plain meaning.

C. The Historical Record Demonstrates That The Second Amendment Guaranteed An Individual Right To Bear Arms.

The historical record further demonstrates the futility of Petitioners' construction. The Second Amendment was designed to guarantee pre-existing rights of individuals; not to protect the powers of the states. The right to keep and bear arms was viewed as a natural and inherent right that individuals possessed *before* the formation of any government, whether federal or state. As this Court has previously found: "The law is perfectly well settled that the first 10 amendments to the constitution ... were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

Here, the right "inherited from our English ancestors" was individual in nature and did not limit possession of firearms to collective purposes. England's Declaration of Rights of 1689 guaranteed that Protestant subjects "may have Arms for their Defence suitable to their Conditions and as allowed by Law." 1 W. & M., Sess. 2, c. 2, § 1 (1689); *see Nunn v. Georgia*, 1 Ga. 243, 249 (Ga. 1846) (finding that "the Constitution of the United States, in declaring that the right of the people to keep and bear arms, should not be infringed, only *reiterated a truth announced a century before*, in the act of 1689") (emphasis added). This article set out a personal right not tied to military service. This understanding was shared by William Blackstone, whose works "constituted the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 706 (1999). Blackstone's influential *Commentaries* refer to "the natural right of resistance and self preservation" and "having and using arms for self-preservation and defense." 1 WILLIAM BLACKSTONE, COMMENTARIES *143-44. Indeed, he described the right of "self-defense" as "the primary law of nature" that cannot be "taken away by the law of society." 3 WILLIAM BLACKSTONE, COMMENTARIES *4 ("Self-defense therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.").

The Founding Generation well understood the right to bear arms as an individual, pre-existing right that would be protected, rather than created, through the Bill of Rights. In *Federalist No. 28*, Alexander Hamilton described the "original right" of self-defense that was "paramount to all positive forms of government." THE FEDERALIST NO. 28, at 178. A 1768 town meeting led by Samuel Adams and John Hancock resolved that the English right was "founded in

Nature, Reason, and sound Policy." BOSTON CHRONICLE at 363 (Sept. 19, 1768), *quoted in* STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS 1-2 (1989) ["HALBROOK, A RIGHT TO BEAR ARMS"]. Contemporaneous newspapers described that right as "a natural right which the people have reserved to themselves, confirmed by the [Declaration] of Rights, to keep arms for their own defence." "Boston, March 17," N.Y.J. Supp. at 1 (Apr. 13, 1769), *reprinted in* HALBROOK, A RIGHT TO BEAR ARMS at 7.

The Second Amendment did not purport to *create* the right to keep and bear arms—it guaranteed that the pre-existing right "shall not be infringed." In doing so, the amendment merely declared what was obvious to all: that each individual enjoyed a fundamental right to bear arms that was a corollary of one of the most fundamental rights—the right of self-defense. *See* Philip Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919-20 (1993) ("the right of self-defense, the right to bear arms, and the right to assemble were said to be natural rights" that were specifically "enumerated in bills of rights"); Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1172 (1996) ("The fact that Madison and his colleagues believed individuals had a natural right both to freedom of speech and to possess arms for self-defense is crucial evidence that they meant exactly what they said in guaranteeing 'the right of the people to keep and bear arms.'").

As a consequence, the right to bear arms cannot be viewed as a mere privilege to participate in a state-run militia or other organized fighting force. The Framers understood the right to exist *before* the creation of such entities. By necessity, it was an individual right that was a corollary to the fundamental right to defend oneself against *all* potential antagonists, not merely those at odds with the government or state-run militias.

II. The Prefatory Clause Of The Second Amendment Does Not Limit The Rights Of Individuals Who Are Not Affiliated With A State-Regulated Militia.

Because the meaning of the terms used in the Second Amendment's operative clause is so clear, Petitioners' brief largely ignores that language and instead focuses primarily on the amendment's prefatory clause: "A well regulated Militia, being necessary to the security of a free State ...." U.S. CONST. amend. II. According to Petitioners, the preamble limits the right to bear arms to those actively "servi[ng] in a military organization." Pet. Br. at 14. This assertion fails for at least two independent reasons.

A. The Second Amendment's Operative Language Protecting The Right Of "The People" Is Not Controlled Or Limited By The Amendment's Prefatory Clause.

As a threshold matter, Petitioners' argument rests on the mistaken belief that a prefatory clause or preamble can compel a result contrary to the command of the operative clause. However, basic rules of grammar make clear that the preamble is independent of this operative clause and does not control its command language. *See* Nelson Lund, *D.C.'s Handgun Band and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. CIV. RTS. L.J. 229, 237 (2008) ("[Prefatory clauses] are grammatically independent of the rest of the sentence, and do not qualify any word in the operative clause to which they are appended.").[3] Thus, "the

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[3] Professor Lund cites several grammar and rhetoric textbooks in support of this proposition. *See* Lund, supra, at 237 n.25; *see e.g.*, JOHN WILSON, THE ELEMENTS OF PUNCTUATION 4 (1857) (such clauses "are grammatically independent of the other portions of the sentence in which they occur"); VIRGINIA WADDY, ELEMENTS OF COMPOSITION AND RHETORIC 13 (1889) ("The absolute phrase is without grammatical dependence on any other word.").

Second Amendment has exactly the same meaning that it would have if the preamble had been omitted." *Id.*

Indeed, at the time the Second Amendment was adopted and ratified, it was "quite common for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it." Pet. App. at 34a. From the Founding to the present day, such clauses have consistently been understood to impose no limitation on the operative language that follows. *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814-21 (1998) (listing dozens of examples roughly contemporaneous with the Second Amendment).[4]

This interpretive principle is as old as the Republic itself. This Court spoke definitively on the use of preambles a mere five years after the Second Amendment's ratification. In *Ware v. Hylton*, 3 U.S. 199 (1796), Justice Chase wrote that "the intention ... expressed in the preamble" may guide the Court where an operative clause is "ambiguous or doubtful." *Id.* at 233. However, "if the words in the enacting clause, in their nature, import, and common understanding, are not ambiguous, but plain and clear, and their operation and effect certain, *there is no room for construction*." *Id.* (emphasis added).

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[4] For example, the Massachusetts, New Hampshire, and Vermont constitutions each declared that freedom of speech in the legislature was "so essential to the rights of the people" that words spoken there could not be the basis of "any" suit. *See* MASS. CONST. pt. 1, art. XXI (1780); N.H. CONST. pt. I, art. XXX (1784); VT. CONST. ch. I, art. XVI (1786). Under Petitioners' approach, speech not "essential to the rights of the people," such as personal slanders unrelated to a pending bill, would not be protected by such provisions. Nonetheless, the consensus at the time was just the opposite: such speech was in fact clearly covered by the immunity conferred by the operative language of these provisions despite the language in the preambles. *See Volokh*, 73 N.Y.U. L. REV. at 799.

Justice Story echoed these sentiments in his *Commentaries*. Writing about the preamble of the federal Constitution, Justice Story stated the prevailing view that preambles are "properly resorted to" only where "doubts or ambiguities arise upon the words of the enacting part." JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459, at 443 (1833, reprint 1991). Where the operative language was unambiguous, however, Story observed that there was "little room for interpretation." *Id.*

More than 100 years later, this Court reaffirmed *Ware*'s interpretative rule in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). Citing Story's *Commentaries*, the Court held that the Constitution's preamble lacks any operative legal effect. *See id.* at 22. Although the preamble states the Constitution's "general purposes," it is not a source of substantive rights or powers and cannot be used to confound clear operative language. *Id.*

Thus, this Court has consistently rejected the mode of interpretation suggested by Petitioners here. There is no reason to except the Second Amendment from this well-settled interpretive rule. Whatever the meaning of the Second Amendment's prefatory clause, its operative clause states plainly that "[t]he people" have a "right" to "keep and bear arms," and that this right "shall not be infringed." U.S. CONST. amend. II. The language in the prefatory clause cannot change this clear command.

B. The Second Amendment's Prefatory Clause Refutes Petitioners' "Collective Rights" View.

Were the prefatory clause controlling, it would only further refute Petitioners' "collective rights" interpretation. Petitioners suggest that the use of the term "well regulated Militia" limits the right to members of "an organized and trained military force, led by state-chosen officers." Pet. Br. at 14. However, this interpretation rests on a narrow reading of "militia" that is inconsistent with the common understanding of this term from the Founding Generation to the present day.

"In 1789, when used without any qualifying adjective, 'the militia' referred to all citizens capable of bearing arms." AMAR, THE BILL OF RIGHTS at 51. For example, the Virginia Declaration of Rights, which was adopted in June 1776 and heavily influenced both the Declaration of Independence and the Bill of Rights, explicitly defines "well regulated militia" as "the body of the people." *See* Virginia Declaration of Rights art. XIII; *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 136 n.13 (1997) (citing the Virginia Declaration of Rights). Likewise, participants in the Virginia and North Carolina ratifying conventions each spoke of "a well regulated militia composed of the body of the people." RATIFICATIONS AND RESOLUTIONS OF SEVEN STATE CONVENTIONS (1788), *reprinted in* 2 DEBATE ON THE CONSTITUTION 561 568 (Lib. of Am. 1993). Indeed, the common understanding of the term was "the able bodied men ... left to pursue their usual occupations ... but not engaged in actual service except in emergencies." WEBSTER, AMERICAN DICTIONARY (unpaginated) (1828).

James Madison articulated this view in *Federalist No. 46*, where he described the militia as "amounting to near half a million citizens with arms in their hands." THE FEDERALIST No. 46, at 321-22. In *Federalist No. 29*, Alexander Hamilton echoed this interpretation, describing the militia as "the great body of the yeomanry, and of the other classes of the citizens," indeed "the whole nation." THE FEDERALIST No. 29, at 183-85. George Mason—who was the principal author of the Virginia Declaration of Rights and is often described as the "Father of the Bill of Rights"—defined the militia in the clearest possible terms. "Who are the Militia? They consist now of the whole people." 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE

CONVENTIONS 425 (3d ed. 1937) (statement of George Mason, June 14, 1788)[5]

To the Framers, the "militia were the people and the people were the militia." AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 323 (2005) ["AMAR, AMERICA'S CONSTITUTION"]. Indeed, the initial version of the Second Amendment that passed the House of Representatives expressly defined the militia as "composed of the body of the people." AMAR, THE BILL OF RIGHTS at 51-52 (quoting EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 214 (1957)); *see* AMAR, AMERICA'S CONSTITUTION at 323 (quoting *Senate Journal*, 1:63 (Aug. 25, 1789)). The Amendment was "stylistically shortened in the Senate" to omit this express definition. AMAR, THE BILL OF RIGHTS at 51-52. Nonetheless, the drafting history demonstrates that the Framers understood the term "militia" to be coextensive with "the people."

The second Militia Act, passed by the Second Congress less than one year after the Bill of Rights was ratified, confirms the Framers' broad understanding of the term "militia." The Act defined the militia as "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years." Militia Act, 1 Stat. 271 (1792). Thus, the historical record demonstrates that the "militia" was comprised of the able-bodied population and was *not* limited to the "organized and trained military force[s]" suggested by Petitioners here.[6]

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[5] By contrast, there are *no* contemporaneous authorities supporting Petitioners' collectivist interpretation. "If anyone entertained this notion in the period during which the Constitution and the Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing [] between 1787 and 1791 states such a thesis." STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 83 (1984).

This Court recognized as much in *United States v. Miller*, 307 U.S. 174 (1939) where it found that "the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators" all demonstrate that the "militia" referenced in the Second Amendment was comprised of "all males physically capable of acting in concert for the common defense":

> [T]he Militia [consists of] civilians primarily, soldiers on occasion. The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense.

Id. at 179. As the Court recognized, the entire concept of a militia was based on the spontaneous formation of an armed body comprised of ordinary citizens. "[O]rdinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* The Court's analysis in *Miller* affirmatively refutes Petitioners' contention that the Second Amendment's protections are limited to members of "an organized and trained military force, led by state-chosen officers." *See* Pet. Br. at 14. The plain language of the prefatory clause contains no such limitation.

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[6] This Court has made clear that "early congressional enactments" are "contemporaneous and weighty evidence of the Constitution's meaning." *Printz v. United States*, 521 U.S. 898, 905 (1997) (quotations and alteration omitted); *see Alden v. Maine*, 527 U.S. 706, 743-44 (1999) ("early congressional practice ... provides contemporaneous and weighty evidence of the Constitution's meaning") (quotations omitted); *Marsh v. Chambers,* 463 U.S. 783, 790 (1983). For example, in *Marsh v. Chambers,* this Court relied on contemporaneous Congressional action to inform its interpretation of the First Amendment. *See* 463 U.S. at 790 ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable."); *see also Carroll v. United States*, 267 U.S. 132, 150-152 (1925) (looking to the actions of the First Congress in interpreting the Fourth Amendment).

Indeed, this well-settled understanding of the term "militia" has persisted to the present day. Under current federal law, the "militia" consists of "all able-bodied males" between ages 17 and 45, as well as "female citizens [] who are members of the National Guard." 10 U.S.C. § 311. The statute specifically distinguishes between the "organized militia," which consists of the National Guard and Naval Militia, and the "unorganized militia," which consists of members of the militia (*i.e.*, everyone who is "able-bodied" and between the ages of 17 and 45) who are *not* members of the National Guard or Naval Militia. Now, as in 1792, Congress defines the "militia" quite broadly.[7]

Likewise, outside of this litigation, the District of Columbia itself has employed a broad definition of "militia" that is nearly identical to that found in the U.S. Code. *See* Pet. App. at 43a. The district defines militia as "[e]very able-bodied male citizen resident within the District of

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[7] The statutory definition has changed little, except in ways that have extended its scope to include minorities and women. At the time this Court decided *Miller*, federal law defined "the militia" as "all able-bodied male citizens of the United States and all other able-bodied males who have declared their intention to become citizens of the United States," between the ages of 18 and 45 years of age. National Defense Act, ch. 134, § 57, 39 Stat. 166, 197 (1916). The statute specifically distinguished between the organized militia, which consisted of the National Guard and Naval Militia, and the "Unorganized Militia," which consisted of everybody else. *Id.*

Columbia, of the age of 18 years and under the age of 45 years," with only a few narrow exceptions for mental illness or criminal background. D.C. Code § 49-401. Thus, its own statutory definition of the term demonstrates that the militia is not limited to "organized and trained military force[s]" under state control. *See* Pet. Br. at 14.

In sum, Petitioners' construction of the Second Amendment is at odds with its well-settled and longstanding meaning. The historical record is clear: the Second Amendment's protections have always extended to the general populace. Interpretations of the clause at the time of its ratification, parallel state constitutional provisions such as that found in the Virginia Declaration of Rights, and statutory definitions beginning in the 1790s and continuing through the present day all demonstrate that the prefatory clause plainly contemplates that the Second Amendment guarantees an individual right.

III. While The Appropriate Standard Of Review Is Not Before The Court, The Second Amendment Guarantees A Fundamental Right And Alleged Violations Of The Amendment Are Therefore Subject To Strict Scrutiny.

Finally, while Petitioners and certain *amici* have presented various arguments concerning the appropriate standard for reviewing potential violations of the Second Amendment, the standard of review is not properly before the Court. This Court does not consider issues not "'fairly included' in the question presented." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 (1993). Nor does it address issues "not presented to, or ruled on by, any lower court." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993).

The Court granted *certiorari* to address a narrowly-circumscribed question: whether the Second Amendment applies to "individuals who are not affiliated with any state-regulated militia." The Court did not grant review to ascertain the appropriate standard of review governing alleged violations of the Second Amendment. Nor is the standard even raised by the court of appeals' decision.

The government action here involved an absolute prohibition on the possession of certain firearms. *See* Pet. App. at 9a ("At oral argument, counsel for the District maintained that ... D.C.'s firearm registration system amounts to a *complete prohibition on handgun ownership.*") (emphasis added). Such action is unconstitutional under *any* applicable standard. This case raises only the threshold question of whether the amendment is even applicable: "Once it is determined ... that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." *See* Pet. App. at 53a. It does not raise any issue regarding the governing standard—a question the court of appeals did not reach.

Nor has the appropriate standard been treated at any length in the decisions of other appellate courts. As such, had it been raised, consideration of this question would be premature. The Court has "in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 25 n.1 (1995) (Ginsburg & Stevens, J.J., dissenting); *see McCray v. New York*, 461 U.S. 961, 963 (1983) ("it is a sound exercise of discretion" to allow other courts "to serve as laboratories in which the issue receives further study before it is addressed by this Court"). Nonetheless, because this issue has been addressed in briefs submitted by Petitioners and various *amici*, Eagle Forum ELDF briefly responds to their arguments here.

The framework articulated by the Court makes clear that alleged violations of the Second Amendment are subject to strict scrutiny. Strict scrutiny applies to "fundamental" rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977)); *see also Burson v. Freeman*, 504 U.S. 191 (1992).

The right to bear arms has always been viewed as a "fundamental right." For example, John Locke maintained that the right to armed self-defense was "so necessary to, and closely tied with, a man's preservation, that he cannot part with it but by what he forfeits his preservation and life together." JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 23 (1690) (reprinted Hackett ed. 1980). Likewise, William Blackstone recognized that the right to bear arms in the English Bill of Rights acknowledged "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 WILLIAM BLACKSTONE, COMMENTARIES *143-44. One of the most prominent early American commentators, St. George Tucker, described the Second Amendment as equivalent to Blackstone's "right of self-defence [which] is the first law of nature." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES 143, 300 (1803). Consistent with this view, *Federalist No. 28* recognizes an "original right of self-defense which is paramount to all positive forms of government." THE FEDERALIST NO. 28, at 178.

The position of this guarantee within the Bill of Rights underscores the fundamental nature of this right. The right to keep and bear arms was enshrined in the *Second* Amendment, thus demonstrating the importance the Framers placed on this fundamental freedom. The right is therefore analogous to the rights of freedom of speech and political expression that are contained in the preceding amendment. *See Elrod v. Burns*, 427 U.S. 347, 363 (1976) (first amendment interests subject to strict scrutiny). Relegating this fundamental right to mere "reasonableness" review would disregard both the constitutional text and history. *See* Pet. Br. at 40-59; Chemerinsky & Winkler Amicus Br. at 1-30.

The emphasis on the fundamental nature of the right to keep and bear arms continued through the Reconstruction Era and was reinforced by the Framers of the Fourteenth Amendment. They maintained that the Fourteenth Amendment was designed to protect the "rights guarantied and secured by the first eight amendments to the Constitution, such as . . . the right to keep and bear arms" and made clear that "[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (Senator Howard). *See also id.* at 1182 (Senator Pomeroy) (every citizen "should have the right to bear arms for the defense of himself and family and his homestead"); AMAR, THE BILL OF RIGHTS at 265-66 (arguing that the Fourteenth Amendment strengthened the individual-rights reading of the Second Amendment); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 104 (1986) ("[a]mong the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech . . . due process . . . and the right to bear arms."); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) ["HALBROOK, FREEDMEN"].

The right to bear arms, in particular, was critical to the newly-freed former slaves who were under constant threat of physical violence. The restrictions on gun ownership in the

Southern States facilitated egregious violations of civil liberties that were of specific concern to the Framers of the Fourteenth Amendment. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 345 (1991) (the fact that "freedmen were being deprived of the right to bear arms [under Southern Black Codes] was of particular concern" to the Framers of the Fourteenth Amendment because it could lead to "virtual reenslavement of those formerly held in bondage"); AMAR, THE BILL OF RIGHTS at 264, 266; HALBROOK, FREEDMEN at 1-55.[8]

In sum, the Second Amendment has consistently been viewed as the ultimate guarantor of other fundamental constitutional rights. As such, the appropriate standard of review is plainly strict scrutiny.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be affirmed.

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[8] Thus, for example, the Reconstruction Congress passed the Freedman's Bureau Act, which specifically guaranteed "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . . , including the constitutional right to bear arms." 14 Stat. 173, 176 (1866). The Act's language was "derived directly from Blackstone's influential chapter on 'The Absolute Rights of Individuals.'" AMAR, THE BILL OF RIGHTS at 261. In that chapter, Blackstone made clear that a right to "hav[e] arms" was necessary to protecting the "primary rights" of security, liberty, and property, as well as the "ultimate individual right of 'self-preservation.'" *Id.* at 261-62.

Respectfully submitted,

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In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,
Petitioners

v.

DICK ANTHONY HELLER,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE 55 MEMBERS OF UNITED STATES SENATE, THE PRESIDENT OF THE UNITED STATES SENATE, AND 250 MEMBERS OF UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions — D.C. Code secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST OF AMICI CURIAE

The Amici Curiae include Senator Kay Bailey Hutchison, the lead member, and 54 other members of the United States Senate; the President of the United States Senate; and 250 members of the United States House of Representatives. See Appendix herein. As Federal officials, we have a fundamental interest in protecting the constitutional rights of our constituents and the American people in general.[1]

The Congress has a long history of protecting the right of the people to keep and bear arms. Like the rest of the Bill of Rights, the Second Amendment was proposed to the States by the Congress in 1789. On several occasions, in different epochs of American history, the Congress enacted statutory texts which explicitly declared its understanding of the Second Amendment as guaranteeing fundamental, individual rights.

Congress interprets the Constitution in deciding what laws to pass. As on other issues, this has historically been the case regarding the Second Amendment and the District of Columbia. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *Nixon v. Administrator of General Services*, 433 U.S. 425, 703 (1977).

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[1] No counsel for any party to this case authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity other than the *Amici Curiae* or their counsel made such a monetary contribution. This brief is filed with the written consent of all parties, seven-days notice having been provided to them of this filing.

The Amici Curiae wish to bring their unique perspective to this Court's attention to explain to the Court the historical meaning of the Second Amendment as understood by the Congress, and why the District's firearms prohibitions at issue infringe on the rights of the law-abiding citizens of the District of Columbia as guaranteed by the Second Amendment.

SUMMARY OF ARGUMENT

The Second Amendment provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Congress adopted that wording and proposed it to the States in 1789. It became part of the Bill of Rights which the States ratified in 1791. As the text and the drafting history demonstrate, the Amendment was intended to guarantee the right of individuals to possess and keep ordinary firearms.

Following the abolition of slavery, Congress sought to end the incidents of slavery, including prohibitions on possession of firearms by African Americans. In 1866, over two-thirds of Congress passed the Freedmen's Bureau Act, which declared protection for the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . ., including the constitutional right to bear arms . . . ."

In passing firearms regulations for the District, Congress has been sensitive to Second Amendment concerns. An 1892 enactment prohibiting the carrying of concealed weapons exempted one's place of business and dwelling house. In 1906, Congress empowered the District to pass "such usual and reasonable police regulations" deemed necessary to regulate firearms, which today remains the District's only delegation to regulate firearms. A ban on handguns is both unusual and unreasonable. In 1932 Congress passed a comprehensive firearms act which remains largely in place. As the Senate report for that act stated, "the right of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill."

In 1941, Congress enacted the Property Requisition Act, which authorized the President to requisition certain types of property. The Act declared that it must not be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport" unless prohibited or already required to be registered, or "to impair or infringe in any manner the right of any individual to keep and bear arms . . . ."

The Gun Control Act of 1968 declared that "this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." And in the Firearms Owners' Protection Act of 1986, over two-thirds of Congress found that the rights of citizens "to keep and bear arms under the second amendment to the United States Constitution" as well as other constitutional rights "require additional legislation to correct existing firearms statutes and enforcement policies."

Attempts to ban handguns through litigation led Congress to enact the Protection of Lawful Commerce in Arms Act in 2005. Approximately two-thirds of Congress found that the Second Amendment "protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms." The Act precludes lawsuits against the lawful industry "to preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes . . . ."

Confiscations of firearms in the wake of Hurricane Katrina led Congress in 2006 to amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act to forbid seizures of lawful firearms in disasters. Over two-thirds of the House enacted Findings that the seizures violated citizens' Second Amendment rights to have firearms for protection in the home and elsewhere. The Findings were deleted when the bill was added to an appropriations bill in the Senate, but its underlying basis in the Second Amendment remained understood.

The "District of Columbia Personal Protection Act," a bill which passed the House in 2004 and is currently pending, includes the Finding that: "Legislation is required to correct the District of Columbia's law in order to restore the fundamental rights of its citizens under the Second Amendment . . . ."

In sum, historically Congress has interpreted the Second Amendment as recognizing the right of law-abiding individuals to keep and bear arms. This Court should give due deference to the repeated findings over different historical epochs by Congress, a co-equal branch of government, that the Amendment guarantees the personal right to possess firearms.

The District's prohibitions on mere possession by law-abiding persons of handguns in the home and having usable firearms there are unreasonable per se. No purpose would be served by remanding this case for further fact finding or other proceedings. This Court should affirm the decision below, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

ARGUMENT

I. ORIGINAL INTENT AND EARLY INTERPRETATION

A. The Text: Rights of the People vs. State Powers

The Second Amendment provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." This declares a political principle and then guarantees a substantive right. The term "the people" is in juxtaposition to the government, federal or State. Only individuals have "rights," while the United States and the States have "powers."

The phrase "the right of the people" also appears in the First Amendment – "Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble, and to petition the government for a redress of grievances." The Fourth Amendment guarantees: "*The right of the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

The Ninth Amendment uses the same phraseology: "The enumeration in the Constitution, of certain *rights*, shall not be construed to deny or disparage others retained by *the people*."[2] These guarantees protect individuals from government action, and do not delegate or reserve powers to governmental bodies.[3]

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[2] *See also* U.S. Const., Amend. VI ("the accused shall enjoy *the right* to a speedy and public trial"); Amend. VII ("*the right* of trial by jury shall be preserved").

[3] It violates ordinary word usage to say that "the people" means only such persons as the government selects, and that one has a "right" to do something only if commanded by the government. Yet these are the premises of the "collective rights" view.

The constitutional text distinguishes between "the people," "the militia," and the "States." The Second Amendment refers to "a well regulated militia," but the right to keep and bear arms is guaranteed to "the people." The Fifth Amendment requires indictment by a grand jury except "in the Militia, when in actual service in time of War or public danger," a class that contrasts with "the people" who may bear arms under the Second Amendment. The Tenth Amendment refers to powers "reserved to the states respectively, or to the people."

The Second Amendment refers to the right to "keep" arms (such as at home) as well as to "bear" arms (meaning to carry them). Protected arms include commonly-kept firearms that one can keep and carry for lawful purposes, such as ordinary rifles, handguns, and shotguns, and not crew-served or heavy weapons.

The Amendment declares a well regulated militia to be necessary to the security of a "free State," which means a free country, and is not restricted to a State government.[4]

Article I, § 8, declares the "powers" of Congress, including its sharing of power over the militia with the

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[4] The First Amendment too has "free State" aims. "The liberty of the press is indeed essential to the nature of a free state . . . ." 4 WILLIAM BLACKSTONE, COMMENTARIES *151-152. "Faithful members of a free State" signed the Memorial and Remonstrance Against Religious Assessments. 8 PAPERS OF JAMES MADISON 298-99 (1973).

States,[5] and the Tenth Amendment declares undelegated "powers" to be reserved to the States or to the people. No "rights" are delegated to the United States or reserved to the States. Only "the people" – individuals – have "rights."

Where a State power is reserved or restricted, the Constitution names the State as the subject entity. It does not name the people the State may employ or conscript as the subject entity, other than in describing the State power. For instance, Congress has power to provide for organizing the militia, "reserving to the States respectively, the Appointment of the Officers . . . ." U.S. Const., Art. I, § 8, cl. 16. It is not declared that "the right of the Officers of the militia to be appointed by the States shall not be infringed." Similarly, the Second Amendment does not declare that "the right of the persons in the militia to be armed as required by the States shall not be infringed." Instead, it recognizes that "the right of the people to keep and bear arms, shall not be infringed."[6]

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[5] U.S. Const., Article I, § 8, clause 16 provides that "Congress shall have power":

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

[6] The lone militiaman compelled by law to render service would have little or no incentive or means to take political or

In sum, the Second Amendment guarantees an individual right to keep and bear arms. Recognition of that right promotes the well regulated militia necessary for a free State's security.

B. Drafting the Amendment in 1789

On June 8, 1789, Rep. James Madison introduced what would become the Bill of Rights in the House of Representatives, stating that it would "expressly declare the great rights of mankind secured under this constitution."[7] In a draft of his speech, Madison referred to the rights of "freedom of press – Conscience . . . arms" as "private rights."[8] His draft of the arms guarantee stated: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously

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legal action to protect any such State power. If the States are the beneficiaries of constitutional protection, they would have the incentive and the means to guard their prerogatives. When analyzed closely, the "collective rights" reading of the Second Amendment is simply implausible.

[7] 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 820 (1992).

[8] 12 PAPERS OF JAMES MADISON 193-94 (1979).

scrupulous of bearing arms shall be compelled to render military service in person."[9]

Ten days later, Federalist Tench Coxe explained: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms."[10] Madison endorsed Coxe's analysis.[11]

Madison's draft was referred to a House Select Committee. Roger Sherman, a committee member, drafted his own amendments, including that "The militia shall be under the government of the laws of the respective states, when not in the actual service of the United States . . . ."[12] The Committee reported a revised version of Madison's draft: "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."[13]

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[9] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 10 (1986).

[10] FEDERAL GAZETTE, June 18, 1789, at 2, col. 1.

[11] 12 PAPERS OF JAMES MADISON 239-40, 257 (1978).

[12] 18 James C. Hutson, *The Bill of Rights: The Roger Sherman Draft*, *in* THIS CONSTITUTION 36 (1988). Even so, in debate on the militia bill the following year, Sherman "conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made. The particular states, like private citizens, have a right to be armed . . . ." 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 92-3 (1995).

While "a free country" was changed to "a free state," the adjective "free" was retained, thus differentiating other textual uses of "State" to denote the State governments.

In House debate, disagreement was expressed to the wording of the militia declaration.[14] The final clause was amended to provide that the religiously scrupulous would not be compelled to bear arms "in person."[15] No objection was expressed to the phrase

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[13] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 28 (1986). One writer saw the Committee amendments as reflecting the proposals by Samuel Adams in the Massachusetts ratification convention, which included "that the said constitution be never construed to authorize Congress . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms . . . ." 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1453 (2000).

[14] Elbridge Gerry argued: "A well regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one." 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1287-88 (1992).

[15] *Id.* at 1309. *See also id.* at 1285-86.

"the right of the people to keep and bear arms."[16]

The Senate revised the House language to render the militia clause more concise and delete the objector clause: "A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed."[17] The Senate rejected a proposal to add "for the common defence" after "bear arms,"[18] making clear that the right was not limited to that purpose. The Senate changed "the best security of a free state" to "necessary to the security of a free state."[19] The Amendment had reached its final form.

Separately from the bill of rights, the Senate considered structural amendments that affected the federal-state balance. It rejected the following: "That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same . . . ."[20] This highlights the distinction between the right of the people to have arms and the state militia power.

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[16] House Speaker Frederick A. Muhlenberg wrote that the House version "takes in the principal Amendments which our Minority had so much at Heart." CREATING THE BILL OF RIGHTS 280 (1991). The Minority in the Pennsylvania convention proposed in part: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . ." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (1976).

[17] JOURNAL OF THE FIRST SESSION OF THE SENATE 71 (1820).

[18] *Id.* at 77.

[19] *Id.*

In sum, the Second Amendment guarantees "the right of the people," which includes residents of the seat of government, to keep and bear arms. This in turn promotes a well regulated militia, seen as necessary for a free state's security.

C. The Freedmen's Bureau Act of 1866

Abolition of slavery nationwide by the Thirteenth Amendment in 1865 did not end the incidents of slavery, which Congress sought to eradicate in 1866 with passage of the Civil Rights Act and the Freedmen's Bureau Act. The latter declared protection for the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . ., including the constitutional right to bear arms . . . ."[21] That text and the debates on both are key to understanding how Congress interpreted the Second Amendment only 75 years after it became part of the Constitution in 1791.[22]

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[20] *Id.* at 75.

[21] 14 Stat. 173, 176 (1866).

On January 5, 1866, Senator Lyman Trumbull introduced S. 60, the Freedmen's Bureau Bill, and S. 61, the Civil Rights Bill.[23] Both included among "civil rights or immunities" the right "to have full and equal benefit of all laws and proceedings for the security of person and estate."[24]

To exemplify their concerns, Rep. Zachariah Chandler endorsed the view that freedom for the slaves required, among other things: "'The right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term 'people.'"[25] Senator Charles Sumner noted a petition of black South Carolinians "that they should have the constitutional protection in keeping arms . . . and in complete liberty of speech and of the press."[26]

After the Senate passed S. 60, the House amended it to protect the civil right to "the security of person and estate, including the constitutional right to bear arms."[27] Senator Trumbull recommended that the Senate concur, noting that the reference to the right to bear arms "does not alter the meaning."[28]

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[22] *See* A. Amar, *The Bill of Rights & the Fourteenth Amendment*, 101 YALE L.J. 1193, 1245 n.228 (Apr. 1992); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS, 1866-1876, 1-55 (1998).

[23] CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866).

[24] *Id.* at 209, 211 (Jan. 12, 1866).

[25] *Id.* at 217 (Jan. 12, 1866).

[26] *Id.* at 337 (Jan. 22, 1866).

As passed by both Houses, the Freedmen's Bureau Bill provided that where judicial proceedings were interrupted, military protection would be extended to protect all person's "civil rights or immunities," including "the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms . . . ."[29]

President Andrew Johnson vetoed the Freedmen's Bureau Bill, although his objections were irrelevant to the right to bear arms.[30] An override vote barely failed.[31]

Meanwhile, the Fourteenth Amendment was working its way through Congress. Senator Samuel Pomeroy noted "safeguards of liberty," including: "He should have the right to bear arms for the defense of himself and family and his homestead."[32]

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[27] *Id.* at 654 (Feb. 5, 1866), 688 (Feb. 6, 1866).

[28] *Id.* at 743 (Feb. 8, 1866).

[29] *Id.* at 748 (Feb. 8, 1866), 775 (Feb. 9, 1866) (passage); 1292 (Mar. 9, 1866) (text). Rep. William Lawrence quoted a military order that "civil rights and immunities" included: "The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed . . . ." *Id.* at 908-09 (Feb. 17, 1866).

[30] *Id.* at 916 (Feb. 19, 1866).

[31] *Id.* at 943 (Feb. 20, 1866).

In debate on the Civil Rights Bill, Rep. Bingham explained that the provisions of the Freedmen's Bureau Bill "enumerate the same rights and all the rights and privileges that are enumerated in the first section of this bill . . . ."[33] As passed, the Civil Rights Act recognized the right of each "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ."[34]

On May 23, Senator Jacob Howard introduced the Fourteenth Amendment, referring to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[35]

Also on May 23, the second Freedmen's Bureau

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[32] *Id.* at 1182 (Mar. 5, 1866).

[33] *Id.* at 1291-92 (Mar. 9, 1866).

[34] 14 Stat. 27 (1866). This remains the law today. *See* 42 U.S.C. § 1981.

[35] CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (May 23, 1866).

Bill, H.R. 613, was debated.[36] Rep. Eliot observed that § 8 – which recognized "the constitutional right to bear arms"[37] – "simply embodies the provisions of the civil rights bill."[38] He recited a report about black soldiers returning home to Kentucky: "Their arms are taken from them by the civil authorities .... Thus the right of the people to keep and bear arms as provided in the Constitution is infringed . . . ."[39] This rendered the freedmen "defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders."[40]

On May 29, the House passed the Freedmen's Bureau Bill and then took up the Fourteenth Amendment.[41] As explained by Rep. George W. Julian, the constitutional amendment was needed to uphold the Civil Rights Act, which

> is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry

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[36] *Id.* at 2773 (May 23, 1866). The bill had been reported by Rep. Eliot on behalf of the Select Committee on Freedmen's Affairs. *Id.* at 2743 (May 22, 1866).

[37] *Id.* at 3412 (June 26, 1866).

[38] *Id.* at 2773 (May 23, 1866).

[39] *Id.* at 2774.

[40] *Id.* at 2775.

[41] *Id.* at 2878 (May 29, 1866).

> weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.[42]

Both Houses passed the second Freedmen's Bureau Bill, which was again vetoed. The House overrode the veto by 104 to 33, or 76%,[43] and the Senate did so by 33 to 12, or 73%.[44] As finally passed into law, § 14 of the Freedmen's Bureau Act provided that in States where judicial proceedings were interrupted or which had not been restored to the Union:

> the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.[45]

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[42] *Id.* at 3210 (June 17, 1866).

[43] *Id.* at 3850 (July 16, 1866).

[44] *Id.* at 3842.

[45] 14 Stat. 173, 176-77 (1866).

The same section extended military jurisdiction to all cases "concerning the free enjoyment of such immunities and rights."

The same more than two-thirds of Congress which enacted this language also approved the more general language of the Civil Rights Act and the Fourteenth Amendment. Congress viewed the Second Amendment as recognizing individual rights to all, including freed slaves, and as not being limited to militias, some of which violated such rights.

II. CONTINUATION OF A CONSISTENT READING

A. Regulation in the District of Columbia

In legislating for the District of Columbia, Congress has been sensitive to Second Amendment rights.[46] In 1892, Congress made it an offense in the District to carry a pistol concealed about one's person, with exemptions for one's place of business and dwelling house, and a concealed carry permit available on showing the "necessity" thereof.[47]

Quoting the Second Amendment, Senator Roger

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[46] *See generally* Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEORGE MASON UNIVERSITY CIVIL RIGHTS LAW JOURNAL, Nos. 1 & 2, 105 (1995).

[47] 27 Stat. 116 (1892). "Necessity" would be changed to "necessary self-defense." 31 Stat. 1328 (1901).

Q. Mills objected: "You render the citizens of the country more defenseless by depriving them of the natural right to carry the arms which are necessary to secure their persons and their lives."[48] Senator Edward O. Wolcott responded that "this bill is intended to apply to the criminal classes. . . . It is not intended to affect the constitutional right of any citizen who desires to obey the law."[49]

In 1906, Congress authorized the District to pass "all such usual and reasonable police regulations . . . as they may deem necessary for the regulation of firearms," which remains the sole enabling legislation empowering it to regulate firearms.[50] Yet the District's prohibitions at issue are highly unusual and unreasonable.[51]

Congress passed a comprehensive firearms act for the District in 1932.[52] It prohibited carrying a concealed pistol on or about one's person without a license, which would be issued to a person with good reason to fear injury to his person or property or other proper reason.[53] A person who was convicted of a crime of violence could not possess a pistol.[54]

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[48] CONG. REC. 5788 (July 6, 1892).

[49] *Id.* at 5789.

[50] 34 Stat. 808, 809 (1906). Codified at D.C. Code § 1-303.43.

[51] Other than the District, Chicago is the only other city nationwide which bans handguns. In addition, not a single State bans handguns.

[52] 47 Stat. 650 (1932).

The Senate report noted that "the right of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill."[55] The House report stated that it would "meet the legitimate needs of all who are charged with the duty of protecting and defending life and property as well as those citizens who require firearms for protection or for sport . . . ."[56]

The 1932 act has remained in place with various amendments. In 1943, Congress made it unlawful for a person to "carry either openly or concealed on or about his person" a pistol, with exceptions for one's home and business or under a permit.[57] In 1953, Congress extended the prohibition on possession of pistols to all felons and to drug addicts.[58]

Elements of the above provisions passed by Congress remain in Chapter 45 of the D.C. Code. The provisions at issue were enacted by the District, and they upset the balance enacted by Congress.

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[53] *Id.* at 651.

[54] *Id.*

[55] Senate Report 575, 72d Cong., 1st Sess., 3 (1932).

[56] House Report 767, 72d Cong., 1st Sess., at 2 (1932).

[57] 57 Stat. 586 (1943).

[58] 67 Stat. 93, 94 (1953).

B. The Property Requisition Act of 1941

The Property Requisition Act of 1941, passed just weeks before the attack on Pearl Harbor, authorized the President to requisition property for national defense. The Act declared that it must not be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law)," or "to impair or infringe in any manner the right of any individual to keep and bear arms . . . ."[59] The Report of the House Committee on Military Affairs included this explanation:

> It is not contemplated or even inferred that the President, or any executive board, agency, or officer, would trespass upon the right of the people in this respect. There appears to be no occasion for the requisition of firearms owned and maintained by the people for sport and recreation, nor is there any desire or intention on the part of the Congress or

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[59] P.L. 274, 55 Stat. 742 (Oct. 16, 1941). *See generally* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENNESSEE LAW REVIEW 597, 618-31 (Spring 1995).

> the President to impair or infringe the right of the people under section 2 [*sic*] of the Constitution of the United States, which reads, in part as follows: 'the right of the people to keep and bear arms shall not be infringed.' However, in view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties, our committee deem it appropriate for the Congress to expressly state that the proposed legislation shall not be construed to impair or infringe the constitutional right of the people to bear arms. . . . [T]here is no disposition on the part of this Government to depart from the concepts and principles of personal rights and liberties expressed in our Constitution.[60]

In debate, Rep. Edwin Arthur Hall of New York noted: "Before the advent of Hitler or Stalin, who took power from the German and Russian people, measures were thrust upon the free legislatures of those countries to deprive the people of the possession and use of firearms, so that they could not resist the encroachments of such diabolical and vitriolic state police organizations as the Gestapo, the Ogpu, and the

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[60] Rpt. No. 1120 [to accompany S. 1579], House Committee on Military Affairs, 77th Cong., 1st Sess., at 2 (Aug. 4, 1941).

Cheka." He opposed taking away "the individual rights and liberties of citizens of this Nation by depriving the individual of the private ownership of firearms and the right to use weapons in the protection of his home, and thereby his country."[61] Senator Tom Connally of Texas favored "safeguarding the right of individuals to possess arms."[62]

The conference committee deleted the ban on registration, but kept the declaration against infringing the right to bear arms.[63] Rep. Paul Kilday of Texas warned that "registration of firearms is only the first step. It will be followed by other infringements of the right to keep and bear arms until finally the right is gone."[64] The Second Amendment protects "our right to bear arms as private citizens," Rep. Lyle H. Boren of Oklahoma stated.[65]

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[61] 87 CONG. REC., 77th Cong., 1st Sess., 6778 (Aug. 5, 1941).

[62] *Id.* at 6811 (Aug. 6, 1941).

[63] *Id.* at 7097 (Aug. 13, 1941). Even so, Rep. A.J. May of Kentucky explained that "the right to keep means that a man can keep a gun in his house and can carry it with him . . . and the right to bear arms means that he can go hunting . . . ." *Id.* at 7098.

[64] *Id.* at 7101.

[65] *Id. See also id.* at 7102 (Rep. John W. Patman of Texas) ("The people have a right to keep arms; therefore . . . they can properly protect themselves."); *id.* at 7103 (Rep. John J. Sparkman of Alabama) ("The Constitution guarantees to every

A motion to recommit the bill to committee passed by 154 to 24,[66] and the committee restored the prohibition on firearm registration.[67] As enacted into law, the Property Requisition Act conditioned the President's power to requisition property with military uses as follows:

> Nothing contained in this Act shall be construed –
>
> (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), [or]
>
> (2) to impair or infringe in any manner the right of any individual to keep and bear arms . . . .[68]

Once again, at a critical time in American history, the Congress clarified its understanding that the Second Amendment guarantees individual rights.

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citizen the right to keep and bears arms").

[66] *Id.* at 7164 (Aug. 13, 1941).

[67] Rpt. No. 1214, Conference Report [to accompany S. 1579], 77th Cong., 1st Sess., at 2 (Sept. 25, 1941).

[68] P.L. 274, 55 Stat. 742 (1941).

C. The Firearms Owners' Protection Act of 1986

In enacting the Gun Control Act of 1968, Congress provided comprehensive regulations, but rejected bills to prohibit or to require registration of firearms.[69] The Act declared:

> it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.[70]

When experience proved the need for reform, Congress enacted the Firearms Owners' Protection Act of 1986 (FOPA). In doing so, Congress again declared by law the individual character of the rights protected by the Second Amendment:

The Congress finds that--

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[69] *E.g.*, 114 CONG. REC. 22248-49 (July 19, 1968) (rejection by House of bill to require registration of handguns); 27427 (Sept. 18, 1968) (rejection by Senate of bill to require registration of firearms).

[70] § 101, P.L. 90-618, 82 Stat. 1213 (1968).

> (1) the rights of citizens--
>
> (A) to keep and bear arms under the second amendment to the United States Constitution; [(B)-(D) deleted] . . . require additional legislation to correct existing firearms statutes and enforcement policies . . . .[71]

The finding that the Second Amendment guarantees "the rights of citizens" to keep and bear arms was supported by a scholarly report by the Senate's Subcommittee on the Constitution, which concluded that "the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner."[72]

The legislative record is replete with expressed intentions to protect the Second Amendment rights of individuals. As an example, FOPA preempted state laws which prohibit interstate travel with lawful firearms.[73] Senator Steve Symms of Idaho explained: "The intent of this amendment . . . is to protect the second amendment rights of law-abiding citizens wishing to transport firearms through States which otherwise prohibit the possession of such weapons."[74] Similarly, Rep. Tommy Robinson of Arkansas stated that "our citizens have a constitutional right to bear arms . . . and to travel interstate with those weapons."[75]

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[71] §1(b), P.L. 99-308, 100 Stat. 449 (1986). It also reaffirmed the above 1968 declaration.

[72] *The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution*, Senate Judiciary Committee, 97th Cong., 2d Sess., 12 (1982). See also David Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URBAN L.J. 31 (1976), reprinted in 131 CONG. REC. S8692 (June 24, 1985); Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N.KY.L.REV. 13 (1982), reprinted in 131 CONG. REC. S9105 (July 9, 1985).

The Firearms Owners' Protection Act passed the Senate by a vote of 79 to 15, or 84%.[76] The bill passed the House by a vote of 292 to 130, or 69%.[77]

III. LEGISLATION IN THE 21ST CENTURY

A. Protection of Lawful Commerce in Arms Act

In the Protection of Lawful Commerce in Arms Act of 2005 ("PLCAA"), Congress once again declared the individual character of Second Amendment rights and sought to preclude firearms, particularly handguns, from being banned through litigation.[78] Municipalities sued the firearms industry claiming that the *lawful* manufacture and distribution of firearms is a public nuisance. PLCAA begins with the following Findings:

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[73] 18 U.S.C. § 926A.

[74] 131 CONG. REC. S9114 (July 9, 1985).

[75] 132 CONG. REC. H1695 (Apr. 9, 1986).

[76] 131 CONG. REC. S9175 (July 9, 1985).

[77] 132 CONG. REC. H1753 (Apr. 10, 1986).

> (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.
>
> (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.[79]

The lawsuits sought damages and injunctive relief against the firearms industry for injuries caused by criminals and other third parties who misuse firearms.[80] Yet the manufacture, possession, sale, and use of firearms is strictly regulated by law.[81] Besides unreasonably burdening interstate and foreign commerce, imposition of liability "threatens the diminution of a basic constitutional right and civil liberty."[82]

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[78] P.L. 109-92, 119 Stat. 2095 (2005).

[79] *Id.*, § 2(a).

[80] *Id.*, § 2(a)(3).

[81] *Id.*, § 2(a)(4).

Purposes of PLCAA include "to preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting."[83]

Senator John Thune of South Dakota noted that the bill protected law-abiding gun owners, dealers, and manufacturers "who are having that second amendment right infringed upon by those who are trying to destroy an industry that, for a couple of centuries now, has provided quality workmanship in accordance with Federal and State laws."[84] The bill passed the Senate by a vote of 65 to 31, or just under 68%.[85]

Rep. Sam Graves of Missouri noted: "This law is necessary to prevent a few state courts from undermining our Second Amendment rights guaranteed by the Constitution."[86] Rep. Joe Schwarz of Michigan averred that the Second Amendment's purposes are: "First, to ensure that citizens would have the tools to protect their families and their homes and, second, to ensure that an armed militia could be called up to defend the country in emergencies."[87] The bill passed the House by a vote of 283 to 144, or just over 66%.[88]

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[82] *Id.*, § 2(a)(6).

[83] *Id.*, § 2(b)(2).

[84] 151 CONG. REC. S9378 (July 29, 2005).

[85] *Id.* at S9396.

[86] 151 CONG. REC. H9006-07 (Oct. 20, 2005).

B. Disaster Relief & Emergency Assistance Act Amendment

In 2006, Congress amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act to forbid confiscation of lawful firearms in disasters.[89] The enactment prohibits any federal agent or person receiving federal funds from seizing "any firearm the possession of which is not prohibited under Federal, State, or local law," from requiring "registration of any firearm for which registration is not required by Federal, State, or local law"; and from prohibiting a firearm "in any place or by any person where such possession is not otherwise prohibited by Federal, State, or local law."[90] An exception exists for the temporary surrender of a firearm for entry in transportation for rescue or evacuation.[91] An individual aggrieved by a violation of this provision has a private right of action against a person who subjects the individual "to the deprivation of any of the rights, privileges, or immunities secured by this section."[92]

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[87] *Id.* at H9009.

[88] *Id.* at H9010.

[89] Department of Homeland Security Appropriations Act, 2007, Title IV, § 557, P.L. 109-295, 120 Stat 1355, 1391, 1392 (2006), codified at 42 U.S.C. § 5207.

[90] 42 U.S.C. § 5207(a).

[91] 42 U.S.C. § 5207(b).

The bill passed the House as H.R. 5013, the Disaster Recovery Personal Protection Act, by a vote of 322 yeas and 99 nays,[93] or 76%. As passed, the bill included Findings recounting that in the wake of Hurricane Katrina, law enforcement was overwhelmed and citizens were threatened by criminal violence, adding:

> (4) Many of these citizens lawfully kept firearms for the safety of themselves, their loved ones, their businesses, and their property, as guaranteed by the Second Amendment, and used their firearms, individually or in concert with their neighbors, for protection against crime.
>
> (5) In the wake of Hurricane Katrina, certain agencies confiscated the firearms of these citizens in contravention of the Second Amendment, depriving these citizens of the right to keep and bear arms and rendering them helpless against criminal activity.

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[92] 42 U.S.C. § 5207(c).

[93] 152 Cong. Rec. H5755, H5814 (July 25, 2006).

> (6) These confiscations were carried out at gunpoint by nonconsensual entries into private homes, by traffic checkpoints, by stoppage of boats, and otherwise by force. . . .
>
> (11) These confiscations and prohibitions, and the means by which they were carried out, deprived the citizens of Louisiana not only of their right to keep and bear arms, but also of their rights to personal security, personal liberty, and private property, all in violation of the Constitution and laws of the United States.[94]

H.R. 5013 was referred to the Senate and was then inserted as an amendment to an appropriations bill.[95] As a drafting practice, appropriations bills do not include findings, and the Findings in this bill were thus deleted. But the bill remained grounded in the Second Amendment. As explained by chief sponsor Senator David Vitter (La.), "the language we do have on the Senate floor . . . protects fundamental second amendment rights."[96]

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[94] *Id.*

[95] 152 Cong. Rec. S7455, S7489 (July 13, 2006) (amendment No. 4615 to H.R. 5441, which passed as the Department of Homeland Security Appropriations Act, 2007, *supra*).

In sum, this is yet another instance in which the Congress enacted legislation to protect the fundamental, individual right of law-abiding citizens to keep and bear arms.

C. The D.C. Personal Protection Act Bill

Bills have been pending in Congress that would repeal the provisions at issue here. The "District of Columbia Personal Protection Act," a bill to restore Second Amendment rights in the District of Columbia, passed the House by a vote of 250 to 171 in 2004.[97] In the current session of Congress, similar pending bills include S. 1001, sponsored by Senator Kay Bailey Hutchison (R-Tex.), and H.R. 1399, sponsored by Reps. Mike Ross (D-Ark.) and Mark Souder (R-Ind.).[98]

The Findings set forth in § 2 of each version of the above bills include: "The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms." The District's law-abiding citizens are deprived of handguns that are commonly kept by law-abiding persons throughout the United States for lawful defense, which exacerbates the District's high murder rate. The Federal Gun Control Act and the District's criminal laws currently punish possession and use of firearms by felons. The Findings conclude: "Legislation is required to correct the District of Columbia's law in order to restore the fundamental rights of its citizens under the Second Amendment to the United States Constitution and thereby enhance public safety."

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[96] *Id.* at S7494. He added: "It [the Katrina emergency] is exactly that very reason that this second amendment right to bear arms and use legally possessed firearms in defense of yourself, your life, and your property is so crucial . . . ." *Id.*

[97] 150 Cong. Rec. H7758, H7777 (Sept. 29, 2004).

[98] S. 1001 currently has 44 bipartisan cosponsors, and H.R. 1399 currently has 242 bipartisan cosponsors

Although the above bills have not been enacted into law, the Findings represent yet another instance in which a House of Congress expressed the view that the Second Amendment protects individual rights.

IV. A HANDGUN BAN IS UNREASONABLE ON ITS FACE, RENDERING A REMAND FOR FURTHER PROCEEDINGS UNNECESSARY

Congress has historically viewed the Second Amendment as protecting from infringement the right of the people at large to keep and bear arms. It has further regarded ordinary, commonly-possessed rifles, handguns, and shotguns to be constitutionally-protected arms. It has also passed regulations for engaging in firearms businesses and to require background checks on firearm transferees, and has restricted certain dangerous categories of persons from possession of firearms.[99] None of these laws is called into question by the lower court's limited holding.

The standard for whether a right is "fundamental" is whether it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). The right of the people to keep arms is obviously such a right. Yet even if this Court applied a lower "reasonableness" test as the standard of review, the District's handgun ban is unreasonable on its face. The lower court's categorical approach in holding a prohibition on handguns to be unconstitutional per se was correct.

Where Congress has sought to restrict certain firearms, some of which may have other characteristics which overlap with handguns, it has defined them in terms of specific categories.[100] A holding by this Court that the District's pistol ban violates the Second Amendment would not apply to such firearms which are restricted under other categories.

This case involves nothing more than the right of law-abiding persons to keep common handguns and usable firearms for lawful self-defense in the home. Accordingly, no purpose would be served by remanding this case for further fact finding or other proceedings.

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[99] 18 U.S.C. § 923 (licencing), § 922(t) (background checks), and § 922(g) (prohibited persons).

[100] *E.g.*, 18 U.S.C. § 922(o) (non-grandfathered machineguns), § 922(p) (firearms not detectable by X-ray).

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

55 MEMBERS OF THE UNITED STATES SENATE, THE PRESIDENT OF THE UNITED STATES SENATE, AND 250 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES
AMICI CURIAE

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APPENDIX

APPENDIX:

THOSE JOINING IN AMICI CURIAE BRIEF

The following members of the United States Congress, and President of the United States Senate Richard B. Cheney, join in this amici curiae brief:

Senate

Senator A. Lamar Alexander (TN, R)
Senator A. Wayne Allard (CO, R)
Senator John A. Barrasso (WY, R)
Senator Max S. Baucus (MT, D)
Senator Robert F. Bennett (UT, R)
Senator Christopher S. Bond (MO, R)
Senator Samuel D. Brownback (KS, R)
Senator James P. D. Bunning (KY, R)
Senator Richard M. Burr (NC, R)
Senator Robert P. Casey, Jr. (PA, D)
Senator C. Saxby Chambliss (GA, R)
Senator Thomas A. Coburn (OK, R)
Senator W. Thad Cochran (MS, R)
Senator Norman Coleman, Jr. (MN, R)
Senator Susan M. Collins (ME, R)
Senator Robert P. Corker, Jr. (TN, R)
Senator John Cornyn, III (TX, R)
Senator Larry E. Craig (ID, R)
Senator Michael D. Crapo (ID, R)
Senator James W. DeMint (SC, R)
Senator Elizabeth H. Dole (NC, R)

Senator Pete V. Domenici (NM, R)
Senator Michael B. Enzi (WY, R)
Senator Russell D. Feingold (WI, D)
Senator Lindsey O. Graham (SC, R)
Senator Charles E. Grassley (IA, R)
Senator Judd A. Gregg (NH, R)
Senator Charles T. Hagel (NE, R)
Senator Orrin G. Hatch (UT, R)
Senator Kay Bailey Hutchison (TX, R)
Senator James M. Inhofe (OK, R)
Senator John H. Isakson (GA, R)
Senator Timothy P. Johnson (SD, D)
Senator Jon L. Kyl (AZ, R)
Senator Blanche L. Lincoln (AR, D)
Senator Melquiades R. Martinez (FL, R)
Senator John S. McCain, III (AZ, R)
Senator A. Mitchell McConnell (KY, R)
Senator Lisa A. Murkowski (AK, R)
Senator E. Benjamin Nelson (NE, D)
Senator C. Patrick Roberts (KS, R)
Senator Kenneth L. Salazar (CO, D)
Senator Jefferson B. Sessions, III (AL, R)
Senator Richard C. Shelby (AL, R)
Senator Gordon H. Smith (OR, R)
Senator Olympia J. Snowe (ME, R)
Senator Arlen Specter (PA, R)
Senator Theodore F. Stevens (AK, R)
Senator John E. Sununu (NH, R)
Senator Jon Tester (MT, D)
Senator John R. Thune (SD, R)
Senator David B. Vitter (LA, R)
Senator George V. Voinovich (OH, R)

Senator James H. Webb, Jr. (VA, D)
Senator Roger F. Wicker (MS, R)

House of Representatives

Representative Robert B. Aderholt (AL-04, R)
Representative W. Todd Akin (MO-2, R)
Representative Rodney M. Alexander (LA-5, R)
Representative Jason Altmire (PA-4, D)
Representative Michael A. Arcuri (NY-24, D)
Representative Joe Baca (CA-43, D)
Representative Michele M. Bachmann (MN-6, R)
Representative Spencer T. Bachus, III (AL-6, R)
Representative Brian Baird (WA-3, D)
Representative Richard H. Baker (LA-6, R)
Representative J. Gresham Barrett (SC-3, R)
Representative John J. Barrow (GA-12, D)
Representative Roscoe G. Bartlett (MD-6, R)
Representative Joe L. Barton (TX-6, R)
Representative Marion Berry (AR-1, D)
Representative Judith B. Biggert (IL-13, R)
Representative Brian P. Bilbray (CA-50, R)
Representative Gus M. Bilirakis (FL-9, R)
Representative Robert W. Bishop (UT-1, R)
Representative Sanford D. Bishop (GA-2, D)
Representative Marsha W. Blackburn (TN-7, R)
Representative Roy D. Blunt (MO-7, R)
Representative John A. Boehner (OH-8, R)
Representative Josiah R. Bonner, Jr. (AL-1, R)
Representative Mary Bono Mack (CA-45, R)
Representative John N. Boozman (AR-3, R)

Representative D. Daniel Boren (OK-2, D)
Representative Leonard L. Boswell (IA-3, D)
Representative Frederick C. Boucher (VA-9, D)
Representative Charles W. Boustany, Jr. (LA-7, R)
Representative F. Allen Boyd, Jr. (FL-2, D)
Representative Nancy Boyda (KS-2, D)
Representative Kevin P. Brady (TX-8, R)
Representative Paul C. Broun (GA-10, R)
Representative Henry E. Brown, Jr. (SC-1, R)
Representative Virginia Brown-Waite (FL-5, R)
Representative Vernon G. Buchanan (FL-13, R)
Representative Michael C. Burgess (TX-26, R)
Representative Danny L. Burton (IN-5, R)
Representative Stephen E. Buyer (IN-4, R)
Representative Kenneth S. Calvert (CA-44, R)
Representative David L. Camp (MI-4, R)
Representative John B. T. Campbell, III (CA-48, R)
Representative Christopher B. Cannon (UT-3, R)
Representative Eric I. Cantor (VA-7, R)
Representative Shelley M. Capito (WV-2, R)
Representative Dennis A. Cardoza (CA-18, D)
Representative Christopher P. Carney (PA-10, D)
Representative John R. Carter (TX-31, R)
Representative Steven J. Chabot (OH-1, R)
Representative A. Benjamin Chandler, III (KY-6, D)
Representative J. Howard Coble (NC-6, R)
Representative Stephen I. Cohen (TN-9, D)
Representative Thomas J. Cole (OK-4, R)
Representative K. Michael Conaway (TX-11, R)
Representative James H. S. Cooper (TN-5, D)
Representative Joseph D. Courtney (CT-2, D)
Representative Jerry F. Costello (IL-12, D)

Representative Robert E. Cramer, Jr. (AL-5, D)
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Representative Barbara L. Cubin (WY-AL, R)
Representative R. Enrique Cuellar (TX-28, D)
Representative John A. Culberson (TX-7, R)
Representative Artur G. Davis (AL-7, D)
Representative David Davis (TN-1, R)
Representative Geoffrey C. Davis (KY-4, R)
Representative Lincoln E. Davis (TN-4, D)
Representative Thomas M. Davis, III (VA-11, R)
Representative J. Nathan Deal (GA-9, R)
Representative Peter A. DeFazio (OR-4, D)
Representative Charles W. Dent (PA-15, R)
Representative Lincoln Diaz-Balart (FL-21, R)
Representative Mario Diaz-Balart (FL-25, R)
Representative John D. Dingell (MI-15, D)
Representative Joseph S. Donnelly (IN-2, D)
Representative John T. Doolittle (CA-4, R)
Representative David T. Dreier (CA-26, R)
Representative Thelma D. Drake (VA-2, R)
Representative John J. Duncan, Jr. (TN-2, R)
Representative T. Chester Edwards (TX-17, D)
Representative Brad Ellsworth (IN-8, D)
Representative Jo Ann H. Emerson (MO-8, R)
Representative Philip S. English (PA-3, R)
Representative R. Terry Everett (AL-2, R)
Representative Mary C. Fallin (OK-5, R)
Representative Thomas C. Feeney, III (FL-24, R)
Representative Jeff Flake (AZ-6, R)
Representative J. Randy Forbes (VA-4, R)
Representative Jeffrey L. Fortenberry (NE-1, R)
Representative Virginia A. Foxx (NC-5, R)

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Representative Kirsten R. Gillibrand (NY-20, D)
Representative J. Phillip Gingrey (GA-11, R)
Representative Louis B. Gohmert, Jr. (TX-1, R)
Representative Virgil H. Goode, Jr. (VA-5, R)
Representative Robert W. Goodlatte (VA-6, R)
Representative Barton J. Gordon (TN-6, D)
Representative Kay M. Granger (TX-12, R)
Representative Samuel B. Graves, Jr. (MO-6, R)
Representative R. Eugene Green (TX-29, D)
Representative Ralph M. Hall (TX-4, R)
Representative Richard N. Hastings (WA-4, R)
Representative Robin C. Hayes (NC-8, R)
Representative Dean Heller (NV-2, R)
Representative T. Jeb Hensarling (TX-5, R)
Representative Walter W. Herger (CA-2, R)
Representative Stephanie M. Herseth Sandlin (SD-AL, D)
Representative Brian M. Higgins (NY-27, D)
Representative Baron P. Hill (IN-9, D)
Representative David L. Hobson (OH-7, R)
Representative Paul W. Hodes (NH-2, D)
Representative Peter Hoekstra (MI-2, R)
Representative T. Timothy Holden (PA-17, D)
Representative Kenny C. Hulshof (MO-9, R)
Representative Duncan L. Hunter (CA-52, R)
Representative Robert D. Inglis (SC-4, R)
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Representative R. Samuel Johnson (TX-3, R)

Representative Timothy V. Johnson (IL-15, R)
Representative Walter B. Jones, Jr. (NC-3, R)
Representative James D. Jordan (OH-4, R)
Representative Steven L. Kagen (WI-8, D)
Representative Paul E. Kanjorski (PA-11, D)
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Representative Ronald J. Kind (WI-3, D)
Representative Steven A. King (IA-5, R)
Representative John H. Kingston (GA-1, R)
Representative John P. Kline, Jr. (MN-2, R)
Representative Joseph C. Knollenberg (MI-9, R)
Representative J. Randy Kuhl, Jr. (NY-29, R)
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Representative Nicholas V. Lampson (TX-22, D)
Representative Thomas P. Latham (IA-4, R)
Representative Steven C. LaTourette (OH-14, R)
Representative Robert E. Latta (OH-5, R)
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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FORMER DEPARTMENT OF JUSTICE OFFICIALS AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are former officials of the United States Department of Justice.[1] In their official capacities, amici curiae were responsible for enforcing the laws of the United States, including federal laws that regulate the possession, use, ownership, and sale of firearms. They submit this brief to express their view that federal, state, and local gun control legislation is a vitally important law enforcement tool used to combat violent crime and protect public safety. Amici disagree with the current position of the United States Department of Justice that the Second Amendment protects an individual right to keep and bear arms for purposes unrelated to a State's operation of a well-regulated militia. That position, which was adopted in the fall of 2001, reversed the Department's longstanding position that the Second Amendment is not implicated by firearms regulations that are designed to protect public safety and do not interfere with participation in a well-regulated militia. The

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[1] A list of the amici who are filing this brief is set forth in the Appendix. Pursuant to Rule 37.6, amici affirm that no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief, and that no counsel for a party authored this brief in whole or in part, except as follows: On January 3, 2008, after the drafting of this brief was substantially completed, Petitioners, through their counsel, asked Robert Long and the law firm of Covington & Burling to provide them with additional legal counsel and advice in connection with the drafting of Petitioners' reply brief and preparation for oral argument. On January 4, Covington & Burling agreed to provide additional legal counsel to Petitioners. The parties' letters consenting to the filing of amicus briefs have been filed with the Clerk.

Department's current position runs against the great weight of federal appellate authority, which has rejected the view that the Second Amendment protects a right to keep and bear arms for private purposes. Amici believe that the Department's original position reflects the correct interpretation of the Second Amendment and that the current position, if adopted by this Court, will place vitally important gun-control legislation at risk of invalidation, to the detriment of effective law enforcement and public safety.

SUMMARY OF ARGUMENT

Gun violence continues to exact a devastating toll on communities throughout the United States. Every year thousands of homicides are committed with firearms, as are hundreds of thousands of non-lethal crimes, including rapes, robberies, and assaults. Crimes involving firearms have a long history in America. The first significant federal legislative response to such crimes was the enactment of the National Firearms Act of 1934 (NFA), which imposed a prohibitive tax on the transfer of firearms considered desirable to criminals.

Congress built on the NFA in subsequent legislation. The Federal Firearms Act of 1938 imposed licensing requirements on gun manufacturers and dealers and prohibited licensees from shipping firearms to certain classes of persons. The Gun Control Act of 1968 (GCA) strengthened licensing requirements and expanded the categories of persons prohibited from possessing firearms. The Brady Handgun Violence Prevention Act of 1993 requires federal firearms licensees to conduct a background check on prospective gun buyers before making a sale.

Enforcement of those gun-control laws is a critical component of the mission of the Department of Justice. The Department prosecutes thousands of defendants for firearms violations every year. In opposing Second Amendment challenges to those prosecutions, the government contended for more than 60 years that the Second Amendment did not protect an individual right to keep and bear arms for purposes unrelated to participation in a well-regulated militia. The government set out that position in its brief in *United States v. Miller*, 307 U.S. 174 (1939), the only prior case in which this Court has squarely addressed a Second Amendment challenge to federal firearms legislation. In rejecting the defendants' Second Amendment challenge to the NFA, which rendered unlawful their transport of an unregistered sawed-off shotgun across state lines, the Court agreed with the government that the "possession or use" of a firearm must "ha[ve] some reasonable relationship to the preservation or efficiency of a well regulated militia" to fall within the scope of the Second Amendment. *Id.* at 178. The government continued to press that position successfully in the federal courts of appeals for the rest of the Twentieth Century. In evaluating the constitutionality of proposed firearms legislation over the same time period, the Department, through the Office of Legal Counsel, repeatedly expressed the same view.

In May 2001, despite the longstanding position of the Department of Justice and uniform body of favorable federal appellate precedent, Attorney General John Ashcroft wrote a letter to the National Rifle Association expressing the view that the Second Amendment "protects the private ownership of firearms for lawful purposes." May 17, 2001 Letter from John Ashcroft, Attorney General, to James Jay Baker, Executive Director, National Rifle Association Institute for Legislative Action (Ashcroft Letter), http://www.nraila.org/images/Ashcroft.pdf. The Attorney General's statement contradicted the longstanding position of the United States, which government lawyers had advanced in pending cases, including a case in the Fifth Circuit involving a Second Amendment challenge to a federal law prohibiting the possession of firearms by persons subject to a domestic violence restraining order. Although the Fifth Circuit ultimately rejected the defendant's claim, the court recognized a Second Amendment right of individuals "to privately possess and bear their own firearms, . . . that are suitable as personal, individual weapons." *United States v. Emerson* 270 F.3d 203, 260 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

Emerson was the first federal appellate decision to adopt the view that the Second Amendment protects an individual right to keep and bear arms for purposes unrelated to the effective functioning of the militia. After the decision was issued, the Attorney General adopted it as the position of the United States.

As the briefs filed by the petitioners and their amici in this case explain, the original, longstanding position of the Department of Justice, embraced by this Court in *Miller* and by all the federal courts of appeals until the *Emerson* decision and the decision below, is firmly rooted in the text of the Second Amendment, its drafting history, and the historical context in which it was enacted. Given the strength of the Department's original position and its acceptance by the courts, the decision to abandon it in 2001 was unjustified.

The decision was also unwise. Recognition of an expansive individual right to keep and bear arms for private purposes will make it more difficult for the government to defend present and future firearms laws. With gun violence continuing to plague the United States, this Court should adhere to the position it staked out nearly 70 years ago in *Miller* and construe the Second Amendment to protect a right to keep and bear arms only to the extent the exercise of such a right is related to the "preservation or efficiency of a well regulated militia." 307 U.S. at 178.

ARGUMENT

The Second Amendment Does Not Protect Firearms Possession or Use That Is Unrelated To Participation In A Well-Regulated Militia.

Gun violence in the United States is an extremely serious problem. Every year firearms are used in thousands of homicides and hundreds of thousands of non-lethal crimes such as rape, robbery, and assault. *See* William J. Krouse, CRS Report for Congress, *Gun Legislation in the 109th Congress* (updated May 15, 2006), at 4-5. The deadly toll that firearms exact on the American people has been punctuated in recent years by especially horrific crimes involving firearms, including the Virginia

Tech and Columbine school shootings and the sniper attacks in the Washington Metropolitan Area.

The question presented in this case is whether the Second Amendment prevents the District of Columbia from enacting public safety measures such as the handgun law at issue here that are designed to combat the violence that firearms enable a criminal to perpetrate against the District's citizens. Amici submit that the answer is no. Properly understood, the Second Amendment does not prohibit a legislature from enacting a law that has neither the purpose nor the effect of interfering with a State's operation of its militia in accordance with state and federal law. That was the position the United States Department of Justice maintained throughout the Twentieth Century in successfully defending federal firearms laws against Second Amendment challenge and in evaluating the constitutionality of proposed firearms legislation.

In 2001, the Department of Justice abandoned its longstanding position, adopting the view that the Second Amendment protects firearms possession and use for purposes unrelated to participation in a well-regulated militia. Because the Department's original position is amply supported by the Second Amendment's text, drafting history, and historical context, the abrupt change in the Department's position was unwarranted. The Department's new interpretation of the Second Amendment, if adopted by this Court, threatens to obstruct legislative efforts to combat gun-related violence, even when the clear purpose of the statute is to protect public safety, not to dismantle the militia, and even when the statute will have no effect on the operation of the militia.

A. Congress Has Enacted A Series Of Statutes Regulating Firearms Possession And Use.

Having determined that "there are more people in the underworld today armed with deadly weapons, in fact, twice as many, as there are in the Army and the Navy of the United States combined," National Firearms Act: Hearings on H.R. 9066 before the H. Comm. on Ways and Means, 73d Cong., 2d Sess., at 4 (1934), Attorney General Homer Cummings in the early 1930s presented a Department of Justice proposal to combat the "armed underworld," *id.* at 5, by taxing commerce in certain firearms and imposing registration requirements. Congress responded by enacting the National Firearms Act of 1934 (NFA), ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5801 *et seq.*), the first major piece of federal legislation addressing gun violence in America. The NFA sought to discourage commerce in firearms favored by criminals—including machine guns, sawed-off shotguns, and silencers—by imposing a prohibitive tax on their transfer.

Congress returned to the regulation of firearms in 1938, enacting the Federal Firearms Act (FFA), ch. 850, 52 Stat. 1250 (1938). The FFA imposed licensing requirements on gun manufacturers, importers, and dealers operating in interstate commerce and prohibited the knowing transfer of firearms to certain categories of persons, including felons and fugitives. 52 Stat. at 1250-1251.

The next significant federal legislative response to the persistent problem of gun violence in the United States came in 1968, towards the end of a decade that saw the fatal shootings of President John F. Kennedy, Robert F. Kennedy, and Martin Luther King, Jr. The Gun Control Act of 1968 (GCA), Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921 *et seq.*), amended the NFA to tax firearms that constitute "destructive devices" and superseded the FFA by imposing more comprehensive licensing requirements and adding to the categories of persons prohibited from possessing firearms, including drug users and the mentally ill. 82 Stat. at 1214-1220. The GCA also established minimum age requirements for handgun and long gun purchases, prohibited the sale of handguns to out-of-state residents, limited the importation of firearms, and imposed significant criminal penalties for using or carrying a firearm in committing a federal felony. 82 Stat. at 1216-1224.

In 1993, Congress enacted the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536, which amended the GCA to require the completion of a background check before a licensed firearms manufacturer, importer, or dealer may sell or transfer a firearm to a nonlicensed person. Pursuant to that law, the Federal Bureau of Investigation established the National Instant Criminal Background Check System (NICS) to facilitate the conduct of the background checks.[2]

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[2] Responding to the Virginia Tech shootings, Congress recently enacted the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559, which is designed to enhance state reporting to NICS of mental health information about prospective gun purchasers. Currently pending in Congress are a variety of measures designed to make it more difficult for (...continued)

B. For Decades The Department of Justice Maintained The Position That The Second Amendment Only Prohibits Those Laws That Interfere With The Operation Of A Well-Regulated Militia.

Enforcing the federal firearms laws is a top priority of the Department of Justice. In 2006, the Department prosecuted 10,425 federal firearms cases against 12,479 defendants. *See* Sept. 17, 2007 Department of Justice Fact Sheet, Project Safe Neighborhoods: America's Network Against Gun Violence, at 1, http://www.psn.gov/Training/Atlanta_conf07/07sep17-factsheet.html. In opposing defendants' claims that such prosecutions violate the Second Amendment, the Department for many decades took the position that the Second Amendment is not implicated by laws that do not interfere with the maintenance of a well-regulated militia. The Department successfully defended federal firearms laws on that theory until 2001, when Attorney General John Ashcroft directed that the position be changed to reflect the view that the

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known or suspected terrorists to obtain firearms in the United States. Spurred by a GAO report finding that, in a five-month period in 2004, 35 individuals designated as known or suspected terrorists were permitted to purchase firearms, *see* GAO Report 05-127, *Gun Control and Terrorism, FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records*, at 11 (Jan. 2005), one such measure would authorize the Attorney General to block the sale of a firearm when the background check reveals that the prospective purchaser is a known or suspected terrorist. *See* Denying Firearms and Explosives to Dangerous Terrorists Act of 2007, S. 1237, 110th Cong. (introduced Apr. 26, 2007).

Second Amendment protects a right to keep and bear arms independent of the State's need to maintain a well-regulated militia.

1. The Government's Brief in *United States v. Miller*

In the first and only Second Amendment challenge to federal firearms legislation resolved by this Court, *United States v. Miller*, 307 U.S. 174 (1939), the government sought reversal of a district court decision invalidating under the Second Amendment a provision of the NFA making it a crime to transport an unregistered firearm (defined in the Act to include a sawed-off shotgun) across state lines. In its brief filed in this Court, the government argued that Section 11 of the NFA did not violate the Second Amendment because

> the right secured by that Amendment to the people to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.

Brief for the United States, *United States v. Miller*, No. 696, 1939 WL 48353, at *15 (1939) (*Miller* Brief).

In support of that proposition, the government pointed to "the very declaration in the Second Amendment that 'a well-regulated militia, being necessary to the security of a free State'" as limiting the scope of the right recognized in the Second Amendment to the public purpose of maintaining a militia for the common defense. *Miller* Brief, at *15.

The government also discussed the historical experience in England, where the recognition of a right to keep and bear arms was the product of "oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people." *Id.* at *12. Quoting the Tennessee Supreme Court's discussion in *Aymette v. State*, 2 Humphr. (Tenn.) 154, 156-157 (1840), of "the origin of the right in England to bear arms, particularly as assured by the Bill of Rights of 1688," the government concluded that the right recognized in England "gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense." *Miller* Brief, at *12.[3]

The government acknowledged that some courts had recognized a right to keep and bear arms for private defense, *Miller* Brief, at *18 (citing *People v. Brown*, 253 Mich. 537 (1931); *State v. Duke*, 42 Tex. 455 (1874)), but explained that "the cases are unanimous in holding that the term 'arms' as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals,"

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[3] The government also cited decisions of two other state supreme courts, both of which construed the Second Amendment as protecting the right to keep and bear arms only to the extent the exercise of that right is related to participation in a well-regulated militia. *Miller* Brief, at *15-18 (quoting *Salina v. Blaksley*, 72 Kan. 230, 232-33 (1905), and *State v. Buzzard*, 4 Ark. 18, 24-25 (1842)).

id.[4] The government argued that "[s]awed-off shotguns, sawed-off rifles and machine guns are clearly weapons which can have no legitimate use in the hands of private individuals." *Id.* at *20. The government concluded by observing that "[t]he Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights." *Id.* at *21 (quoting *United States v. Adams*, 11 F. Supp. 216, 218-219 (S.D. Fla. 1935)).

2. This Court's *Miller* Decision

In upholding Section 11 of the NFA, this Court agreed with the government that the scope of the Second Amendment right to keep and bear arms is limited to furthering the operation of a well-regulated militia. *Miller*, 307 U.S. at 178. The Court held that the Second Amendment was not implicated because the "possession or use" of a sawed-off shotgun did not have a "reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* The Court reinforced that point by discussing the Militia Clauses of the Constitution, which grant Congress the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.* (quoting art. I, § 8, cls. 15-16). The Court then observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made." *Id.* The Court concluded that "[the Second Amendment] must be interpreted and applied with that end in view." *Id.*[5]

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[4] *Brown* and *Duke* construed state constitutional provisions that, in contrast to the Second Amendment, conferred a right to bear arms for self-defense. *See Brown*, 253 Mich. at 538; *Duke*, 42 Tex. at 458-59.

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[5] The court of appeals in this case, while acknowledging that "the *Miller* Court linked the Second Amendment's language to the Constitution's militia clause[s]," Pet. App. 43, concluded that neither that linkage nor the language of the Second Amendment's introductory clause imposes a purpose-related limitation on the exercise of the right beyond excluding from protection those weapons that are not "Arms" within the meaning of the Second Amendment, *id.* at 44. The court of appeals held instead that the Second Amendment was not in fact designed to serve only the "civic purpose of helping to preserve the citizen militia." *Id.* at 46. Rather, it "was premised on the private use of arms for activities such as hunting and self-defense," *id.*, a proposition that finds no support in the text of the Second Amendment, its drafting history, the relevant debates surrounding its enactment, or in *Miller*. *See* Jack N. Rakove, *The Second Amendment, The Highest Stage of Originalism*, 76 Chi.-Kent. L. Rev. 103, 161 (2000) ("[T] he records from the Constitutional Convention, the ensuing ratification campaign, and the debates in the First Congress of 1789 all demonstrate [that] the issue under discussion was always the militia, and that issue was posed primarily as a matter of defining the respective powers of two levels of government.").

3. Post-*Miller* Developments

Having successfully defended the NFA before this Court on the theory that the scope of the Second Amendment does not extend further than protecting the operation of a well-regulated militia, the Department of Justice adhered to that position for more than 60 years in defending federal firearms prosecutions against Second Amendment challenges. The Department was successful, as every federal appellate court held that the scope of the Second Amendment is limited.

In *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943), the Third Circuit rejected a Second Amendment challenge to a provision of the FFA that prohibited a person who had been convicted of a crime of violence from receiving a firearm in interstate commerce. The court of appeals observed that the Second Amendment "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power." *Id.* at 266. The court explained that the defendant's challenge could "be denied without more under the authority of [*Miller*]," given that he had failed to show a relationship between his possession of a pistol and maintenance of a well-regulated militia. *Id.* The court further observed that it would not invalidate laws such as the FFA that are "in the nature of police regulations, but which do not go so far as substantially to interfere with the public interest protected by" the Second Amendment. *Id.* The First Circuit rejected a similar challenge to the FFA in *Cases v. United States*, 131 F.2d 916, 923 (1st

Cir. 1942), *cert. denied*, 319 U.S. 770 (1943), holding that the defendant's use of a revolver was not entitled to any Second Amendment protection because he used the firearm "on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia."

Federal courts of appeals addressing more recent Second Amendment challenges similarly construed the protection it affords as limited to restricting the federal government from passing laws that interfere with a State's capacity to maintain a well-regulated militia. *See, e.g., Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999) (upholding 18 U.S.C. § 922(g)(9), which bars persons convicted of domestic violence offenses from possessing firearms, because "the viability and efficacy of state militias will [not] be undermined by" the prohibition), *cert. denied*, 528 U.S. 1116 (2000); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir.) (holding that the Second Amendment "protect[s] only the use or possession of weapons that is reasonably related to a militia actively maintained and trained by the states"), *cert. denied*, 522 U.S. 1007 (1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (upholding federal machine gun ban in absence of evidence that the defendant's possession of machine guns "had any connection with militia-related activity"), *cert. denied*, 522 U.S. 807 (1997); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) ("The purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia."), *cert. denied*, 507 U.S. 997

(1993); *United States v. Warin*, 530 F.2d 103, 106-07 (6th Cir. 1976) (possession of submachine gun does not bear reasonable relationship to preservation of well-regulated militia); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam) (upholding felon-in-possession statute in the absence of evidence that it "in any way affects the maintenance of a well regulated militia").

When review of this uniform body of precedent was sought in this Court, the Department of Justice opposed such review on the ground, among others, that the decisions adopted the correct interpretation of the Second Amendment. For example, in *Gillespie v. City of Indianapolis*, in which the court of appeals had rejected a Second Amendment challenge to 18 U.S.C. § 922(g)(9), the government defended the decision on the ground that "[u]nder [*Miller*], the Second Amendment does not apply in the absence of 'some reasonable relationship' between the regulation at issue and 'the preservation or efficiency of a well regulated militia.'" Brief for the United States in Opposition, *Gillespie v. City of Indianapolis*, No. 99-626, 1999 WL 33632892, at *10 (1999) (quoting *Miller*, 307 U.S. at 178). The government made the same argument in its opposition brief in *Fraternal Order of Police v. United States*, No. 99-106, 1999 WL 33640087, at *10 (1999). *See also* Brief for the Respondent in Opposition, *Farmer v. Higgins*, No. 90-600, at 11-12 (1990) ("Since *Miller*, the lower federal courts have concluded that the mere allegation that a firearm might be of value to a militia is insufficient to establish a right to possess that firearm under the Second Amendment.").

This Court relied on *Miller* in *Lewis v. United States*, 445 U.S. 55 (1980), to reject an equal protection challenge to the federal law prohibiting convicted felons from possessing firearms. The Court held that the firearm prohibition was lawful provided that there was a "rational basis" for it because "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Id.* at 65 n.8. The Court cited *Miller* as support for that proposition, *id.* at 65-66 n.8, and further observed that "a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm," *id.* at 66.

The Department of Justice addressed a similar equal protection and due process challenge premised in part on the Second Amendment in a brief filed in *United States Department of the Treasury v. Galioto*, 477 U.S. 556 (1986). There, the government argued that a provision prohibiting persons who have been committed to mental institutions from possessing firearms should be subject to deferential rational-basis review because "the opportunity to acquire a firearm has not been held to fall within th[e] category" of cases "bearing on the exercise of fundamental rights." Brief for the Appellant, *United States Dep't of the Treasury v. Galioto*, No. 84-1904, 1986 WL 728208, at *28 n.24 (1986). The government made the point again in its reply brief, characterizing as "entirely without merit" the suggestion of an amicus that "the right to acquire firearms must be considered fundamental" because this Court had "flatly held that '[t]hese legislative restrictions on the use of firearms . . . [do not] trench upon any constitutionally protected liberties.'" Reply Brief for the Appellant, *Galioto,* 1986 WL 728209, at *4 n.4 (quoting *Lewis,* 445 U.S. at 65 n.8) (alterations in government's brief).[6]

C. The Office of Legal Counsel Repeatedly Took The Position That The Second Amendment Does Not Protect A Right To Keep And Bear Arms For Private Purposes.

In addressing the constitutionality of proposed gun-control legislation, the Department of Justice through the Office of Legal Counsel (OLC) repeatedly expressed the view that the Second Amendment does not protect a right to keep and bear arms for purposes unrelated to a State's operation of the militia. In 1954, in response to an inquiry from the Joint Committee on Atomic Energy, OLC opined in a memorandum that proposed amendments to the Atomic Energy Act that would authorize prohibitions on individual ownership or possession of fissionable materials that could be used for a bomb or grenade would not violate the Second Amendment. Unsigned Memorandum on Whether Reasonable Regulation By AEC Under Proposed Amendments To Atomic Energy Act For Peacetime Use Of Fissionable Materials Would Violate The Second Amendment To

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[6] The Supreme Court did not address the merits of the challenge, however, because it determined that an amendment to the law while the case was pending rendered the challenge moot. *Galioto,* 477 U.S. at 559-60.

The Constitution, at 1 (attached to Feb. 11, 1954 Letter from J. Lee Rankin, Assistant Attorney General, OLC, to George Norris, Jr., Esq., Joint Committee on Atomic Energy, United States Senate). The memorandum relied on the analysis of the Second Amendment set out in *Cases* and *Tot*, *supra*, and concluded that, even assuming a State would "be so remiss in its duty . . . as to permit in the future any member of a militia to possess a hand-throwing bomb containing fissionable material," the Second Amendment would not preclude federal regulation given "the destructive consequences that would attend irresponsible use of these powerful weapons." *Id.* at 12-13.

In 1965, when Congress was considering proposed firearms legislation, OLC, then headed by Assistant Attorney General Norbert A. Schlei, wrote a memorandum addressing the scope of the Second Amendment. The Origin of the Second Amendment, attached to May 3, 1965 Letter from Norbert A. Schlei, Assistant Attorney General, OLC, to Myrl E. Alexander, Director, Bureau of Prisons, Re: Attorney General's Testimony Regarding the Application of the Second Amendment to S. 1592—Federal Firearms Act Amendments. The memorandum discussed the "original proposal of what is now the Second Amendment" submitted by James Madison and the proposal reported by the Select Committee, both of which contained a conscientious objector clause barring any "person religiously scrupulous" from being compelled to bear arms. *Id.* The memorandum observed that the conscientious objector clause contained a reference to "person" whereas the clause recognizing a right to bear arms referred collectively to "the people." *Id.* The memorandum concluded that "[t]he contrast in terminology supports the view that the right to bear arms was intended as a collective right while the protection of religious scruples was a personal benefit." *Id.*

The memorandum found additional support for its conclusion in the reported congressional debates on the Second Amendment, which discussed the need for a militia to counter the threat posed by a standing army, but not an individual right to possess or use arms. *Id.* at 2. The memorandum also found support in State constitutions. The memorandum observed that "Five States had Constitutions specifically providing for the organization and maintenance of a militia but making no reference to bearing arms." *Id.* at 3. Three States "expressly recognized the 'right of the people to bear arms'" but only "*for the defense of the State.*" *Id.* (emphasis in memorandum). The memorandum found that "it is reasonable to conclude" that the two States whose constitutions recognized a right of "'the people'" to "'defence of themselves'" "referred only to collective defense and did not include individual self-defense" in light of those States' concerns about a standing army and the need for civilian control of the militia. *Id.* at 4. OLC concluded from its review of the historical materials that, at the time the Second Amendment was adopted, "[b]oth the States and the Congress were preoccupied with the distrust of standing armies and the importance of preserving State militias. It was in this context that the Second Amendment was written and it is in this context that it has been interpreted by the courts." *Id.* at 5.

The view that the Second Amendment protects a right to keep and bear arms only in connection with service in a well-regulated militia was also reflected in the testimony of Attorney General Nicholas deB. Katzenbach before the Judiciary Committee. Katzenbach stated that this Court had "made it clear that the [Second] [A]mendment did not guarantee to any individuals the right to bear arms." Federal Firearms Act, Hearings Before the Subcomm. To Investigate Juvenile Delinquency of the S. Comm. on the Judiciary, 89th Cong., 1st Sess., 41 (1965). Attorney General Katzenbach submitted a memorandum that "documents the opinion that the right to bear arms protected by the [S]econd [A]mendment relates only to the maintenance of the militia." *Id.* The memorandum made several points.

First, it observed that the Second Amendment was not an obstacle to the enactment of the NFA and was not even mentioned in connection with the enactment of the FFA. *Id.* at 42. Second, it explained that the decisions in *Miller, Tot,* and *Cases* "demonstrate[d] that the proposed amendments to the FFA are in no way invalidated by the [S]econd [A]mendment." *Id.* Third, the memorandum discussed the laws relating to the establishment of a well-regulated militia, observing that "for nearly a century and a half Congress has provided for the arming of the enrolled, organized militia, . . . and that for at least the past half century no member of the organized militia has been required or permitted to supply his own arms." *Id.* at 44. The memorandum identified the National Guard and the Naval Militia as "the 'well-regulated' militia' of the present day," *id.,* and explained that, because the proposed legislation "exempt[s] from [its] application activities by Federal and State authorities," it was clear that the Second Amendment was not implicated, *id.* at 45.[7]

Finally, the memorandum addressed the question whether the Second Amendment recognizes an individual or collective right. The memorandum observed that

> [i]nasmuch as "arms" is traditionally a military term and the statement of the right in the Federal and several State constitutions is connected with the necessity for a well-regulated militia, it has been concluded that, if such a right is personal in nature, it is at least restricted to members of a well regulated, or, synonymously, organized State militia.

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[7] This Court discussed the changes to the laws governing the militia in *Perpich v. Department of Defense*, 496 U.S. 334 (1990). The Court observed that a 1792 law directing that "every able-bodied male citizen between the ages of 18 and 45 be enrolled [in the Uniform Militia] and equip himself with appropriate weaponry" was "virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force." *Id.* at 341. Congress responded by repealing the law in 1901 and enacting a new law in 1903 that began "[t]he process of transforming 'the National Guard of the several States' into an effective fighting force." *Id.* at 341-42. *See* H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 511-47 (2000) (discussing the transformation of the militia since the enactment of the Second Amendment and concluding that "the militia world contemplated by the Second Amendment no longer exists, and no plausible analogy to that nexus can be reconstructed").

Id. *See, e.g.,* Jack N. Rakove, *The Second Amendment, The Highest Stage of Originalism*, 76 Chi.-Kent. L. Rev. 103, 132 (2000) ("[T]he framers, clearly reasoning on the basis of hard-earned experience, saw the militia as an institution that would henceforth be regulated through a combination of national and state legislation firmly anchored in the text of the Constitution, rather than some preexisting, preconstitutional understanding."). The memorandum further observed that "respectable authority supports the view that the [S]econd [A]mendment merely affirms the right of the States to organize and maintain militia," *id.* at 45-46, and that, even assuming an individual right was protected, the Second Amendment would still pose no obstacle to federal firearms legislation unless a law "in fact prevent[ed] an eligible citizen from functioning as a State militiaman," *id.* at 45.

In 1968, OLC opined on the constitutionality of a Johnson Administration proposal to "[r]equire the registration of every firearm in the United States" and to "[p]rovide a Federal system for licensing possession of firearms." June 25, 1968 Unsigned Memorandum On Constitutional Basis For Administration Gun Registration And Licensing Bill, at 1. The memorandum concluded that the Second Amendment "does not create a personal right in individuals to be free of reasonable legislative regulation of their possession of firearms" and that "Congressional action in enacting earlier Federal firearms legislation, and judicial rulings sustaining this legislation, confirm this understanding." *Id.* at 11. The memorandum thus opined that the Second

Amendment "does not affect regulation of individual possession as proposed in this bill." *Id.* at 12.

The following year, after a change in Administration, the same issue resurfaced. In responding to a request from Deputy Attorney General Richard G. Kleindienst for OLC's views on the registration provision, which had been omitted from the GCA but had been resubmitted to Congress, then-Assistant Attorney General William H. Rehnquist, while objecting to the proposed legislation on policy grounds, stated that the Office "d[id] not believe that constitutional objections based on the Second Amendment's guarantee of 'the right of the people to keep and bear arms' present any serious legal obstacle to this legislation." February 13, 1969 Memorandum from William H. Rehnquist, Assistant Attorney General, OLC, to Richard G. Kleindienst, Deputy Attorney General, Re: Proposed Federal Gun Registration and Licensing Act of 1969, at 4 (citing *Miller* and *Tot*).

In 1973, OLC responded to an inquiry from the Republican National Committee respecting whether "individual citizens have the constitutional right to own guns," by observing that "[t]he language of the Second Amendment, when it was first presented to the Congress, makes it quite clear that it was the right of the States to maintain a militia that was being preserved, not the rights of an individual to own a gun." July 19, 1973 Letter from Mary C. Lawton, Deputy Assistant Attorney General, OLC, to George Bush, Chairman, Republic National Committee, at 1.

In 1981, OLC expressed its views on a bill that would "narrow the scope of permissible firearms regulation under the [GCA]." May 27, 1981 Memorandum for D. Lowell Jensen, Assistant Attorney General, Criminal Division, from Theodore B. Olson, Assistant Attorney General, OLC, Re: Proposed Legislation Relating to Firearms and to Mandatory Sentencing, at 2. Observing that "the 'findings' portion of [the bill] . . . purports to rest the bill, in part, on a legislative determination that the current scheme for federal firearms regulation violates a range of constitutional rights," OLC "perceive[d] no basis for suggesting that the [GCA] so interferes with the powers of the States to raise militias as to transgress the Second Amendment." *Id.*

To amicis' knowledge, the only pre-2001 statements from OLC that could be read to reflect a more expansive view of the Second Amendment's scope came in connection with proposed legislation respecting the custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices. In a April 5, 1959 Memorandum to Deputy Attorney General Lawrence E. Walsh, Paul A. Sweeney, the Acting Assistant Attorney General, stated that "serious constitutional problems would arise under the Second Amendment" if the proposed statute defined "missile" in a way that would "prohibit private individuals from acquiring, possessing, or receiving any standard ammunition for firearms." *Id.* at 2. The Memorandum contains no legal analysis, however. Then-Assistant Attorney General Nicholas deB. Katzenbach repeated the same concern (also without providing a legal analysis) two years later with respect to a similarly worded bill, observing that "[t]he definition of 'missile' in the bill is so loose it would seem to include an ordinary revolver bullet, so as to raise constitutional problems under the Second Amendment." May 8, 1961 Memorandum from Nicholas deB. Katzenbach, Assistant Attorney General, OLC, to Byron R. White, Deputy Attorney General. As noted above, p. 21, *supra*, Katzenbach subsequently adopted the view that the Second Amendment's scope is limited to protecting the functioning of a well-regulated militia.

D. The Department Of Justice Changes Its Position.

In May 2001, despite the Department's longstanding position, and despite the federal appellate decisions uniformly rejecting a more expansive construction of the Second Amendment, Attorney General Ashcroft wrote a letter to the National Rifle Association (NRA) expressing the view that "the Constitution protects the private ownership of firearms for lawful purposes." Ashcroft Letter, *supra*, at 2.

At the time Attorney General Ashcroft wrote the letter, the government was a party in federal firearms cases in the courts of appeals, including a government appeal to the Fifth Circuit of a district court decision dismissing on Second Amendment grounds an indictment charging the defendant with violating 18 U.S.C. § 922(g)(8), which prohibits persons subject to a domestic violence restraining order from possessing firearms. *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999). In its appellate brief, the government adhered to its longstanding position that "possession of the firearm must be 'reasonably related' to the preservation or efficiency of the militia before the Second Amendment will shield such possession." Brief for Appellant, *United States v. Emerson*, No. 99-10331, at 11 (Aug. 27, 1999), http://www.saf.org/EmersonAppealGovtl.html; *see* Reply Brief for Appellant, *Emerson*, 2000 WL 33978355, at *24-34 (Jan. 31, 2000) (same).[8]

Departing from the uniform precedent in the courts of appeals, the Fifth Circuit concluded that the Second Amendment "protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons." *Emerson*, 270 F.3d at 260. The court elaborated that recognition of such individual rights "does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms." *Id.* at 261. After examining the standards applicable to obtaining a domestic violence restraining order in Texas, the court concluded that Section 922(g)(8), as applied to the defendant, did not violate his Second Amendment rights. *Id.* at 261-65.

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[8] In response to an inquiry concerning the position the Department had taken at oral argument in the *Emerson* case, former Solicitor General Seth P. Waxman wrote that "the position that the Second Amendment does not extend an individual right to keep and bear arms" was "consistent with the view of the Amendment taken both by the federal appellate courts and successive Administrations." Aug. 22, 2000 Letter from Seth P. Waxman, Solicitor General, at 1, http://www.vpc.org/ashapb.htm. For other statements of the government's position in the federal courts, *see, e.g.*, Brief for the United States, *United States v. Witherspoon*, No. 99-51110, 1999 WL 33728315, at *12 (5th Cir. 1999) ("The *Miller* Court instructs that the necessity of maintaining effective state militias is, by the language itself, the only concern of the Second Amendment."); Brief for the United States, *United States v. Rybar*, No. 95-3185, 1995 WL 17197798, at *38 (3d Cir. 1995) (fact that firearm might be useful to a militia "is insufficient to establish that the defendant's possession of [it] as charged was reasonably related to the preservation of a well-regulated militia").

On November 9, 2001, less than one month after *Emerson* was decided, Attorney General Ashcroft issued a Memorandum To All United States' Attorneys in which he observed that the *Emerson* decision was "noteworthy" for having held that the Second Amendment protects an individual right to keep and bear arms unrelated to militia service and stated that "the *Emerson* opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment." Nov. 9, 2001 Ashcroft Memorandum, http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8272.resp.pdf.

In May 2002, the Office of the Solicitor General confirmed that Attorney General Ashcroft's view on the scope of the Second Amendment was now the litigating position of the United States. In its brief opposing the petition for a writ of certiorari filed in the *Emerson* case, the government stated:

> In its brief to the court of appeals, the government argued that the Second Amendment protects only such acts of firearm possession as are reasonably related to the preservation or efficiency

> of the militia. The current position of the United States, however, is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse.

Brief for the United States in Opposition, *Emerson v. United States*, No. 01-8780, at 19-20 n.3 (May 6, 2002) (citation omitted). On the same day, the government filed an opposition to another petition raising a Second Amendment claim in which it noted that it "agree[d] with petitioner that the Fifth Circuit's decision in *Emerson* reflects a sounder understanding of the scope and purpose of the Second Amendment than does the [Tenth Circuit's] decision," which, like "other courts of appeals," held that "the Amendment protects the possession of firearms only in connection with state militia activity." Brief for the United States in Opposition, *Haney v. United States*, No. 01-8272, at 4-5 (May 2002), http://www.usdoj/osg/briefs/2001/0responses/2001-8272.resp.pdf.

E. The Department's Change In Position Was Unjustified And Unwise.

The abrupt turnabout by the Department of Justice on the scope of the Second Amendment is remarkable. At the time Attorney General Ashcroft wrote to the NRA, a federal district court had invalidated a federal firearms provision on the very theory of the Second Amendment that the Attorney General endorsed. At the same time, the federal courts of appeals had uniformly rejected Second Amendment challenges to federal firearms prosecutions, adopting a more modest, militia-based view of the Amendment's scope the government had long advocated. That view was also adopted by this Court in *Miller*, which held that the Second Amendment does not protect the "possession or use" of a firearm unless such possession or use "has some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178.

In his letter to the NRA, Attorney General Ashcroft did not cite *Miller* or the substantial body of other cases rejecting the view that the Second Amendment protects a right to keep and bear arms for private purposes. Moreover, the sources the Letter does cite do not support the proposition that the Second Amendment protects an individual right independent of the State's operation of a well-regulated militia. *See generally* Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. Ky. L. Rev. 705, 713-36 (2002) (addressing each source cited and concluding that the Attorney General's reliance on them was misplaced).[9] While the letter correctly refers to a body of scholarship endorsing a more expansive interpretation of the Second Amendment right, there is also a body of scholarship that supports the Department's original, longstanding position. *See* Aug. 24, 2004 Memorandum Opinion for the Attorney General, *Whether The Second Amendment Secures An Individual Right*, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, OLC, Howard C. Nielson, Jr., Deputy Assistant Attorney General, OLC, and C. Kevin Marshall, Acting Deputy Assistant Attorney General, OLC (2004 OLC Mem. Op.), at 9 (concluding from review of modern scholarship that there are "many adherents" of the view that the Second Amendment does not protect an individual right to keep and bear arms for private purposes) (collecting citations); Nosanchuk, *supra*, at 768-72 & n.377 (discussing scholarship on both sides of the debate).

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[9] Attorney General Ashcroft also cited the testimony of Attorney General Cummings at the 1934 hearings on the NFA. That testimony cannot fairly be read to support the position (...continued)

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taken in the Ashcroft Letter. At the hearings, when a Congressman broached the subject of the relationship between the Second Amendment and firearms restrictions and how the two could be reconciled (Hearings on H.R. 9066, *supra*, at 18-19), Attorney General Cummings explained that the proposed legislation "easily" fell within Congress' Article I powers. Cummings did suggest that, had Congress flatly prohibited the possession of machine guns, there "might" have been "some constitutional question" respecting Congress's power to enact such a ban, but Cummings framed that concern as an Article I authority issue, not as a view on the scope of the Second Amendment. The other excerpts of testimony on which the Ashcroft Letter relies similarly involve Cummings' expression of views on Congress' Article I powers, not the Second Amendment. *See id.* at 6-8, 13; *see also* Nosanchuk, *supra*, at 746-50.

As the analysis in the OLC memoranda discussed in Part C above and the briefs filed by petitioners and their other supporting amici illustrate, the text of the Second Amendment, its drafting history, and the historical context in which it was enacted support the conclusion that the constitutional right to keep and bears arms is limited to the possession or use of firearms that is reasonably related to a State's operation of a militia regulated by state and federal law.[10]

Given the strength of the legal arguments supporting the Department's original, longstanding position, and the substantial body of case law adopting it, Attorney General Ashcroft's decision to abandon that position in favor of an individual rights theory that accords constitutional protection to the possession and use of firearms for private purposes was, in our view, unjustified. It was also unwise. While the Attorney General pledged to "continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws," Ashcroft Memorandum, *supra*, the change in position has made the Department's task more difficult. None of the federal firearms laws in place today could reasonably be described as having as their aim or effect interfering with a State's operation of its militia. If the Second Amendment protects a person's right to keep and bear arms for self-defense, recreation, or other purposes unanchored to the operation of the militia, however, the analysis that courts must undertake becomes less straightforward and the risk that a firearms regulation or prohibition enacted to protect public safety will be invalidated is increased.[11]

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[10] In 2004, OLC wrote that "the Second Amendment secures to individuals a personal right to keep and to bear arms, whether or not they are members of any militia or engaged in military service or training." 2004 OLC Mem. Op., at 1. While the 2004 OLC memorandum is lengthy and cites more sources than the Ashcroft Letter, the most relevant sources—the text of the Second Amendment, its drafting history, and the views expressed by those involved in its enactment—refute the memorandum's contention that the introductory clause of the Amendment identifies the militia as merely "*a* justification" for recognizing the right to keep and bear arms (*id.* at 19 (emphasis added)) and the related suggestion that the Amendment protects a "right of self-defense" (*id.* at 33-35). *See* Rakove, *supra*, at 161 ("Had the framers and ratifiers of the Constitution really perceived the problem in terms of a private right detached from service in the public institution of the militia, we would know it.").

In conceptualizing the appropriate analytical framework, Attorney General Ashcroft has adverted to standards such as requiring a showing of "compelling state interests" that are affiliated with the application of strict scrutiny. Ashcroft Letter, *supra*, at 2 n.1. *See also* Ashcroft Memorandum, *supra* (endorsing the *Emerson* decision, which permits only "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms"). Under such an exacting standard, present and future firearms regulations and prohibitions designed to combat gun violence and having no practical effect on the functioning of the militia would face the prospect of invalidation to the detriment of law enforcement and public safety.

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[11] The *Emerson* case itself offers an example. Applying an expansive individual rights theory, the district court invalidated the federal law prohibiting persons subject to a domestic violence restraining order from possessing firearms. While the Fifth Circuit reversed, it observed that "the nexus between firearm possession by the party so enjoined and the threat of lawless violence" was "barely" sufficient "to support the [firearms] deprivation." 270 F.3d at 264-65.

At a time when the Nation continues to feel the terrible effects of gun violence, this Court should adhere to its view in *Miller* that the scope of the Second Amendment is limited to furthering the institution of the well-regulated militia and in all events should adopt a standard that gives legislatures flexibility to enact firearms laws designed to protect their citizens.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 2008

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APPENDIX

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Eric H. Holder, Jr. served as Deputy Attorney General of the United States from 1997 to 2001, and Acting Attorney General in 2001. He also served as the United States Attorney for the District of Columbia from 1993 to 1997.

Jamie S. Gorelick served as Deputy Attorney General of the United States from 1994 to 1997.

Philip B. Heymann served as Deputy Attorney General of the United States from 1993 to 1994.

Warren M. Christopher served as Deputy Attorney General of the United States from 1967 to 1969. He also served as Secretary of State from 1993 to 1997 and Deputy Secretary of State from 1977 to 1981.

Seth P. Waxman served as Solicitor General of the United States from 1997 to 2001. Before serving as Solicitor General, he served as Acting Deputy Attorney General, Acting Solicitor General, Principal Deputy Solicitor General, and Associate Deputy Attorney General.

Drew S. Days III served as Solicitor General of the United States from 1993 to 1996. He also served as Assistant Attorney General in charge of the Civil Rights Division from 1977 to 1980.

James K. Robinson served as Assistant Attorney General in charge of the Criminal Division of the Department of Justice from 1998 to 2001. He also served as United States Attorney for the Eastern District of Michigan from 1977 to 1980.

Jo Ann Harris served as Assistant Attorney General in charge of the Criminal Division of the Department of Justice from 1993 to 1995. She also served as Chief of the Fraud Section of the Criminal Division from 1979 to 1981 and as an Assistant United States Attorney in the Southern District of New York from 1981 to 1983 and 1974 to 1979.

Roscoe C. Howard, Jr. served as United States Attorney for the District of Columbia from 2001 to 2004.

Earl J. Silbert served as United States Attorney for the District of Columbia from 1974 to 1979.

David Schertler served as Chief of the Homicide Section of the United States Attorney's Office for the District of Columbia from 1992 to 1996 and was an Assistant United States Attorney in that Office from 1984 to 1996.

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Supreme Court of the United States

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DISTRICT OF COLUMBIA and ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

◆

BRIEF FOR AMICI CURIAE FORMER SENIOR OFFICIALS OF THE DEPARTMENT OF JUSTICE IN SUPPORT OF RESPONDENT

◆

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INTEREST OF AMICI CURIAE

Amici Curiae are former Attorneys General and other senior officials of the Department of Justice who have had extensive government experience interpreting and enforcing the United States Constitution, the federal firearms laws, or both.[1] Amici believe that the current Administration properly bowed to its duty to uphold the Constitution when it reexamined and rejected the collective rights interpretation of the Second Amendment adopted by certain prior Administrations. *See* Memorandum for All United States' Attorneys from the Attorney General, *Re: United States v. Emerson* (Nov. 9, 2001) (announcing this interpretation); Memorandum for the Attorney General from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Howard C. Nielson, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, and C. Kevin Marshall, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether the Second Amendment Secures an Individual Right* (Aug. 24, 2004) ("2004 OLC Opinion") (memorializing the Administration's Second Amendment analysis).[2] Amici believe that the Amendment secures to individuals a personal right to keep and bear arms and that the decision below correctly interpreted and applied the Amendment in this case.

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[1] A list of amici curiae is set forth in the Appendix. Pursuant to Rule 37.6, amici affirm that no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief, and that no counsel for a party authored this brief in whole or in part. The parties' letters consenting to the filing of amicus briefs have been filed with the Clerk.

◆

SUMMARY OF ARGUMENT

Amici wish to make three points. First, contrary to the suggestion of the amici curiae brief filed on behalf of former Attorney General Reno and other former Justice Department officials ("Reno Brief"), prior Executive Branch interpretations do not provide well-reasoned, or even consistent, support for a collective rights view of the Second Amendment. As demonstrated below, the Executive Branch had long interpreted the Amendment to secure an individual right prior to the litigation that culminated in this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939). And although the Government advanced, in the alternative, a contrary, collective rights interpretation during the *Miller* litigation, the Executive Branch appears generally to have adhered to an individual rights view for many years thereafter.

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[2] The Solicitor General attached the Memorandum for All United States' Attorneys to the United States' briefs in opposition in *Emerson v. United States*, 536 U.S. 907 (2002) (No. 01-8780), and *Haney v. United States*, 536 U.S. 907 (2002) (No. 01-8272). The 2004 OLC Opinion is available at http://www.usdoj.gov/olc/secondamendment2.pdf.

While the Executive Branch did offer a collective rights interpretation in support of the Johnson Administration's gun control initiatives during the 1960s, the analysis offered in support of that interpretation was flawed and incomplete. Throughout the remainder of the twentieth century, the Executive Branch's interpretations of the Second Amendment were cursory and often equivocal.

In systematically reexamining the scope of the Second Amendment, the current Administration correctly recognized that previous Executive Branch opinions and federal appellate decisions offered little meaningful historical evidence or constitutional analysis in support of the collective rights view and that the proper interpretation of the Amendment remained an open question in this Court. Building on a wealth of recent scholarship, and on the Fifth Circuit's decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Department of Justice's Office of Legal Counsel ("OLC") carefully and exhaustively demonstrated that the Second Amendment secures an individual right and that a collective rights interpretation of the Amendment is untenable. Under these circumstances, the current Administration properly fulfilled its obligation to uphold the Constitution by embracing an individual rights view of the Second Amendment.

Second, the Reno Brief also errs in suggesting that affirming the judgment below would jeopardize existing federal firearms laws. The Second Amendment's protection was never understood to extend to unfit persons or to unusual and especially dangerous firearms. Reading the Second Amendment to secure the right of a law-abiding individual to possess a common handgun for personal defense in his own home does not call into question any existing federal firearms regulations, including those restricting possession of machineguns. Indeed, the decision below, in emphasizing that the Amendment protects only arms of the kind commonly owned and used by private individuals for lawful purposes, contemplates that restrictions on machineguns would be constitutional.

Third, amici respectfully submit that it is neither necessary nor advisable in this case for the Court to embrace the Solicitor General's proposed multi-tiered framework for judicial review of Second Amendment cases. If the Second Amendment does secure an individual right, then this case lies within its very core. For if that right means anything, it surely protects the right of a law-abiding citizen to keep an ordinary handgun in his own home for self defense. The District of Columbia's laws prohibit this, and so are to that extent unconstitutional. This is the only question before the Court, and deciding it does not require resolution of the doctrinal issues raised by the proposal of amicus United States.

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ARGUMENT

I. The Current Administration Properly Recognized That the Second Amendment Secures an Individual Right.

In interpreting the Second Amendment to secure a personal right of individuals to keep and bear arms, the current Administration properly fulfilled its duty to vindicate the Constitution. Neither judicial precedent nor, as demonstrated below, prior Executive Branch opinions, provides any persuasive support for a collective rights view of the Amendment.

A. Prior to *United States v. Miller*, the Executive Branch Repeatedly Recognized That the Second Amendment Secures an Individual Right.

The Reno Brief proceeds on the tacit assumption that Second Amendment interpretation began in 1939 with this Court's decision in *Miller*. That is incorrect. Prior to 1939, the Executive Branch repeatedly expressed its understanding that the Second Amendment secures an individual right.

For example, prior to *United States v. Cruikshank* – which held that the Second Amendment does not protect citizens against private "violation by their fellow-citizens of the rights it recognizes," 92 U.S. 542, 553 (1876)[3] – the United States repeatedly indicted and tried members of the Ku Klux Klan and other individuals under the Enforcement Act of 1870, 16 Stat. 140, codified as amended, 18 U.S.C. §§ 241-42, for conspiring to prevent former slaves from exercising their right to keep and bear arms as secured by the Second Amendment. Indeed, the prosecution in *Cruikshank* itself involved two Second Amendment counts arising out of the disarming and murder of freed slaves in Louisiana. *See* 92 U.S. at 543-43 (describing indictment); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 159-68 (1998) ("*Freedmen*") (documenting the *Cruikshank* trials).[4] Similar prosecutions had been previously brought against numerous members of the Ku Klux Klan in South Carolina. *See* Halbrook, *Freedmen* at 137-45. In assessing indictments for these prosecutions, Attorney General Amos T. Akerman advised the local federal prosecutor that "upon the right to bear arms, I think you are impregnable." *Id.* at 137. Whatever the merits of the Executive Branch view of state

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[3] The Court recognized, however, that the Second Amendment provides that the right of "'bearing arms for a lawful purpose'. . . shall not be infringed by Congress." *Id.*

[4] Apparently acquiescing in Justice Bradley's opinion, as Circuit Justice, that the Second Amendment did not protect against purely private action, *see United States v. Cruikshank*, 25 F. Cas. 707, 714-15 (C.C.D. La. 1874), the United States appears not to have defended the sufficiency of the Second Amendment counts before the Supreme Court in this case, *see* 92 U.S. at 561 (Clifford, J., dissenting).

action reflected in these prosecutions, it is plain that the Executive Branch understood the Second Amendment to protect the right of individuals to keep and bear arms.

In litigation involving other constitutional rights, the Executive likewise made clear that it understood the Second Amendment to protect an individual right. For example, in *Ex parte Milligan*, Attorney General James Speed responded to Fourth, Fifth, and Sixth Amendment challenges to the military trial of a civilian accused of conspiring against the Government and giving aid and comfort to the South as follows:

> All these amendments are in *pari materia*, and if either is a restraint upon the President in carrying on war, in favor of the citizen, it is difficult to see why all of them are not. Yet will it be argued that the fifth article would be violated in "depriving of life, liberty, or property, without due process of law," armed rebels marching to attack the capital? Or that the fourth would be violated by searching and seizing the papers and houses of persons in open insurrection and war against the government? It cannot properly be so argued, any more than it could be that it was intended by the second article (declaring that "the right of the people to keep and bear arms shall not be infringed") to hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them.

71 U.S. (4 Wall.) 2, 20 (1866).

Similarly, in defending a prohibition on the mailing of lottery tickets against a First Amendment challenge, the United States argued in this Court that "[f]reedom of the press, like freedom of speech, and 'the right to keep and bear arms,' admits of and requires regulation, which is the law of liberty that prevents these rights from running into license." *In re Rapier*, 143 U.S. 110, 131 (1892). These arguments confirm that, throughout the nineteenth century, the Executive Branch understood the Second Amendment, no less than the First, Fourth, Fifth, and Sixth, to protect the rights of individuals.

The testimony of Attorney General Homer S. Cummings in support of the National Firearms Act of 1934 ("NFA") reflects the same understanding. Contrary to the Reno Brief's suggestion, *see id.* 30-31 n.9, General Cummings' testimony cannot reasonably be understood to involve solely the scope of Congress's Article I powers. Indeed, when specifically asked how the proposed legislation "escaped" the "provision in our Constitution denying the privilege to the legislature to take away the right to carry arms," General Cummings responded:

> Oh, we do not attempt to escape it. We are dealing with another power, namely the power of taxation and of regulation under the interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say "We will tax

> the machine gun" and when you say that "the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated" you are easily within the law.

National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. On Ways and Means, 73d Cong., 2d Sess. 19 (1934). When the Member responded, "In other words, it does not amount to prohibition but allows of regulation," *id.*, General Cummings replied, "That is the idea. We have studied that very carefully," *id.* It is plain that this discussion relates to the constitutionality of the proposed legislation under the Second Amendment, and it is significant that General Cummings responded not by denying that the Second Amendment secured an individual right, but rather by explaining that the right was subject to regulations such as those proposed in the NFA. Nor can General Cummings' view of the Second Amendment be dismissed as an offhand comment – on the contrary, he indicated that the Government had "studied that very carefully."

It is not surprising that the Executive Branch repeatedly expressed an individual rights view of the Second Amendment during the first 150 years of our history. As demonstrated at great length in the 2004 OLC Opinion, although early precedents recognized that the right to arms did not extend to weapons particularly suited for criminal misuse, *see, e.g.*, *Aymette v. State*, 21 Tenn. 154, 158 (1840), and was subject to other well-established limitations, *see, e.g.*, *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897), any suggestion that the right protected States rather than individuals or that the right was limited to members of the organized militia is simply absent from the cases and commentary prior to the twentieth century. *See* 2004 OLC Op. at 78-98, 102-05.[5]

B. The Position of the United States in *Miller* Did Not Signal an Abandonment of the Individual Rights View of the Second Amendment.

As the Reno Brief notes, *see id.* at 10, the Government's brief in *United States v. Miller* argued that the right secured by the Second Amendment "is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia . . . and intended for the protection of the state." Brief for the United States, *United States v. Miller*, No. 39-696, 1939 WL 48353, at *15 (1939) ("U.S. Miller Br."). The Reno Brief, however, overstates the significance of the Government's argument in *Miller*.

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[5] As noted in the 2004 OLC Opinion, *see id.* at 97, the opinion of one Justice in *State v. Buzzard* appears to have construed the Second Amendment to protect the *federal government* against the States. *See* 4 Ark. 18, 31 (1842) ("So long as the enactments of the General Assembly do not weaken the arm of the Federal Government, impair its power, or lessen its means to protect and sustain itself, and preserve inviolate the freedom of the States, they must be respected and enforced. But the slightest interference with the constitutional regulations and restrictions in effecting these objects becomes a violation of the compact between the State and Federal Authorities, and ceases to be obligatory on the citizen."). However even on this view – which lacks any historical support and has not been endorsed, to our knowledge, by any other court or commentator – the right ultimately inures to the benefit of the individual, who is free to ignore any state laws that interfere with the Federal Government's authority.

First and foremost, the United States pressed this argument *only in the alternative*. Other portions of the brief emphasized the limited reach of the challenged statute, *see id.* at *6-*7, and argued that the "'arms' referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes" and that "weapons peculiarly adaptable to use by criminals are not within the protection of the Amendment." *Id.* at *4. *See also, e.g., id.* at *20 ("Second Amendment has relation only to the right of the people to keep and bear arms for lawful purposes and does not conceivably relate to weapons of the type referred to in the National Firearms Act"; "Sawed-off shotguns, sawed-off rifles and machine guns . . . are not weapons of the character . . . recognized by the common opinion of good citizens as proper for defense."); *id.* at *8 ("'The right of the people to keep and bear arms' recognized by the Second Amendment does not, we submit, guarantee to the criminal the right to maintain and utilize arms which are particularly adaptable to his purposes."). This latter argument is fully consistent with the individual rights view of the Second Amendment. And it is the one the *Miller* Court adopted – *see* 307 U.S. at 178 (absent evidence that a sawed-off shotgun "is any part of the ordinary military equipment or that its use could contribute to the common defense," Court could not "say that the Second Amendment guarantees the right to keep and bear such an instrument").[6]

Furthermore, far from abandoning the individual rights view of the Second Amendment in the wake of the *Miller* litigation, the Executive Branch continued to express this view through the Roosevelt, Eisenhower, and Kennedy Administrations.[7] Thus, in 1941,

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[6] Indeed, *Cases v. United States*, one of the very first federal appellate decisions issued in the aftermath of *Miller*, understood the decision in precisely this manner. 131 F.2d 916, 922 (1st Cir. 1942). Thus, after quoting the operative language of the *Miller* holding, the court of appeals in *Cases* stated:

> Apparently, then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.

Id. The *Cases* court rejected this position, however, as incomplete, "already outdated," and unwise. *Id.*

[7] The Reno Brief asserts that "[i]n opposing Second Amendment challenges to [firearms] prosecutions, the government contended for more than 60 years that the Second Amendment did not protect an individual right to keep and bear arms for purposes unrelated to participation in a well-regulated militia." *Id.* at 3. Aside from the alternative argument in the *Miller* brief and a handful of briefs filed during the Clinton Administration, the Reno Brief offers in support of this contention briefs filed in two cases during the Reagan and first Bush Administrations. As discussed below, the briefs filed in these two cases do not advocate a collective rights view of the Second Amendment.

President Roosevelt signed into law a bill authorizing the President "to requisition such property for the defense of the United States upon the payment of fair and just compensation . . . and to dispose of such property in such manner as he may determine is necessary for the defense of the United States." Property Requisition Act, ch. 445, § 1, 55 Stat. 742, 742. Significantly, the legislation expressly provided that "[n]othing contained in this Act shall be construed – (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport . . . [or] (2) to impair or infringe in any manner the right of any individual to keep and bear arms." *Id.*

Likewise, during the Eisenhower and Kennedy Administrations, the Office of Legal Counsel repeatedly voiced Second Amendment objections to legislation that could have been construed "to prohibit private individuals from acquiring, possessing, or receiving any standard ammunition for firearms." Memorandum for Lawrence E. Walsh, Deputy Attorney General, from Paul A. Sweeney, Acting Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 232, 86th Cong., 1st Sess., a bill "To provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices adaptable to military uses, and for other purposes"* at 1 (Apr. 9, 1959); *see also* Memorandum for Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 2057, a bill to* *provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices adaptable to military use* (May 8, 1961); Memorandum for Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed report of the Department of Defense on H.R. 2057 "To provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites and similar devices adaptable to military uses, and for other purposes"* (Mar. 22, 1962).[8]

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[8] The Reno Brief prominently cites an unsigned OLC opinion from 1954 as illustrating the Executive Branch's view that the Second Amendment protects only a collective right. *See* Reno Brief at 18-19. It is true that this opinion's analysis, which appears to conflate the question of the scope of Congress's enumerated Article I authorities with the meaning of the Second Amendment, does contain some language consistent with a collective rights analysis. Its central point, however – that regulations that would "prohibit an individual from owning, possessing or carrying fissionable material in the form of hand-throwing bombs or grenades" would be "at least as reasonable" as the Federal Firearms Act prohibition "against the receipt of weapons from interstate transactions by persons who have been shown to be aggressors of society" – is surely consistent with any individual rights view of the Second Amendment. Unsigned Memorandum, *Re: Whether Reasonable Regulation By AEC Under Proposed Amendments To Atomic Energy Act For Peace-time Use Of Fissionable Materials Would Violate The Second Amendment To The Constitution* at 7 (appended to Letter to George Norris, Jr., Esq., Joint Committee on Atomic Energy, United States Senate, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel (Feb. 11. 1954)).

C. The Collective Rights Analysis Offered by the Johnson Administration in Support of Its Gun Control Initiatives Was Flawed And Incomplete.

In his testimony to Congress in support of the Johnson Administration's gun control initiatives, Attorney General Nicholas deB. Katzenbach argued that "the right to bear arms protected by the second amendment relates only to the maintenance of the militia" and does not "guarantee to any individuals the right to bear arms." Federal Firearms Act, Hearings before the Subcomm. To Investigate Juvenile Delinquency of the S. Comm. On the Judiciary, 89th Cong., 1st Sess. 41 (1965) ("1965 Hearings"). In so doing, General Katzenbach departed from the individual rights view that he had previously expressed, as noted above, while head of the Office of Legal Counsel during the Kennedy Administration. General Katzenbach submitted two memoranda in support of his new interpretation, the first concluding that "respectable authority supports the view that the second amendment merely affirms the right of the States to organize and maintain militia," *id.* at 45, and the second contending, among other things, that "[i]t is certainly arguable then that it was Federal infringement of the militia that concerned these

States when the First Congress assembled, rather than any individual right to bear arms," *id.* at 47.[9]

As an initial matter, a collective rights analysis was unnecessary to support the constitutionality of the proposed legislation. *See infra*, section II. Indeed, General Katzenbach recognized that "[e]ven if it were applicable, the fact remains that this measure does not infringe on the right of the people to keep and bear arms." *Id.* at 52; *see also id.* (arguing that the proposed legislation would merely "make the purchase of weapons a little more inconvenient"). Furthermore, the analysis offered in support of the collective rights interpretation was flawed and incomplete.

General Katzenbach's textual analysis relied on the fact that, unlike an earlier proposal addressing conscientious objectors, the Second Amendment addresses the right of "the people" as opposed to a "person." *See id.* at 46. Given that other provisions of the Bill of Rights, including, most notably, the First and Fourth Amendments, also address individual rights of "the people," this argument is plainly untenable. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (reading the phrase "the people" as used throughout the Constitution in *pari materia*); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 899 n.213 (3d ed. 2000) ("But any notion that the phrase 'the people' is being used to connote only a collective entity like 'the electorate' or 'the citizenry' would be hard to sustain.").

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[9] This second memorandum is the same memorandum discussed in the Reno Brief at 19-20.

Similarly, the historical analysis offered by General Katzenbach was superficial and incomplete. Among other things, his discussion of the Second Amendment's framing overlooked the majority Federalists' avowed determination to allow amendments securing individual rights but to defeat any amendments altering the balance of power between the States and the Federal Government; it failed to mention Congress's rejection of a motion to insert the phrase "for the common defense" immediately after "to keep and bear arms"; and it ignored Congress's rejection of an entirely separate constitutional amendment that would have expressly secured the States' power to organize, arm, and discipline the militia in the event of federal dereliction or neglect. *See* 2004 OLC Op. at 60-78.

Finally, General Katzenbach's treatment of precedent was mistaken. He misread not only this Court's decision in *Miller*, *see* 1965 Hearings at 41 (asserting that *Miller* rejected any individual rights view of the Second Amendment), but earlier case law as well. Thus, while recognizing that "[a] majority of court decisions, both State and Federal, assume without discussion or determination of the issue that the right to bear arms exists in the people as individuals," *id.* at 45, General Katzenbach read this body of precedent to establish only that "if such a right is personal in nature, it is at least restricted to members of a well regulated or, synonymously, organized State militia," *id*. This proposition, however, was supported by only one of the pre-*Miller* decisions cited by General Katzenbach – the twentieth century decision *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905), which appears to have been the first decision ever to espouse a collective rights view. *See* 2004 OLC Op. at 104-05.

D. Subsequent Twentieth Century Executive Interpretations Were Cursory and Often Equivocal.

Subsequent twentieth century Executive Branch interpretations of the Second Amendment broke little new ground. Although the Executive Branch sometimes reiterated the collective rights position advanced by General Katzenbach, *see e.g.*, Letter to George Bush, Chairman, Republic National Committee, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel (July 19, 1973); Letter from Seth P. Waxman, Solicitor General (Aug. 22, 2000), in doing so it merely recycled General Katzenbach's testimony and provided citations to federal appellate decisions that offered little meaningful constitutional analysis. *See* 2004 OLC Op. at 5-8 (summarizing post-*Miller* federal appellate decisions).[10]

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[10] For example, besides summarizing General Katzenbach's flawed textual and historical arguments, the Lawton letter cited five cases in support of its collective rights conclusion. Only one

(Continued on following page)

Furthermore, with the exception of the Clinton Administration – whose litigators advocated a collective rights interpretation (albeit without fresh analysis), *see* Reno Brief at 16, 26-27 & n.8 – the Executive Branch adopted positions that were generally equivocal and at least on occasion appear to have inclined toward an individual rights view of the Second Amendment.

Indeed, even the Johnson Administration appears to have hedged the collective rights position advanced by General Katzenbach. Thus, a later unsigned OLC memorandum analyzing a proposal to require registration and licensing of every firearm in the United States, after reciting several of the arguments offered by General Katzenbach in support of his collective rights position, concluded only that "interpretations of the Second Amendment by the Congress and the courts, as well as its language and historical context, clearly negate any *absolute* personal right of an individual to possess firearms. The Amendment does not affect regulation of individual possession *as proposed in this bill.*" Unsigned Memorandum, *Re: Constitutional Basis for Administration Gun Registration And Licensing Bill* at 11-12 (June 25, 1968) (emphases added); *see also id.* at 11 (Second Amendment "does not create a personal right in

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of those cases, however – *City of Salina* – actually supported this position. The Waxman letter, in turn, quoted from the Lawton letter and General Katzenbach's testimony and cited *Miller* and a handful of subsequent federal appellate decisions.

individuals to be free of *reasonable* legislative regulation of their possession of firearms.") (emphasis added).

When the Nixon Administration later reviewed the same proposal, then-Assistant Attorney General Rehnquist simply stated, even more neutrally, that "we do not believe that constitutional objections based on the Second Amendment's guarantee of 'the right of the people to keep and bear arms' present any serious legal obstacle to this legislation." Memorandum for Richard G. Kleindienst, Deputy Attorney General, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed "Federal Gun Registration and Licensing Act of 1969"* at 4 (Feb. 13, 1969) ("Rehnquist Memorandum") (citing *Miller* and *United States v. Tot*, 131 F.2d 261 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943)).[11]

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[11] As discussed above, this Court's decision in *Miller* is fully consistent with an individual rights view of the Second Amendment. And the Third Circuit's decision in *Tot*, though containing dicta often cited in support of the collective rights view, ultimately rested its holding on the ground that the statute barring convicted felons from receiving firearms in interstate commerce was a reasonable restriction on firearm possession that did "not go so far as substantially to interfere with the public interest protected by the constitutional mandate[ ]." 131 F.2d at 266. That holding, of course, is fully consistent with an individual rights view of the Second Amendment. *See, e.g., Emerson*, 270 F.3d at 226 n.21; U.S. Amicus at 25-26. Accordingly, the Rehnquist Memorandum's citation of *Miller* and *Tot* does not necessarily imply that the Memorandum embraced a collective rights view of the Second Amendment.

And although the Rehnquist Memorandum endorsed the 1968 memorandum's analysis of the Commerce Clause basis for the proposed legislation as "set[ting] forth a respectable constitutional argument for the legislation and one that, more likely than not, would be accepted by the courts," Rehnquist Memorandum at 4, it does not appear to have endorsed the 1968 memorandum's Second Amendment analysis, *id.*

During the Reagan Administration, the Department of Justice appears initially to have entertained a collective rights view of the Second Amendment. In objecting to a 1981 proposal to amend the Gun Control Act of 1968 that purported to rest "in part, on a legislative determination that the current scheme for federal firearms regulation violates a range of individual constitutional rights," including the Second Amendment, the Office of Legal Counsel could "perceive no basis for suggesting that the Act so interferes with the powers of the States to raise militias as to transgress the Second Amendment." Memorandum for D. Lowell Jensen, Assistant Attorney General, Criminal Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Legislation Relating to Firearms and to Mandatory Sentencing* at 2 (May 27, 1981). Neither the Department nor the President appears to have entertained such concerns about a similar bill passed by Congress five years later, however, and President Reagan signed without objection the Firearms Owners' Protection Act which expressly found that "the rights of citizens . . . to keep and bear arms under the second amendment of the United States Constitution . . . require additional legislation to correct existing firearms statutes and enforcement policies." Pub. L. No. 99-308, § 1(b), 100 Stat. 449, 449 (1986), codified at 18 U.S.C. § 921 note.[12]

Nor did the Administration of George H.W. Bush, contrary to the Reno Brief's implication, *see id.* at 16, advance a collective rights view of the Second Amendment in urging this Court to deny review of an early decision sustaining the constitutionality of the federal machinegun ban. *See* Brief for the Respondent in Opposition, *Farmer v. Higgins*, No. 90-600 (1990), available at http://www.usdoj.gov/osg/briefs/1990/sg900583.txt. The Government's brief did note that "Petitioner does not suggest that the decision below conflicts with" federal appellate decisions that "have concluded that the mere allegation that a firearm might be of value to a militia is insufficient to establish a right to possess that firearm under the Second Amendment." *Id.* at 11-12. The brief pointedly did not, however, endorse the collective-rights reasoning of these decisions. Instead, it argued on the merits only that "the court of appeals in [*United States v.*] *Warin*[, 530 F.2d 103 (6th Cir. 1976)], which like this case involved a machinegun, observed that the Second Amendment does not absolutely bar all congressional regulation of firearms. 530 F.2d at 107. Congress's decision flatly to prohibit the private possession of this particular type of weapon is surely reasonable. *See id.* at 107-108." *Id.* at 12. As discussed below, *see infra* part II, this reasoning and conclusion are fully consistent with an individual rights view of the Second Amendment.

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[12] The Government briefs in *United States Department of the Treasury v. Galioto*, 477 U.S. 556 (1986), did not address the Second Amendment. In response to an equal protection challenge to the federal prohibition barring persons who have been adjudicated mentally incompetent or committed to a mental institution from owning a firearm, the Government did argue in passing that strict scrutiny was not appropriate because the statute did not implicate fundamental rights. *See* Brief for the Appellant, *United States Department of Treasury v. Galioto*, No. 84-1904, 1986 WL 728208, at *28 n.24 (1986); Reply Brief for the Appellant, *United States Department of Treasury v. Galioto*, No. 84-1904, 1986 WL 728209, at *4 n.5. This position is fully consistent with an individual rights view of the Second Amendment, as it was well established at the time the Amendment was drafted and ratified that the right to keep and bear arms did not extend to unfit persons, including the mentally incompetent. *See* U.S. Amicus at 26 & n.7 (explaining that the prohibition at issue in *Galioto* "has a precise analog in Framing-era practice").

E. In Definitively Affirming That the Second Amendment Secures an Individual Right, the Current Administration Fulfilled Its Obligation to Uphold the Constitution.

In 2001, the current Administration faced the question whether to adhere to the collective rights understanding advocated by the previous Administration. The Administration correctly recognized that the proper interpretation of the Second Amendment remained an open question in this Court and that modern federal appellate decisions embracing a collective rights view were devoid of persuasive constitutional analysis. Furthermore, although the Executive Branch had, during the Clinton Administration and at other times in recent years voiced this interpretation, the constitutional analysis offered in support of this view was flawed and superficial. At the same time, other recent Executive interpretations were equivocal, and many earlier Executive Branch interpretations had plainly interpreted the Second Amendment to secure an individual right.

The current Administration, moreover, had the benefit of the "growing body of scholarly commentary" that had "[m]arshall[ed] an impressive array of historical evidence . . . indicat[ing] that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right." *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring) (collecting commentary); *accord* TRIBE, AMERICAN CONSTITUTIONAL LAW at 896-97 & n.211 (noting that "in recent years . . . a growing array of scholars have argued that the Second Amendment should be interpreted as creating a more expansive right to private gun ownership that may not be abridged by Congress or perhaps even by state and local governments"); 2004 OLC Op. at 9 & n.33 (concluding that "the preponderance of modern scholarship appears to support the individual-right view"). This impressive wealth of historical scholarship, all but unavailable when the Executive Branch last attempted to engage in meaningful Second Amendment analysis during the 1960s, has persuaded many prominent constitutional experts to embrace the individual rights view of the Second Amendment, often despite prior contrary positions or predilections.[13]

The current Administration also had the benefit of OLC research that was far more searching and exhaustive than any previous Second Amendment analysis conducted by the Executive Branch. *See* 2004 OLC Op. at 1 ("This memorandum memorializes and expands upon advice that this Office provided to [Attorney General John Ashcroft] on this question in 2001."). Moreover, prior to instructing federal prosecutors to adhere to the individual rights view, this Administration also had the benefit of the Fifth Circuit's exhaustive analysis in *Emerson*, the first federal appellate decision carefully to consider whether the Second Amendment secures an individual or collective right. *See* Memorandum for All United States' Attorneys from the Attorney General, *Re: United States v. Emerson* (Nov. 9, 2001).

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[13] *Compare, e.g.*, TRIBE, AMERICAN CONSTITUTIONAL LAW at 900, 902 n.221 (rejecting suggestion that the Second Amendment "may plausibly be construed to do no more than protect state defense forces against outright abolition by Congress" and concluding that the amendment secures "a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in defense of themselves and their homes"), *with* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 226 n.6 (1st ed. 1978) (arguing that "the sole concern of the second amendment's framers was to prevent such federal interference with the state militia" and concluding that the amendment is "merely ancillary to other constitutional guarantees of state sovereignty"); *see also, e.g.*, L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1401 (1997) ("Thus, like all other constitutional law scholars who have taken the time to analyze the Second Amendment, I join with them reluctantly singing the Monkees' refrain: 'I'm a believer.'"); *cf. generally* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989).

The extensive and careful analysis offered by recent historical scholarship, the Office of Legal Counsel, and the *Emerson* opinion demonstrated that the collective rights view of the Second Amendment was untenable and that the individual rights view was correct. Under these circumstances, the Administration's duty to uphold the Constitution plainly outweighed its interest in advancing any argument, however unsound, that might further the Government's litigation interests.

II. Interpreting the Second Amendment to Secure An Individual Right Does Not Call into Question the Constitutionality of Existing Federal Firearms Laws.

The Reno Brief warns that an individual rights interpretation of the Second Amendment would jeopardize existing federal firearms statutes. Reno Brief at 32-34. This assertion is simply incorrect, and the Reno Brief ventures no elaboration. Indeed, the sole example offered of the supposed threat to federal firearms legislation is the Fifth Circuit's decision in *Emerson* (Reno Brief at 33 n.11), where the court, after adopting an individual rights reading of the Second Amendment, nevertheless *upheld* a statute barring firearms possession by those subject to domestic violence restraining orders. 270 F.3d at 260, 264-65. In fact, Second Amendment challenges to federal firearms restrictions have been uniformly rejected by those courts of appeals that have held, or assumed *arguendo*, that the Second Amendment protects an individual right. *See United States v. Lippman*, 369 F.3d 1039, 1043-44 (8th Cir. 2004) (assuming in the alternative that Second Amendment protects individual right but nevertheless upholding statute barring possession of firearms by those subject to restraining orders); *id.* at 1045 (Colloton, J., concurring) (opining that decision should be limited to this alternative ground); *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003) (assuming in the alternative that Second Amendment protects individual right but nevertheless upholding statute barring possession of firearms by convicted felons).

The amicus brief of the United States demonstrates at length that existing federal firearms regulations are consistent with the original meaning of the Second Amendment's individual right to keep and bear arms.[14] The Solicitor General voices concern,

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[14] As General Ashcroft recognized in embracing an individual rights interpretation, the right secured by the Second Amendment is subject to "reasonable restrictions" designed "to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse." Memorandum for All United States' Attorneys at 1. Accordingly, General Ashcroft determined that the United States "can and will continue to defend vigorously the constitutionality, under

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however, that the particular analytical approach employed by the court below "could be read" to "cast doubt on the constitutionality" of existing federal legislation banning certain categories of firearms, "including machineguns." U.S. Amicus at 9. We respectfully disagree. Affirming the decision below, which extends Second Amendment protection to the right of a law-abiding, licensed individual to keep a registered, ordinary handgun for self-protection in his own home, does not require the adoption of any principle which endangers federal restrictions on the private possession of machineguns.

The decision below expressly holds that the "protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007). This comports with the Court's teaching that the liberties secured by the Bill of Rights "ha[ve], from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case." *Robertson v. Baldwin,* 165 U.S. 275, 281 (1897). Without, of course, purporting to decide such cases in the abstract, the court below noted several restrictions to which the right preserved by the Second Amendment "was subject . . . at common law," and which it took "to be the sort of

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the Second Amendment, of all existing federal firearms laws." *Id.*

reasonable regulations contemplated by the drafters of the Second Amendment." *Parker*, 478 F.3d at 399. *See also id.* at 382 n.8 (the Second Amendment "right was not newly created, but rather recognized as part of the common law tradition."). Among these are laws barring possession of firearms by unfit persons, such as felons, and laws restricting the manner of possession, such as the carrying of concealed weapons. *See id.* (discussing *Robertson*, 165 U.S. at 281-82; *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921)).

Despite agreeing that the limited holding below thus raises no doubts about the vast majority of federal firearms laws, *see* U.S. Brief at 25-27, the United States nevertheless is concerned that the court below adopted a "categorical approach," under which a determination that a particular category of firearms constitutes "arms" protected by the Second Amendment compels the conclusion that the federal government may not ban such weapons entirely. *Id.* at 21. The United States fears that "such a categorical approach would cast doubt on the constitutionality of the current federal machinegun ban, as well as on Congress's general authority to protect the public by identifying and proscribing particularly dangerous weapons." *Id.*

The D.C. Circuit, however, grounded its conclusion that "most handguns (those in common use) fit" the meaning of "arms" in the Amendment squarely on this Court's analysis in *United States v. Miller*, 307 U.S. 174 (1939). *Parker*, 478 F.3d at 397. The court of appeals described the historical understanding of the weapons protected by the Second Amendment as "private arms" "'of the kind in common use at the time.'" *Id.* (quoting *Miller*, 307 U.S. at 179). Such were the weapons that private citizens could reasonably be expected to own and to be proficient with, leading to the *Miller* Court's conclusion that men subject to militia service in the Founding Era "'were expected to appear *bearing arms supplied by themselves and of the kind in common use at the time.*'" *Id.* at 394 (quoting *Miller*, 307 U.S. at 179) (emphasis supplied by the court below). The decision below repeatedly stressed this limitation on the type of "arms" protected by the Second Amendment. *See id.* at 383 n.9 ("commonly owned"); 386 ("'in common use'") (quoting *Miller*); 398 ("'common use'") (three iterations); 398 ("common circulation").[15]

The "common use" criterion endorsed both in *Miller* and in the decision below is likewise embraced by amicus United States, which includes "whether a particular kind of firearm is commonly possessed" among the factors to be considered in the constitutional analysis of a ban on a type or class of firearms. U.S. Amicus at 22. As the court of appeals held – and amicus United States does not dispute – ordinary handguns fit that description both in 1789 and today.

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[15] The Fifth Circuit has similarly noted *Miller*'s emphasis on protected arms as those "'of the kind in common use.'" *See United States v. Emerson*, 270 F.3d 203, 225 (5th Cir. 2001) (quoting *Miller*).

478 F.3d at 397. It seems equally apparent that machineguns do not. To be sure, machineguns are a familiar part of a modern army's arsenal, but suitability for military use is not the sole test of whether a firearm falls within the Second Amendment. Cannons, for example, were common militia weapons in the colonial period – the British ignited the Revolution by marching on Concord on April 18, 1775 to seize cannon and gunpowder stored there – but men answering the call to militia service were not expected to provide their own artillery. The Founding Era militia statutes make plain that such heavy military weapons, which were neither "personally owned" nor "'of the kind in common use at the time,'" were to be provided by the state. *Parker*, 478 F.3d at 398 (discussing Militia Act of 1792).

There is another reason to believe that machineguns would not come within the individual Second Amendment right recognized below – a reason that has previously been endorsed by amicus United States. As noted above, the decision below recognizes that the right preserved by the Second Amendment was subject to exceptions or restrictions "at common law," *id.* at 399, just as the right of free speech protected by the First Amendment is subject to exceptions for such things as perjury and libel. As Blackstone – who was of course the Framers' guide to the common law – recognized, the right to bear arms was subject to an exception carved out by "[t]he offense of riding or going armed, with dangerous or unusual weapons." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS

OF ENGLAND 148-49 (1st ed. 1765). Similarly, Bishop's treatise on statutory crimes explained that "going about armed with dangerous or unusual weapons to the terror of the people, was always indictable under the common law of England." JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 784, at 531 (3d ed. 1901).[16]

This Court's decision in *Miller* sustaining a congressional restriction on sawed-off shotguns comports with this ancient common-law exception. In *Miller* the United States defended that prohibition on a class of weapons on the ground that "'Congress was striking not at weapons intended for legitimate use but at weapons which form the arsenal of the gangster and the desperado' . . . 'weapons which are the tools of the criminal.'" U.S. *Miller* Brief at *7, *8 (quoted in *Emerson*, 270 F.3d at 222). The same can be said of machineguns, which were likewise restricted by the very statute upheld in *Miller*, where the United States argued that "[s]awed-off shotguns, sawed-off rifles and machineguns are clearly weapons which can have no legitimate use in the hands of private individuals. [They are the] arsenal of the 'public enemy' and the 'gangster'. . . ." *Id.* at *20. Indeed, the United States went further, and specifically distinguished machineguns from the handguns at issue here: "'[W]hile there is a justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a machinegun or sawed-off shotgun.'" *Id.* at *8 (quoting H. Rep. No. 1780, 73d Cong., 2d Sess. at 1-2). This position is entirely consistent with the court of appeals' caveat that Second Amendment rights are subject to common-law exceptions, and seems sufficient to answer the concerns expressed here by amicus United States.

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[16] This passage from the Bishop work was quoted by the United States in its brief in *United States v. Miller*. *See* U.S. *Miller* Brief at *11.

III. The Court Need Not Address the Solicitor General's Proposal for a Multi-tiered Standard of Second Amendment Review to Affirm the Decision Below, Nor Is This Case a Suitable Vehicle for Doing So.

Few rules are more deeply rooted in this Court's tradition of restrained constitutional adjudication, or more confirmed by experience, than the venerable doctrine that "constitutional issues affecting legislation will not be determined . . . in advance of the necessity of deciding them [nor] in broader terms than are required by the precise facts to which the ruling is to be applied." *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947). In this case, the fundamental question presented is whether an individual right of any kind is guaranteed by the Second Amendment. Resolving that threshold issue resolves the case. For if the Second Amendment's protection does extend to individuals, the District of Columbia's sweeping, across-the-board ban on possession of *all* handguns must surely fall. Again, the Second Amendment claim before the Court is brought by a competent, law-abiding, licensed adult seeking only to keep an ordinary, registered handgun in his own home for self-protection.[17] If the Amendment does not protect this individual, it protects no one at all.

Nevertheless, the Solicitor General invites the Court to go further and to adopt, here and now, a multi-tiered standard to govern review of all Second Amendment challenges, comprising elements of "intermediate scrutiny" (U.S. Amicus at 28), minimal scrutiny (*id.* 25-26), and several prescribed factors (*id.* 24 & n.6). The Solicitor General recognizes, however, the wisdom of "permitting Second Amendment doctrine to develop in an incremental and prudent fashion as is necessary to decide particular cases that may arise." U.S. Amicus at 29. The Solicitor General also acknowledges that his doctrinal proposal must be fashioned from scratch because "there is scant case law interpreting the scope of the Second Amendment, much less precedent fleshing out and applying various principles or sub-doctrines giving effect to that right." *Id.* at 29.

Although offered by the Solicitor General as reasons to remand for initial application of his proposed analytical model to the facts of this case, we submit that these points counsel in favor of declining to consider his doctrinal proposal.

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[17] Respondent is a D.C. special police officer who carries a handgun on duty as a guard at the Federal Judicial Center. *Parker*, 478 U.S. at 373-74.

As the Solicitor General further observes, "this case, which involves private possession" of a common handgun in the home, "provides no opportunity for the Court to expound on the different principles that might govern" other types of gun control statutes. *Id.* at 27. That is wise counsel. Other cases involving other individuals bringing other Second Amendment challenges to other firearms regulations are not presented here, and the Court need not develop a doctrinal framework for resolving them today. We respectfully urge the Court to do no more than rule on the narrow question presented by the circumstances of this case. That is work enough for one day.

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CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Amici Curiae in Support of Respondent

Edwin Meese III served as Attorney General of the United States from 1985 to 1988.

William P. Barr served as Attorney General of the United States from 1991 to 1993, as Deputy Attorney General from 1990 to 1991, and as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990.

George J. Terwilliger III served as Deputy Attorney General of the United States from 1991 to 1992, as acting Attorney General in 1993, and as United States Attorney for Vermont from 1986 to 1991.

Robert H. Bork served as Solicitor General of the United States from 1972 to 1977, except when he was serving as acting Attorney General from 1973 to 1974. He served as a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit from 1982 to 1988.

Christopher A. Wray served as Assistant Attorney General for the Criminal Division from 2003 to 2005, as Principal Associate Deputy Attorney General from 2001 to 2003, and as an Assistant United States Attorney for the Northern District of Georgia from 1997 to 2001.

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BRIEF

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In The
Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICI[1]

The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the decision of the D.C. Circuit panel should be affirmed.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and the author of New York Times bestseller, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics* and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on the Second Amendment and therefore has a particular interest and expertise in this area of constitutional law.

SUMMARY OF THE ARGUMENT

The issue facing this Court is straightforward and urgent: Can the government pass laws that disarm the American people and render them vulnerable to violent attack in their homes and communities? The answer to this question is vital to the life and liberty of every American.

---

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten (10) days prior to the due date of *amicus curiae's* intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

America is a government of the people, by the people, and for the people. It was and is a dramatic departure from the dictatorships common in foreign lands. The Declaration of Independence recognizes life and liberty as inalienable rights. The Second Amendment safeguards the corresponding right to defend these primary rights. Its text and legislative history reveal the individual character of that right, and it is placed in the Bill of Rights among other rights guaranteed to "the people." Early American commentators, state constitutions, and case decisions all confirm that the right to keep and bear arms is an individual right to defend self and others. Many of our criminal and civil laws presuppose the basic natural right to self-defense.

No constitutional right is absolute. However, research reveals that the restrictions heralded by gun control proponents, including those at issue in the District of Columbia, actually increase the violent crime they are supposed to prevent. Mass public shootings occur in supposedly safe "gun-free" zones. But crime has decreased significantly in states where "right-to-carry" laws enable law-abiding citizens to defend and save lives in emergencies. Unfortunately, such heroic efforts rarely make headlines.

Courts have greatly expanded the reach of individual rights in recent decades, carving out rights nowhere mentioned in the Constitution. This Court should consistently interpret the Constitution and not excise a particular right that *is* explicitly guaranteed because it fails to align with popular political sentiment. "The courts should enforce our individual rights guaranteed by our Constitution, not erase them." *Silveira v. Lockyer*, 328 F.3d 567, 588-589 (9th Cir. 2003) (Kozinski, J., dissenting).

I. THE TEXT OF THE SECOND AMENDMENT SUPPORTS AN INDIVIDUAL RIGHT TO BEAR ARMS.

The wording of the Second Amendment:

> . . . so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's right to possess those arms.
>
> Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 217-218 (1983) ("Kates, *Handgun Prohibition*")

The individuals who made up the militia had both the right and the legal obligation to possess the arms they needed to defend themselves and their fellow citizens. Even leading liberal scholars acknowledge the individual right inherent in the Amendment. Laurence Tribe has revised his position, abandoning the collective rights view in favor of an individual right to bear arms for self-defense (*see* G-3, *infra*). Alan Dershowitz is strongly opposed to firearms ownership, but he warns against repealing the Second Amendment because that would pave the way for further revisions to the Bill of Rights and the Constitution. In a telephone interview with reporter Dan Gifford, he stated that:

> "[Those] who are trying to read the Second Amendment out of the Constitution by claiming it's not an individual right or that it's too much of a public safety hazard don't see the danger in the big picture. They're courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don't like."
>
> Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 Tenn. L.R. 759, 789 (1995)

A. The Second Amendment Protects Both the Right of the People to Participate in Government and Their Right to be Free From Improper Government Interference.

The liberty on which this nation is built has both an "active" and a "negative" aspect. Citizens enjoy the "active" liberty to participate in our "government by the people" but also the "negative" liberty to pursue their own interests free of unwarranted government intrusion on their private lives. *See generally* Stephen Breyer, Active Liberty (Vintage Books 2006). The Second Amendment captures both aspects of American liberty. Its introductory clause concerns the right to participate in defense of the community ("active" liberty), while the main clause safeguards the individual right to keep and bear arms for self-defense, free of unjustified government regulation ("negative" liberty). The D.C. statutes at issue violate the Second Amendment's main clause by prohibiting the possession of a functional firearm in the home and failing to provide an exception for self-defense. *See* David Kopel, *In Liberty's Two Arms*, Legal Times (January 14, 2008). The collective rights position highlights the "active" liberty but disregards the "negative" liberty guaranteed by the Amendment.

B. A Well-Regulated Militia is Composed of the Entire People, Prepared to Defend Themselves and Others Using Their Individually Owned Arms.

When the Second Amendment was drafted, virtually all of the people belonged to the militia. They were prepared and obligated to defend themselves and others as needed. In order to fulfill their duties, they had to maintain their own arms and be prepared to use them. If there is no individual right to keep and bear arms, then the government could effectively repeal the Second Amendment by passing laws to disarm the private citizens who make up the militia.

1. The Militia Has Always Been Broadly Defined as an Amorphous Body of the People.

Early Americans feared standing armies and defined the militia accordingly to curtail the need for them. They viewed such armies as a threat to *both* individuals *and* the states:

> "There was a widespread fear that a national standing Army posed an intolerable threat to

> individual liberty and to the sovereignty of the separate States."
>
> *Perpich v. Dept. of Defense*, 496 U.S. 334, 340 (1990) ("*Perpich*")

James Madison, in Federalist No. 46, explained that the newly created congressional power to raise armies (U.S. Const., art. 1, § 8, cl. 12) would not threaten our liberties because any abuse of that power would be opposed by a huge militia composed of armed American citizens. Madison distinguished America from contemporaneous European kingdoms, where governments did not trust the people with arms. The Federalist Papers at 299 (Rossiter, New American Library), cited in *United States v. Emerson*, 270 F.3d 203, 235 (5th Cir. 2001) ("*Emerson*").

American history, early legislation, commentators, and debates at the Constitutional Convention all confirm that the "militia" was composed of "all males physically capable of acting in concert for the common defense." *United States v. Miller*, 307 U.S. 174, 180 (1939) ("*Miller*"). These were "civilians primarily, soldiers on occasion." *Id.* at 179. The militia system was patterned after the ancient pre-colonial practice in England. All free Englishmen were armed and ready to respond to violence, whether criminals attacked their homes or foreign armies invaded their country. Kates, *Handgun Prohibition*, *supra*, at 214-215.

The Militia Act of 1792 defined the militia to include all able-bodied free men between 18 and 45. These men were required to maintain their own arms. *Perpich*, *supra*, at 341. Militia members were civilians engaged in other occupations, not full-time professional soldiers. *Dunne v. People,* 94 Ill. 120, 138 (1879). The Militia Act was repealed in 1901, but Congress enacted the Dick Act in 1903. This new Act continued to define militia broadly, but divided it between the organized National Guard and the *unorganized* Reserve Militia. *Perpich, supra*, at 343. The broad definition of "militia" remains in effect under current federal law. In fact, 10 U.S.C. § 311 has actually broadened the term by removing racial and gender restrictions. Moreover, subsection (b)(2) provides for an "unorganized militia" composed of militia members not belonging to the National Guard or the Naval Militia.

In contrast to later federal circuit cases, this Court did not base its *Miller* decision on the lack of membership in a formally organized state militia. Instead, *Miller* hinged on the particular arms at issue. *Miller, supra*, at 178; cf. *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), *United States v. Oakes,* 564 F.2d 384, 387 (10th Cir. 1977), *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997). Just as the First Amendment does not protect the right to say anything, anytime, anywhere, the Second Amendment does not guarantee an absolute right to own any and every type of arms. *Miller* affirmed the broad definition of militia and did not disturb the right to keep and bear appropriate arms for defensive purposes.

2. A Militia is "Well-Regulated" When Citizens are Prepared to Act Defensively in Emergencies, Using Their Lawfully Possessed Weapons. Formal Organization is Not Required.

"A well-regulated" militia is that broad, unorganized group of "the people" who maintain privately owned arms. The "regulation" of the militia must not be confused with formal organization. There was no organizational precedent to the existence of the early American militia, nor does modern law require such organization. If it did, "unorganized militia" would be an oxymoron. *See* 10 U.S.C. § 311(b)(2). The militia is not a free-for-all but is composed of law-abiding citizens who maintain arms and know how to use them. Most states now have nondiscretionary right-to-carry laws that allow law-abiding citizens to carry concealed weapons. All states impose criminal penalties for homicides and other violence not justified by the defense of self or others. These regulations contribute to the "well-regulated" character of the militia.

Armed citizens frequently save lives using lawfully owned weapons. An off-duty police officer, picking up his daughter at Santana High School in San Diego, averted a tragic school shooting by forcing the attacker to take cover. John Lott, The Bias Against Guns: Why Almost Everything You've Heard About Gun Control is Wrong 24-25 (Regnery Publishing, Inc. 2003) ("Lott, Bias Against Guns"). A brave 11-year-old boy saved his mother's life when he shot an intruder holding a box cutter to her head. *Id.* at 7-8. A man who pulled out a knife at a convenience store fled when the owner told him he kept a gun behind the counter. *Id.* at 10. Another gunman, trying to forcibly enter a residence, ran away upon hearing the owner yell for his wife to get their gun and call police. *Id.* at 10. Assistant principal Joel Myrich immobilized a would-be assassin at a school in Pearl, Mississippi after retrieving his permitted concealed gun from his car. John Lott, More Guns, Less Crime: Understanding Crime and Gun Control Law 236 (University of Chicago Press - 2d ed. 2000) ("Lott, More Guns"). These and many other examples show how the system is working. Americans are defending themselves and others through the lawful use of arms.

C. "A Free State" is a Political Entity in Which Citizens are Secure in Their Homes and Travel Freely Because They Have the Means to Defend Themselves Against Criminal Attacks or Oppressive Government.

A community of unarmed citizens is not "a free state." Our Founders abhorred the despotism of the French monarchy. Police enforced arms prohibitions to "protect" the public against violent crime in France, but these laws were actually a pretext to subordinate the peasant population. Kates, *Handgun Prohibition*, *supra,* at 233. America was intended to be "a free state" where the people are trusted with arms to protect themselves against both common criminals and oppressive government.

1. "A Free State" is a General Reference to a Political Unit. It is Not a Synonym for One of the States of the United States.

The indefinite article "a" is used with no surrounding context to suggest a more definitive meaning. U.S. Const., Amend. XXIII, § 1, cl. 2, also uses the phrase "a State" but the context--Electors for the District of Columbia--shows that it refers to one of "the States" in contrast to the District. Art. III, § 2, cl. 1, speaks to controversies between "a State" and either "Citizens of another State" or "foreign States, Citizens, or Subjects." This language makes no sense except in reference to "the States" that make up the United States. The most natural reading of the Second Amendment is that "a free state" means republic government generally. *Parker v. District of Columbia*, 478 F.3d 370, 396 (D.C. Cir. 2007).

In the First Congress, James Madison proposed language stating that a well-regulated militia was "the best security of a free *country*." Anti-Federalist Elbridge Gerry explained that the change was made to ensure that the federal standing army would never supplant the militia as the means of preserving security. The substitution of "a free *state*" in place of "a free *country*" implies that the "state" to be protected was the entire American nation. *Id.*, at 395-396.

2. The Right to Bear Arms is Broader in Scope Than the Need to Maintain a Well-Regulated Militia.

The Second Amendment's second comma separates its two clauses. The prefatory clause articulates purpose, while the operative clause describes a specific means to achieve it. Many early state constitutions contain similar preambles. For example, Rhode Island's 1842 constitution provides that: "The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for abuse of that liberty." Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U.L. Rev. 793, 794 (1998). The freedom to publish is a means to securing a free state, but it is not restricted to publications that directly contribute to that purpose. Similarly, the right to keep and bear arms is not protected only when it contributes to a well-regulated militia. It is guaranteed to "the people," not merely those who belong to the militia. The means--whether free press or bearing arms--guarantees a right broader in scope than the purpose to be achieved.

3. People Are Not *Free* When They Are Not at Liberty to Move About the Community Without Fear of Criminal Attacks.

The entire community enjoys greater freedom in states with right-to-carry laws:

> The benefits of concealed handguns are not limited to those who use them in self-defense. Because the guns may be concealed, criminals are unable to tell whether potential victims are carrying guns until they attack, thus making it less attractive for criminals to commit crimes that involve direct contact with victims. Citizens who have no intention of ever carrying

> concealed handguns in a sense get a "free ride" from the crime-fighting efforts of their fellow citizens.
>
> John Lott, More Guns, *supra,* at 161

When states enact right-to-carry laws, mass public shootings plummet and so do the number of deaths. The attacks that do occur are typically in "gun-free" zones where concealed weapons are forbidden. Lott, Bias Against Guns, *supra,* at 30. Three horrific European shooting sprees in gun-free "safe" zones show that other countries experience similar results: sixteen people killed in a public school shooting in Germany (April 2002); fourteen regional legislators killed in Zug, a Swiss canon (September 2001); and eight city council members massacred in a Paris suburb (March 2002). *Id*. at 72-73. Strict European gun laws failed to prevent these tragic crime sprees.

D. To "Bear" Arms is to Carry or Wear Them on the Person for the Purpose of Defensive Action in Appropriate Circumstances.

This Court has cited the Second Amendment as a familiar example of the Black's Law Dictionary definition of bearing arms:

> "To wear, bear or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person."

Black's Law Dictionary 214 (6th ed. 1990), cited in *Muscarello v. United States*, 524 U.S. 125, 130 (1998)

The term "bear arms" is susceptible to military use but that is not its exclusive meaning. State constitutions of the late eighteenth and early nineteenth centuries frequently protected the right of "the people" to "bear arms" for self-defense outside a military context: Alabama, Connecticut, Indiana, Kentucky, Michigan, Mississippi, Missouri, Ohio, Pennsylvania, and Vermont. *Emerson, supra,* at 230. State Bills of Rights in Kentucky, Massachusetts, North Carolina, Pennsylvania, and Vermont all safeguard "the right of the people to bear arms." Since that right is secured against the governments of individual states in these documents, it cannot possibly be construed as a right that benefits states rather than individuals. Volokh, *The Commonplace Second Amendment*, *supra,* 73 N.Y.U.L. Rev. at 810.

When citizens cannot lawfully bear arms, or where access to them is delayed during the first critical moments of a crime, lives are lost. The longer it takes to secure armed assistance, the greater the danger. An off-duty police officer at the Trolley Square Mall in Utah intervened to stop an attack in progress in February 2007. The mall was a gun-free zone, but fortunately the officer had violated the ban. Still, it took three minutes for him to track down and confront the assailant because he was at the other end of the convoluted mall complex. In the meantime, nine people were shot and five of them died. Other well-publicized massacres have been perpetrated in gun-free zones: Virginia Tech (32 murdered in April 2007);

Columbine High School (13 killed in 1999); Luby's Cafeteria in Killeen, Texas (23 shot to death in 1991); McDonald's in Southern California (21 murdered by an unemployed security guard in 1984). John R. Lott, Jr., *Media Coverage of Mall Shooting Fails to Reveal Mall's Gun-Free-Zone Status* (December 6, 2007), www.foxnews.com/printer_friendly_story/0,3566,315563,00.html. "Gun-free" zones do not prevent crime. Instead, they provide an ideal setting for criminals to launch their attacks without fear that potential victims will be armed.

E. To "Keep" Arms is to Retain Possession of Them.

The word "keep" has been largely neglected in discussions of the Second Amendment. As the D.C. Circuit observed, it has been brushed aside as part of a unitary phrase, "keep and bear," or otherwise dismissed:

> Even if "keep" and "bear" are not read as a unitary term, we are told, the meaning of "keep" cannot be broader than "bear" because the *Second Amendment* only protects the use of arms in the course of militia service.... But this proposition assumes its conclusion, and we do not take it seriously.
>
> *Parker v. District of Columbia*, *supra,* 478 F.3d at 385

This sort of circular reasoning should be avoided in constitutional analysis.

"Keep" poses serious problems for the states' rights proponents:

> While "bear" often has a military meaning, "keep" does not. For centuries, the primary meaning of "keep" has been "to retain possession of." [Citations.] There is only one straightforward interpretation of "keep" in the *Second Amendment*, and that is that "the people" have the right to retain possession of arms, subject to reasonable regulation and restrictions.
>
> *Silveira v. Lockyer*, *supra*, 328 F.3d at 573 (Kozinski, J., dissenting)

The common understanding of "keep" supports a personal, individual right to possess arms for lawful purposes. Early colonial statutes required citizens to "keep" arms in their homes. The law applied not only to military men, but also to those who were not part of the militia due to age or other reasons. Kates, *Handgun Prohibition*, *supra,* at 219-220. The private "keeping" of firearms facilitates the public act of community defense. Robert H. Churchill, *FORUM: RETHINKING THE SECOND AMENDMENT: Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 167 (2007) ("Churchill, *Gun Regulation*").

Early colonial and state governments did not exercise their police powers to restrict individual ownership of guns. Their consistent legislative restraint strongly suggests that states recognized a "zone of immunity" around the private right to own firearms. Moreover, state laws imposed affirmative obligations on every free adult male to own and carry arms for defensive purposes. Americans began to consider the right to keep arms a basic right of citizenship, along with voting, holding office, access to the courts, and jury service. *Id*. at 142, 164-166.

F. Arms is a Broad, Indefinite Term That Must be Understood in the Context of the Second Amendment's Purposes.

The Second Amendment does not qualify the term "arms." This broad term must be reasonably defined so as to facilitate the Amendment's purpose and not infringe the right guaranteed. *Miller* held that the Second Amendment did not guarantee rights to the particular arms at issue--a sawed-off shotgun. The "arms" must bear some reasonable relationship to the preservation or efficiency of a "well-regulated militia," as that term is properly understood.

Certain firearms have been the subject of civil lawsuits against gun manufacturers because of their attractiveness to criminals. Such weapons are generally low in price, easy to conceal due to small size and weight, resistant to corrosion, accurate in firing, and high-powered. However, the same factors also help protect law-abiding citizens and lower crime rates in the many states that allow concealed handguns. Lott, Bias Against Guns, *supra*, at 5. It is exactly these firearms that should be protected under the Second Amendment because of their effectiveness when quick defensive action is needed.

G. "The People" is a Term of Art Used in the Constitution to Describe the Individual Citizens of the United States.

This Court has observed that:

> ..."the people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The *Second Amendment* protects "the right of the people to keep and bear Arms," and the *Ninth* and *Tenth Amendments* provide that certain rights and powers are retained by and reserved to "the people."
>
> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)

It stretches credibility to restrict "the people" in the Second Amendment to a subset of that term as it is used in other sections of the Bill of Rights. The states' rights model departs even further from the text, requiring us to redefine "the people" as "the States." The language of the Tenth Amendment is evidence that the framers knew how to distinguish between "the people" and "the States." The individual rights position attributes the same meaning to the same words--"the people"--in the First, Second, and Fourth Amendments. *Emerson*, *supra*, at 227.

1. "The People" Has a Collective Aspect But That Aspect is Not Exclusive.

The people of America collectively founded our system of government. It was "we the People" who did "ordain and establish [the] Constitution." *U.S. Const. pream.* However, it does not follow that "the people" may only exercise their constitutional rights in service of the state. Consider, for example, how that principle would apply to First Amendment rights of the people to peaceably assemble, form associations, or engage in religious worship. These rights do not hinge on action in service of the state or any other collective exercise. It would be even more absurd to apply this construction to the Fourth Amendment right to freedom from unreasonable searches and seizures. The states' rights analytical approach to the Second Amendment cannot stand if the same logic is applied to any other right of "the people" in the Bill of Rights. *See Silveira v. Lockyer*, *supra*, 328 F.3d at 575-576 (Kozinski, J., dissenting); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L. J. 637, 645 (1989).

2. "The People" Have "Rights" and "Powers" Under the Constitution. Governments Have "Powers" but Never "Rights."

Either "the people" or "the States" may have powers. The Tenth Amendment reserves to the people or to the States those powers not delegated to the federal government. But only "the people" are guaranteed rights (First, Second, Fourth, and Ninth Amendments). *Silveira v. Lockyer*, *supra*, 328 F.3d at

574-575 (Kozinski, J., dissenting); *Emerson, supra,* at 227-228. This Court has acknowledged the distinction:

> The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself.
>
> *Scott v. Sandford*, 60 U.S. 393, 449 (1857) (emphasis added) (overruled on other grounds)

If the distinction between powers and rights were unimportant, the framers could have collapsed the Ninth and Tenth Amendments into something like this: "The powers and rights not expressly delegated to the United States are reserved to the people or to the States." Instead, the Ninth Amendment addresses rights retained by the people, whereas the Tenth Amendment speaks to the powers reserved to either the people or to the States. Nowhere does the Constitution grant "rights" to the States.

3. Ordinary Citizens Have the Right to Participate in the Defense of Their Communities and Country.

Laurence H. Tribe, a well respected constitutional law professor and commentator, expressed it well:

> Perhaps the most accurate conclusion one can reach with any confidence is that the core meaning of the *Second Amendment* is a populist/republican/federalism one: Its central object is to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their

> state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit. Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes...a right that directly limits action by Congress or by the Executive Branch...."
>
> Laurence Tribe, 1 American Constitutional Law 902, n. 221 (3d ed. 2000)

The transition in Tribe's thinking is worth noting. The first two editions of his constitutional law treatise espoused the collective states' rights view of the Second Amendment. *United States v. Wright*, 117 F.3d 1265, 1271 (11th Cir. 1997); *Silveira v. Lockyer*, 312 F.3d 1052, 1068 (9th Cir. 2002). The abrupt change in this scholar's thinking should challenge states' rights proponents to reconsider their position.

II. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT CONSISTENT WITH AMERICA'S FOUNDING DOCUMENTS AND OTHER BASIC LEGAL PRINCIPLES.

The founding of America was truly revolutionary. The people established a radically new form of government based on the consent of those governed. Our founders were careful to safeguard certain liberties so that Americans, unlike their European counterparts, could participate in government and be able to revise or even abolish it if it ever became tyrannical. Early Americans were armed and ready to defend themselves, their families, their communities, and their country.

A. The Declaration of Independence Acknowledges Inalienable Rights to Life and Liberty. The Second Amendment Guarantees an Auxiliary Right to Protect These Primary Rights.

When early Americans broke the political ties with England, they declared:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are **life, liberty** and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

The Declaration of Independence (emphasis added)

The assurance of rights to life and liberty would ring hollow without a corresponding right to defend and preserve them. Law-abiding citizens use guns to save lives many times a year. A survey of 1,015 people in late 2002 revealed over 2.3 million such uses nationwide in 2001. John Lott, Straight Shooting: Firearms, Economics and Public Policy 46 (Merril Press 2006), citing *The American Enterprise*, July 1, 2003. In 2002, two students at Appalachian Law School retrieved guns from their cars and held an assailant until police arrived. Unfortunately, most news stories only reported that the student heroes "overpowered" the gunman, omitting any mention of the guns. Lott, Bias Against Guns, *supra*, at 24-25. This Court must guard such exercises of Second Amendment rights.

B. The Bill of Rights Consistently Guarantees Individual Rights of "The People."

The Bill of Rights reflects "the twin hallmarks of traditional liberal thought: trust in the people, and distrust in government, particularly the military and the police." Kates, *Handgun Prohibition*, *supra,* at 271. It was not written to create new rights or to "lay down any novel principles of government," but to guarantee rights historically recognized by our English ancestors. *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). This Court has recognized the right to bear arms as one of the many individual rights that government may never infringe:

D. Defense of Self or Others Has Long Been Recognized as a Natural Right and a Complete Defense to Criminal or Civil Charges.

Our laws exonerate a person who kills in self-defense because of the high value placed on human life. William Blackstone, 1 Commentaries on the Laws of England 126 (The University of Chicago Press 1979) (1765). The natural right to self-defense has ancient roots:

> ... the doctrine that "a man's home is his castle" originated in cases upholding the right to possess and use arms for home defense. Semayne's Case, 5 Co. Rep. 91a, 91b, *77 Eng. Rep. 194, 195 (K.B. 1603)* (quoted with approval in *Payton v. New York, 445 U.S. 573, 596 n.44 (1980));* Dhutti's Case, Northumberland Assize Rolls (1255) (88 Publications of Surtees Society 94 (1891)) (household servant privileged to kill nocturnal intruder); Rex v. Compton, 22 *Liber Assisarum* pl. 55 (1347) (homicide of burglar is no less justifiable than that of criminal who resists arrest under warrant); Anonymous 1353, 26 *Liber Assisarum* (Edw. III), pl. 23 (householder privileged to kill arsonist).

Kates, *Handgun Prohibition, supra,* 204-205, n. 5 (1983)

In 1765, Blackstone proposed three primary, inviolate rights--personal security, personal liberty, and private property--along with the "auxiliary rights" needed to protect them. The maintenance of suitable arms is one of those auxiliary rights. It arises from "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." William Blackstone, 1 Commentaries on the Laws of England 139 (The University of Chicago Press 1979) (1765). When law-abiding citizens maintain private arms and use them defensively, lives are saved, but when they are disarmed by tight gun control laws, criminals thrive.

1. Law-Abiding Citizens Frequently Use Guns to Save Lives and Halt the Escalation of Violent Crime.

Shortly after this Court granted certiorari, a gunman opened fire at the New Life Church in Colorado Springs. An armed congregant with a concealed weapons permit acted swiftly to halt the attack, wounding the assailant. The pastor of the megachurch credited her with saving 100 lives. *Colorado Shooting Highlights Churches' New Emphasis on Security*, (December 10, 2007) www.foxnews.com/printer_friendly_story/0,3566,316378,00.html. If this had been a "gun-free" zone and no one onsite had been armed, the situation would have undoubtedly escalated before police could arrive. In fact, that is exactly what occurred the previous week at a crowded Omaha mall. Eight people were killed and five wounded in this tragedy. Nebraska allows people to carry permitted concealed handguns, but private property owners can ban weapons. The Westroads Mall posted signs prohibiting guns. Most media coverage failed to note that the deadly attack occurred in a "gun-free" zone. John R. Lott, Jr., *Media Coverage* *of Mall Shooting Fails to Reveal Mall's Gun-Free-Zone Status* (December 6, 2007), www.foxnews.com/printer_friendly_story/0,3566,315563,00.html.

When violent crime occurs, it takes time to notify the police and even more time for them to arrive at the scene. Lives could be saved in these critical moments if armed law-abiding citizens were prepared and allowed to intervene. Surveys of convicted felons and criminal trial transcripts reveal that criminals fear armed victims and choose their targets accordingly. James D. Wright and Peter Rossi, Armed and Considered Dangerous: A Survey of Felons and Their Firearms (Hawthorne, NY: Aldine de Gruyter Publishers, 1986); John Lott, Bias Against Guns, *supra,* at 9-10. For example, the 1999 shooting at a Los Angeles Jewish community center was planned after the killed determined that security was too tight at other Jewish institutions in the area. *Id.* at 9.

2. Gun Control Laws Do Not Contribute to the Government's Interest in Preserving Human Life.

Gun control proponents advocate laws to reduce violent crime and save lives, including safe storage, registration, background checks, waiting periods, and one-gun-a-month purchase limitations. However, research shows that such laws contribute to a significant increase in crime and thus do not achieve the government's interest in preserving human life.

Safe storage laws like D. C. § 7-2507.2 threaten lives by hindering defensive use in an emergency. Criminals find it more attractive to invade homes where guns are locked up and not readily available to residents. One study shows that in twelve states with safe storage laws in effect for at least four years, violent crime fell briefly but then rose to an even higher level by the end of the period. Lott, Bias Against Guns, *supra,* at 148. Research shows that safe storage laws are related to statistically significant increases in murders, rapes, robberies, and burglaries. *Id.* at 166-167. Real life examples illustrate the point. A 14-year-old girl in Las Vegas knew where the family guns were stored and how to use them, but because of safe storage laws she could not access them to prevent the stabbing deaths of her younger siblings. The killer, armed with a pitchfork, cut the phone lines and forced his way into the home. *Id.* at 165. Moreover, studies show no consistent evidence that safe storage laws actually reduce accidental gun deaths, possibly because these accidents often occur among not-so-law-abiding segments of society. *Id.* at 158, 188-189.

III. THE INDIVIDUAL RIGHT TO BEAR ARMS IS CONFIRMED BY HISTORY, COMMENTATORS, EARLY STATE CONSTITUTIONS, AND EARLY CASE LAW.

The philosophy of America's founders can be traced back to classical Greece and Rome, where:

> ...the ideal of republican virtue was the armed freeholder, upstanding, scrupulously honest, self-reliant and independent -- defender of his family, home and property, and joined with his fellow citizens in the militia for the defense of their polity.

Kates, *Handgun Prohibition*, *supra,* at 232

The history of early America and its English roots confirms that individual citizens of a free state have the right to arm and defend themselves.

A. England's Bill of Rights Guaranteed The Individual Right to Bear Arms for Self-Defense.

England's Bill of Rights, adopted in 1689 in the aftermath of the English Revolution, provided "That the subjects which are Protestants, may have arms for their defense suitable to their conditions, and as allowed by law." 1 W. & M. Stat. 2d Sess., c. 2 (1689). This provision had to be an individual right to self-defense, because it was guaranteed to "the subjects," and England was not composed of states. Americans drafted their Constitution in the wake of the Revolution, after a vigorous battle for independence. It is highly unlikely they would have forfeited a right they previously held as English subjects. Kates, *Handgun Prohibition*, *supra,* at 238.

B. American Government Departed from the Traditions of Other Countries, Where Governments Did Not Trust the People to Bear Arms.

The American right to bear arms stands in stark contrast to the practices of foreign nations, where governments maintain tight control and only authorized personnel may lawfully keep and bear arms. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 3 Duke L. J. 1236, people" language actually adopted is identical to that used for individual rights in the First and Fourth Amendments. *Id.*, at 249-250.

The final draft also deleted a religious exemption clause. States' rights proponents insist that such a clause could only be understood as an exemption from carrying arms in the service of a state militia. The exemption would have never appeared at all if the Second Amendment were intended to guarantee a private right. *Silveira v. Lockyer, supra,* 312 F.3d at 1074, 1085-86 (9th Cir. 2002). However, it may have been deleted precisely because the Amendment's primary purpose was to safeguard an individual right. Moreover, early state laws obligated nearly everyone to own arms and carry them regularly for defensive use. In this context, the religious exemption is a logical accommodation of those citizens, like the Quakers, who could have never conscientiously carried a weapon.

D. The Constitutional Ratification Process Confirms the Understanding of Early Americans That Individuals Had the Right to be Armed.

Federalists and Anti-Federalists held heated debates about the proposed Constitution, but all agreed on the individual nature of the right to bear arms. In a widely distributed article, Federalist Tench Coxe described the future Second Amendment:

> As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall

> be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.
>
> REMARKS *on the first part of the* AMENDMENTS *to the* FEDERAL CONSTITUTION, *moved on the 8th instant in the House of Representatives*, Philadelphia FEDERAL GAZETTE, June 18, 1789 (emphasis added); quoted in *Emerson, supra*, at 252.

Anti-Federalist editorials concurred with this description of the Second Amendment as a private right. Kates, *Handgun Prohibition, supra,* at 224-225. Anti-Federalists worried that the federal government might destroy the militia through disarmament, prescribed training, or use of a standing army to tyrannize the people. Federalists believed that Americans would never tolerate infringement of their freedoms, because the American people were armed and ready to resist oppression. *Emerson*, *supra*, at 237-240. Noah Webster, urging ratification, wrote that: "Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe." Kates, *Handgun Prohibition, supra,* at 221. As they debated the details of the Constitution and its wording, both parties presupposed that the federal government had no right to disarm the people.

Several of the states--New Hampshire, New York, Rhode Island, Massachusetts, and the Pennsylvania minority--made proposals to guarantee the right to keep and bear arms. *Id.*, at 221-222. In the Massachusetts Convention, Samuel Adams proposed language assuring that "the said constitution be never construed...to prevent the people of the United States who are peaceable citizens, from keeping their own arms." *Id.* at 224. At Virginia's ratification convention, Patrick Henry objected to authorizing a standing army and granting Congress control of the militia, and he voiced concerns over the lack of clause that would forbid disarming individual citizens: "The great object is that every man be armed... Everyone who is able may have a gun." *Id.* at 228-229. In response to concerns about the controversial new powers granted to Congress to call forth, organize, arm, and discipline the militia, Hamilton and Madison argued that Congress had no power to deprive the people of their right to keep and bear arms. Alstyne, *Personal Right to Arms*, at 1246.

The 1787-88 ratification debates in Pennsylvania, New Hampshire, and Massachusetts produced several proposals for amendments that would safeguard the right to bear arms. New Hampshire offered the broadest protection: "Congress shall never disarm any Citizen unless such are or have been in Actual Rebellion." Churchill, *Gun Regulation*, at 168.

As debates raged on, both sides offered arguments grounded in the belief in an armed citizenry. Fears about federal powers were ultimately calmed by the Bill of Rights, which included the Second Amendment guarantee that government would never infringe the right of "the people" to keep and bear arms.

E. State Constitutions, State Laws, and Early American Legal Commentators All Agreed That the American People Retained the Right to Bear Arms.

1. State Laws and Constitutions Guarded the Individual Right to Bear Arms.

In the early eighteenth century, states reluctantly exercised their emergency military powers in a way that effectively disarmed citizens. However, most states had repudiated such claims on privately owned arms by the decade prior to the drafting of the Constitution. Churchill, *Gun Regulation*, at 155. States began to regulate gun ownership and other civil rights based on a test of allegiance. *Id*. at 159-160. Police powers supported the regulation of dangerous uses of guns and reasonable time-place-manner restrictions. However, Americans began to perceive the right to keep arms as the "birthright" of any citizen who professed his allegiance to the country. *Id*. at 161.

Numerous state constitutions guaranteed a right to bear arms for self-defense, unrelated to military service. These included Alabama, Connecticut, Indiana, Kentucky, Michigan, Mississippi, Missouri, Ohio, Pennsylvania, and Vermont. *Emerson, supra,* at 230. The seventeenth article of the Massachusetts Constitution of 1780 provided that "the people have a right to keep and bear arms for the common defense."

2. Early American Commentators Unanimously Agreed That the Second Amendment Guaranteed an Individual Right.

Several commentators familiar to America's founders, including Blackstone, Hawkins, Bracton, and Coke, all affirm a common law right to possess arms for home defense. Kates, *Handgun Prohibition*, *supra*, at 240. Blackstone classified it among the five "absolute rights of individuals" at common law. *Id.* at 240, n. 53.

William Rawle wrote that the Second Amendment prohibited any attempt by either Congress or a state legislature to "disarm the people." William Rawle, *A View of the Constitution of the United States of America* (2d ed. 1829), 125-26. Rawle's proposed restraint of the state legislatures could not coexist with the states' right model.

Former Chief Justice Story held the right to bear arms in high regard:

> The right of the citizens to keep and bear arms has justly been considered... the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

3 J. Story, Commentaries § 1890, p. 746 (1833)

Thomas Cooley, another well-respected scholar, traced the Second Amendment to the English Bill of Rights and declared that "the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose." Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 270-71 (1880).

Viewed against this backdrop of unanimous commentators, it is difficult to conceive of the Second Amendment as guaranteeing anything other than an individual right.

F. Nineteenth Century Case Law and Other Judicial Sources Affirm an Individual Rights Interpretation of the Second Amendment.

Early state cases overwhelmingly affirm that the Second Amendment and/or similar provisions in state constitutions protect the right to bear arms in defense of self *and* the state: *Bliss v. Commonwealth,* 12 Ky. 90, 2 Litt. 80 (1822); *State v. Reid,* 1 Ala. 612 (1840); *Aymette v. State,* 21 Tenn. 154, 2 Hum. 119 (1840); *State v. Buzzard,* 4 Ark. 18 (1842); *Nunn v. State,* 1 Ga. 243 (1846); *State v. Chandler,* 5 La. Ann. 489 (1850); *Cockrum v. State,* 24 Tex. 394 (1859) (affirms inalienable right to self-defense); *Smith v. Ishenhour,* 43 Tenn. (3 Cold.) 214 (1866); *State v. Duke,* 42 Tex. 455 (1875); *Fife v. State,* 31 Ark. 455 (1876); *Wilson v. State,* 33 Ark. 557, 34 Am. Rep. 52 (1878); *State v. Rosenthal,* 75 Vt. 295, 55 A. 610 (1903). State cases also uphold the reasonable regulations so long as they do not infringe the basic right to self-defense: *State v.*

Mitchell, 3 Blackf. 229 (Ind. 1833); *Aymette v. State,* 21 Tenn. 154, 2 Hum. 119 (1840); *State v. Jumel,* 13 La. Ann. 399 (1858); *English v. State,* 35 Tex. 473 (1872); *Hill v. State,* 53 Ga. 472 (1874); *State v. Duke,* 42 Tex. 455 (1875); *Wilson v. State,* 33 Ark. 557, 34 Am. Rep. 52 (1878); *State v. Workman,* 35 W. Va. 367, 14 S.E. 9 (1891); *In re Brickey,* 8 Idaho 597, 70 P. 609 (1902).

The legislative history of the Fourteenth Amendment is further evidence of the common nineteenth century understanding that the Second Amendment guarantees an individual right. When Senator Howard introduced that Amendment for passage in the Senate, he recommended that:

> To these privileges and immunities [U.S. Const., Art. IV, § 2]... **should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution**; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; **the right to keep and to bear arms**....
>
> Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866), cited in *Duncan v. Louisiana,* 391 U.S. 145, 166-167 (1968) (Black, J., concurring) (emphasis added)

Although this Court has chosen a process of selection incorporation rather than the wholesale approach advised by Senator Howard, these comments reflect the widespread perception that the right to bear arms is one of many individual constitutional rights.

G. The U.S. Senate Judiciary Committee and U.S. Justice Department Have Adopted the Individual Rights Position.

The Subcommittee on the Constitution of the U.S. Senate Judiciary Committee has endorsed the individual rights view, based on its research of the archives of the Library of Congress. SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982).

More recently, the U.S. Department of Justice reversed its prior position and affirmed the Fifth Circuit's individual rights holding in *Emerson*. That new position is set forth in the Memorandum From the Attorney General to All United States Attorneys, re: *United States v. Emerson*, November 9, 2001. *See* http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf. The Attorney General was convinced by the comprehensive scholarly review undertaken by the Fifth Circuit in deciding *Emerson*, which affirmed the individual right to bear arms but also recognized that restrictions can be imposed to prevent unfit persons from possessing firearms.

CONCLUSION

This Court should uphold the individual right to keep and bear arms guaranteed to Americans, so they might lawfully defend themselves and their communities.

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AMICUS CURIAE BRIEF

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DISTRICT OF COLUMBIA AND MAYOR ADRIAN F. FENTY,
Petitioners,
v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia

Brief of *Amicus Curiae* Foundation for Moral Law, In Support of Respondent

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QUESTION PRESENTED FOR REVIEW

1. Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violated the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning religious freedom, the sanctity of life, and others that implicate the fundamental freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because it believes that our God-given freedom starts with the natural right of self-defense, a right recognized by the Second Amendment's protection of the individual ownership and use of firearms. Fundamental principles of our constitutional system are at stake in this case. Only the original understanding of the Second Amendment will yield a proper result in this case, and the need for constitutional fidelity drives the Foundation's legal advocacy. This brief primarily focuses on the history and text of the Second Amendment and how those support Respondent's case.

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[1] *Amicus curiae* Foundation for Moral Law, Inc., files this brief with consent from both Petitioners and Respondent. Counsel of record for all parties received notice at least 10 days prior to the due date of the Foundation's intention to file this brief. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The text is paramount in constitutional interpretation. Properly interpreting the text requires reading it with an eye toward what it meant by common understanding at the time of its enactment. This requires placing the text in its historical context. It is especially important to carry out this method of interpretation where the Second Amendment is concerned because its concepts and language are so historically dependent.

The code provisions at issue in this case[2] essentially place a complete ban on the private ownership of handguns in the District of Columbia. Their sustainability relies upon the notion that the Second Amendment does not protect an individual right to own and use handguns in a responsible fashion. However, a review of the history and text of the amendment shows that denying that the Second Amendment recognizes such a right "requires almost herculean indifference to every kind of evidence." Don B. Kates, Jr., "Minimalist Interpretation of the Second Amendment," *in The Bill of Rights: Original Meaning and Current Understanding*, at 130 (Eugene Hickock, Jr. ed., 1991). A reasonable reading of the Second Amendment requires that these code provisions be declared contrary to "the right of the people to keep and bear arms." U.S. Const. amend II.

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[2] D.C. Code §§ 7-2502.02(a)(4), 22-450(a), and 7-2507.02.

The court of appeals below understood this and consequently correctly concluded that the code provisions at issue violate the Second Amendment. This Court should affirm the erudite and well-reasoned opinion of the court below.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE D.C. HANDGUN PROVISIONS SHOULD BE DECIDED ACCORDING TO THE UNALTERED TEXT OF THE SECOND AMENDMENT.

James Madison once wrote that, "As a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison*, at 228 (Philip R. Fendall, ed., 1865). This is almost axiomatic when dealing with any legal instrument, let alone a constitution. "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). A textual reading of the Constitution, Madison said, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

As important as a textual reading is for any constitutional interpretation, its necessity is heightened where the text obviously employs language and ideas peculiar to the time in which it was written. "In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). Such is the case with the Second Amendment, which includes phrases such as "a well-regulated militia" and "to keep and bear arms" that were ubiquitous at the time of the amendment's enactment but have since fallen into disuse.[3] A recovery of the amendment's proper meaning requires placing this text in its historical context. The context eases any apparent tension between the mention of "a well-regulated militia" and the idea of an individual right to own firearms.

The tension, which has become palpable with the split among circuits as to the meaning of the Second Amendment, stems from there being two general ways to read the text of the amendment. The first reads it as granting a *collective* states' right; the second reads it as recognizing an *individual* right.

The first interpretation understands the point of the amendment to be maintenance of "[a] well-regulated militia," with "the right to keep and bear arms" being dependent upon the states' need for such militias. *See, e.g., United States v. Napier,* 233 F.3d 394, 404 (6th Cir. 2000); *United States v. Hancock,* 231 F.3d 557, 565-66 (9th Cir. 2000). With the advent of the modern structure of the United States military and the National Guard, this interpretation effectively renders the Second Amendment a dead-letter. The survival of the code provisions at issue depends upon the plausibility of this narrow reading of the amendment.

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[3] Textual analysis is made all the more essential in this case by the dearth of precedents from this Court on the meaning of the Second Amendment. The only case of any import is *United States v. Miller*, 307 U.S. 174 (1939), in which this Court upheld the National Firearms Act against a challenge by a defendant indicted under the act for possession of a sawed-off shotgun. However, *Miller* made no "attempt to define, or otherwise construe, the substantive right protected by the Second Amendment." *Printz v. United States*, 521 U.S. 898, 939 n.1 (1997) (Thomas, J., concurring).

The second interpretation of the amendment understands the point of the amendment to be protecting an individual "right to keep and bear arms," with the militia language serving as a prefatory explanation of why such a right is necessary. *See, e.g., Parker v. District of Columbia,* 478 F.3d 370, 395 (D.C. Cir. 2007); *United States v. Emerson,* 270 F.3d 203, 32 (5th Cir. 2001). The code provisions at issue fail to pass constitutional muster under this reading of the Second Amendment.

The lenses of history and text reveal that the true concerns behind the amendment were the people's fear of government tyranny and their ability to combat such tyranny through the possession and wielding of firearms, meaning that this second interpretation is the proper way to read the Second Amendment. Therefore, this Court should strike down the D.C. code provisions as violations of "the right of the people to keep and bear arms."

II. THE HISTORY BEHIND THE SECOND AMENDMENT REVEALS A HEALTHY AMERICAN FEAR OF GOVERNMENT TYRANNY AND THE NEED FOR SELF-DEFENSE THROUGH THE BEARING OF ARMS.

A. The right to keep and bear arms in English history

The history behind the Second Amendment began—as did so many others—in England, which had a long history of private arms ownership. In the twelfth century, Henry II required all freemen to possess arms, and Henry III required "every subject ages fifteen to fifty, including even landless farmers, to own a weapon other than a knife. Crown officers periodically inspected subjects to be certain that they were properly armed." Leonard Levy, *Origins of the Bill of Rights* 136 (1999). Private arms ownership continued until 1671 when Parliament enacted a gaming statute that restricted arms ownership to the wealthy. In 1686, James II, who favored Catholic subjects, "infuriated Protestants by banning their firearms." *Id.* at 137.

Thus, it was hardly surprising that when James II was deposed three years later, the Bill of Rights enacted by Parliament provided "[t]hat the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." English Bill of Rights (Dec. 16, 1689), *reprinted in* 5 *The Founders' Constitution* 210 (Phillip Kurland & Ralph Lerner eds., 1987). England's population was 98 percent Protestant at the time, so the provision granted a nearly universal right to possess personal defense weaponry over which the king had no control.

As its language discusses "subjects" and "their defense," the provision leaves no doubt that the English right was considered to be an individual one.

Three-quarters of a century later, Sir William Blackstone described this right in his *Commentaries on the Laws of England* as the "right of the [citizens] . . . of having arms for their defense," which flowed from "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." W. Blackstone, I *Commentaries on the Laws of England* 139 (U. Chi. Facsimile Ed. 1979) (1765). Though the right appears to have been on solid footing at the time Blackstone summarized the law, by the turn of the century it had been severely curtailed. St. George Tucker, in his American edition of Blackstone's *Commentaries*, observed in 1803 that, "In England, the people have been disarmed, generally, under the specious pretext of preserving the game." This was done by interpreting the words "suitable to their conditions" in the English Bill provision "to authorize the prohibition of keeping a gun or other engine for the destruction of game, ... So that not one man in five hundred can keep a gun in his house without being subject to a penalty." St. George Tucker, *View of the Constitution of the United States* 239 (Clyde Wilson ed., Liberty Fund 1999) (1803).

United States Supreme Court Justice Joseph Story similarly noted in his 1833 *Commentaries on the Constitution of the United States* that "under various pretences the effect of this [arms] provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege." J. Story, III *Commentaries on the Constitution of the United States*, § 1891 (1833).

B. The right to keep and bear arms in early American history

Well aware of England's history concerning the right to bear arms, Americans did not wish to see the deterioration of the right to bear arms repeated in this country. In fact, they had experienced the British penchant for disarming the people firsthand during the War for Independence. The battles that began the war, at Lexington and Concord in Massachusetts, occurred because British General Thomas Gage ordered a detachment of troops to march to Concord and seize a reserve of gunpowder and cannon said to be in the town. *See* Thomas Fleming, *Liberty: The American Revolution* 105-06 (1997). Three days after "the shot heard 'round the world," General Gage tricked the people of Boston into turning in their arms, an "open violation of honour" that was complained about in the *Declaration of the Causes and Necessity of Taking Up Arms* approved by the Second Continental Congress on July 6, 1775. *See* Stephen P. Halbrook, "The Original Understanding of the Second Amendment," *in The Bill of Rights: Original Meaning and Current Understanding*, at 118-120 (Eugene Hickock, Jr. ed., 1991); *Declaration of the Causes and Necessity of Taking Up Arms* (July 6, 1775), *reprinted in Documentary Source Book of American History: 1606-1913*, at 181 (William MacDonald ed., 1923).

Representative Elbridge Gerry referenced these events in the Congressional debate concerning the Second Amendment when he noted,

> Whenever government mean[s] to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward.

E. Gerry, Discussion on draft of the Second Amendment, *Congressional Register* (August 17, 1789) *as reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins (CBR)*, at 186 (Neil H. Cogan ed., 1997).

The colonies' first-hand hand experiences with British forces in the course of the Revolutionary War undoubtedly prompted the inclusion of arms provisions in their new state constitutions. Some of these provisions, such as the one in the Virginia Declaration of Rights of 1776, emphasized the role of the militia in protecting freedom: "[A] well regulated militia composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free state; . . . ." Virginia Declaration of Rights, Art. XIII (1776). Others, such as Pennsylvania's provision, focused more on the use of arms generally: "[T]he people have a right to bear arms for the defense of themselves and the state; . . ." Pennsylvania Declaration of Rights, Art. XIII (1776). Pennsylvania was the first state to use the phrase "right to bear arms," and at the time it did not even have a state militia. *See* Levy, at 135. The Massachusetts Constitution of 1780 was the first state constitution to employ the conjunctive phrase "to keep and bear arms," combining the individual and communal aspects of the right: "The people have a right to keep and to bear arms for the common defence." Mass. Const. Part I, Art. XVII (1780).

C. The right to keep and bear arms in the debate on the Constitution

During the debate over the ratification of the Constitution, a common charge from those who came against the proposed new government was that it would dominate the state governments through the force of its power and be capable of tyrannizing the people. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 648 (1989) (explaining that during the founding era there existed "a well-justified concern about political corruption and consequent government tyranny"). James Madison attempted to assuage these fears in *Federalist No. 46* by listing several reasons the people needed to feel no fear concerning the federal government. Among those reasons, he noted that

> [b]esides *the advantage of being armed, which the Americans possess over the people of almost every other nation*, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

The Federalist No. 46 (James Madison), at 247 (Carey & McClellan eds., 2001) (emphasis added).

Noah Webster similarly tried to allay these fears of federal power in a pro-Constitution pamphlet by matter-of-factly stating: "The supreme power in

America cannot enforce unjust laws by the sword; *because the whole body of the people are armed*, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." N. Webster, "An Examination of the Leading Principles of the Federal Constitution," (1787) *reprinted in* 1 *The Debate on the Constitution*, at 155 (Bernard Bailyn ed., 1993) (emphasis added).

While these assurances rested on the incontestable point that most American citizens owned personal firearms, this fact and the implication of self-defense which flowed from it were not enough to convince the Constitution's critics. One such critic, writing under the pen name "Common Sense," complained that "the chief power will be in Congress, and that what is to be left of our government is plain, because a citizen may be deprived of the privilege of keeping arms for his own defence, he may have his property taken without a trial by jury." "Common Sense," *New York Daily Advertiser* (April 21, 1788). The deprivation of arms was unacceptable because, as stalwart Anti-Federalist Richard Henry Lee intoned in one of his "Federal Farmer" letters, [T]to preserve liberty, it is essential that the whole body of the people always possess arms, ..." Richard Henry Lee, Letter XVIII (January 25, 1788), *in An Additional Number of Letters From the Federal Farmer to The Republican* 170 (1788).

These Anti-Federalist sentiments were echoed in the state ratifying conventions by those who opposed the Constitution. George Mason was the father of the Virginia Bill of Rights and a Constitutional Convention delegate who refused to sign the final document in part because of its lack of a Bill of Rights. In the Virginia Ratifying Convention, he expressed his belief that "divine providence has given to every individual the means of self-defense" and that "disarm[ing] the people [is] the best and most effectual way to enslave them." G. Mason, Virginia Ratifying Convention (June 14, 1788), *as reprinted in CBR*, at 193-94. Given the importance of this right, he wondered aloud, "Why should we not provide against the danger . . . ?" *Id.* Vocal critic of the Constitution Patrick Henry agreed with Mason, rehearsing what the point would be of having an amendment on the topic: "The great object is that every man be armed. . . . Everyone who is able may have a gun . . . ." P. Henry, Virginia Ratifying Convention (June 14, 1788), *as reprinted in CBR*, at 198.

Anti-Federalist concerns found their official expression in the proposals for additions to the Constitution made by the ratifying conventions. Five of the eight states whose convention majority or minority submitted proposals related to arms included the statement that "the people have a right to keep and bear arms," and all five separated the statement from any mention of the militia. *See CBR*, at 181-82. Extending the language of their state constitution, the Pennsylvania minority's proposal left out the word "keep" but otherwise constituted the most broadly worded proposal:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for *the purpose of killing game*; and *no law shall be passed for disarming the people* or any of them, unless for crimes committed, or real danger of public injury from individuals; . . .

The Pennsylvania Minority of the Pennsylvania Ratification Convention (Dec. 12, 1787), *reprinted in CBR*, at 182 (emphasis added).

The New Hampshire majority and the Maryland minority proposals did not include any variation of this, by then common, phraseology. However, the New Hampshire provision's wording even more dramatically emphasized the individual nature of the right, stating that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."[4] New Hampshire State Ratification Convention Proposal (June 21, 1788), *reprinted in CBR*, at 181.

D. James Madison and the right to keep and bear arms

This background of English and Revolutionary War history, state constitutional provisions, Anti-Federalist angst, and suggestions from state ratifying conventions shaped both James Madison's proposal for an arms-bearing provision in the Constitution and the debate which produced the final wording of the Second Amendment. Madison hoped that his proposals would "render [the Constitution] as acceptable to the whole of the people of the United States, as it has been found acceptable to a majority of them," so he was well aware of the document's perceived shortcomings. J. Madison, Speech on the floor of the House of Representatives regarding Amendments to the Constitution (June 8, 1789), *reprinted in* 5 *The Founders' Constitution*, at 24. He wished "to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they so valiantly fought and honorably bled." *Id.* Alleviating these apprehensions goes to the heart of the Second Amendment's purpose: preserving the right of self-defense against the perceived dangers created by the newly-formed federal government.

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[4] The Maryland ratification minority's provision concerned conscientious objectors. *See CBR*, at 181.

Madison's arms-bearing proposal provided: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." *Id.* Several points about the proposal warrant notice.

First, following the lead of many of the state ratifying conventions, Madison placed "the right of the people to keep and bear arms" at the beginning of the proposed amendment, indicating that he thought this was the main subject of the proposal.

Second, Madison wanted to insert this amendment—as well as his versions of what became the First, Third, Fourth, Fifth, Sixth, and Eighth amendments—"in article I, Section 9, between clauses 3 and 4" of the Constitution, that is, immediately after the guarantee of the writ of habeas corpus and the prohibitions on bills of attainder and *ex post facto* laws. *Id.* at 25. These represent the few individual rights provisions in the body of the Constitution. Madison believed that his arms-bearing proposal was similar enough in kind to these individual rights provisions to propose listing it with them.

Third, in the course of the drafting of the amendment, Congress dropped the portion of the proposal related to exempting those "religiously scrupulous of bearing arms." The legislative history indicates that this was done because some congressmen believed such exemptions should be carried out through ordinary legislation rather than in the Constitution. *See Daily Advertiser* (August 18, 1789), *reprinted in CBR*, at 171. However, at least one member of the House of Representatives, New Jersey's Elias Boudinot, expressed the opinion that leaving the religious scruples clause out made it possible to read the amendment as having "an intention in the General Government to compel all citizens to bear arms." Debate in the House of Representatives, Amendments to the Constitution (August 20, 1789), *reprinted in Founders' Constitution*, at 211. Thus, far from there being a doubt about the *right* to bear arms, there was a fear that individuals would be *compelled* to bear arms by the amendment.

Initial public reaction to Madison's proposals, which were reprinted in newspapers throughout the nation, was sparse but positive. Staunch Federalist Tench Coxe, writing a missive in favor of the proposals a mere ten days after they were proposed, explained what he perceived to be the purpose behind the arms-bearing provision:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article in *their right to keep and bear their private arms.*

Tench Coxe, "Remarks on the First Part of the Amendments to the Federal Constitution," *Philadelphia Federal Gazette*, June 18, 1789, at 2, *quoted in* Halbrook, at 126 (emphasis added). Coxe noted the familiar fear of tyrannical government and cited the amendment's "confirmation" of an individual right to bear "private arms" as the remedy to the possible perversion of power. Coxe's "Remarks" were reprinted in other papers[5] and no contemporary took up a pen to refute his interpretation.

III. THE TEXT OF THE SECOND AMENDMENT RECOGNIZES AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

While the final wording of the amendment differed from Madison's proposal, the meaning Coxe gleaned from Madison's version remained unchanged through the drafting process. The focus remained squarely on checking government power via a personal right to keep and bear arms.

In its final form, the Second Amendment would be listed separate from the Constitution in the collection of amendments known as "the Bill of Rights." The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II. The *Statutes at Large* version of the amendment leaves out the first and last commas, *see* 1 *The Public Statutes at Large of the*

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[5] *New York Packet*, June 23, 1789, at 2; *Boston Massachusetts Centinel*, July 4, 1789, at 1.

United States of America 97 (R. Peters ed., 1848), *as reprinted in CBR* at 181, indicating that the second comma was grammatically necessary to set off the two major parts of the amendment, while the other commas represented grammatical quirks of the time.

Reading the amendment sans its superfluous commas—"[a] well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed"—more cleanly illustrates a second, weightier point of grammar. The clause containing the militia language is a dependent clause, while the arms-bearing language is located in the independent clause—as it was in Madison's proposed, but differently ordered, version. This means that the arms-bearing language can stand on its own as a sentence, but the "well regulated militia" language only forms a complete thought if coupled with the main focus of the compound sentence—the "right to keep and bear arms."

The sentence structure confirms what the history behind the amendment indicates:

> The plain language of the amendment, without attenuate inferences therefrom, shows that the function of the subordinate clause was not to qualify the right, but instead *to show why it must be protected. The right exists independent of the existence of the militia.* If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized.

United States v. Emerson, 46 F. Supp.2d 598, 600 (N.D. Tex. 1999) (emphasis added).[6]

A. The "militia" clause

The words chosen by Congress for the final draft of the amendment fortify the conclusion that the Second Amendment countenances an individual, rather than collective, right to possess and use firearms. As it was understood at the time of the amendment's drafting and adoption, the term "militia" "was understood to be every individual citizen rather than just the army or the organized military." David Barton, *The Second Amendment: Preserving the Inalienable Right of Individual Self-Protection* 32 (2000).

> Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but two hundred years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called a 'select corps' or 'select militia'—and viewed in many quarters as little better than a standing army.

Akhil Reed Amar, *The Bill of Rights* 51 (1998). Simply put, the "militia" was "the people."[7] Indeed, one of the first modifications made to Madison's proposed amendment changed the pertinent part of this text to: "A well regulated militia, *composed of the body of the People*, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, ..." House Consideration (August 17, 1789), *reprinted in CBR*, at 170 (emphasis added). This language was later eliminated, no doubt because it was viewed to be redundant.

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[6] *See also*, Levy, *Origins*, at 135:

> The very language of the amendment is evidence that the right is a personal one, for it is not subordinated to the militia clause. Rather the right is an independent one, altogether separate from the maintenance of a militia. Militias were possible only because the people were armed and possessed the right to be armed. The right does not depend on whether militias exist.

[7] The modifier "well regulated" in front of "militia" does not change this idea of the militia into that of a military body. State constitutions such as those of Delaware and Virginia employed

Moreover, certain clauses in the body of the Constitution obviate against reading the amendment as recognizing a right to bear arms only for a militia body like the National Guard. Article I, section 8, clause 16 of the Constitution states that Congress has the power to provide for "organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the service of the United States, ..." Why would Congress and the states which ratified the Constitution worry about protecting the right of the organized militia to be armed when clause 16 already provided for it?

Even more troublesome for this reading is the immediately preceding clause, which gives Congress the power to "call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const., Art. I, § 8, cl. 15. As the Anti-Federalist complaints about the Constitution and Federalist responses to them indicate, the Second

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this same phrase "a well regulated militia" in their arms-bearing provisions, and they had no bodies equivalent to a semi-professional corps like the National Guard. *See* Virginia Declaration of Rights, Art. XIII (1776), Delaware Declaration of Rights, § 18 (1776).

Amendment was designed to dispel the fear that this clause would allow Congress to disarm the citizenry and abuse their rights. If the Second Amendment merely protected the right of the organized militia to possess arms, then it protected nothing since Congress could constitutionally commandeer that militia to do its bidding under clause 15. It is no exaggeration to say that the collectivist reading causes the Second Amendment to mean exactly the opposite of its historical purpose.[8]

To put the focus of the Second Amendment on militias rather than the right to bear arms is to read its preamble as its point. Writing a century after the amendment's adoption in his widely read general treatise on constitutional law, Judge Thomas Cooley clarified that point:

> It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia: but this would be an interpretation not warranted by the intent. . . . [I]f the right were limited to those enrolled [in the militia], the purpose of this guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have

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[8] "If all it meant was the right to be a solider or serve in the military, whether in the militia or the army, it would hardly be a cherished right and would never have reached constitutional status in the Bill of Rights." Levy, *supra* note 6, at 134-35.

> a well-regulated militia; for to bear arms implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; . . . .

T.M. Cooley, *General Principles of Constitutional Law* 282 (Weisman pub. 1998) (1891).[9] Simply put, the preamble provided a reason for the personal right to bear arms, but it did not limit or control that right. The preamble sets up what follows, but the right itself stands alone.

Even if maintenance of some kind of militia force was the primary reason for ensuring that the people were armed, the purpose of the militia was to defend "the people" against government tyranny via a standing army. Thus, the *purpose* of the amendment is ensuring that the people could not be disarmed by the government, not preservation of the militia; the militia is a means while an armed citizenry is the end.[10] In other words, a distinction must be made between motive and purpose. One *motive* behind the amendment was to ensure continuation of the citizen militia. The *purpose* of the amendment was recognition of a personal right to bear arms.

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[9] Cooley's reading was not a new one for constitutional law scholars. Sixty years earlier, Federalist William Rawle wrote in his *A View of the Constitution of the United States* that

> [T]he militia form the palladium of the country. They are ready to repel invasion, suppress insurrection, and preserve the good order and peace of government. . . . The *corollary*, from the first position, is that *the right of the people to keep and bear arms shall not be infringed.* The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people.

William Rawle, *A View of the Constitution of the United States* 125-26 (1829) (first emphasis added).

B. "[T]he people" to whom the right belongs

According to its text, the central focus of the Second Amendment—"the right" which "shall not be infringed"—belongs to "the people," not to the states. "[T]he people" is a term of art also employed in the First, Fourth, Ninth, and Tenth Amendments. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The text of the Tenth Amendment[11] plainly shows that "the people" and "the states" are not one and the same; "when the Constitution means 'states' it says so." Amar, *The Bill of Rights*, at 51. "[A]s used throughout the Constitution, 'the people' have 'rights' and 'powers,' but federal and state governments only have 'powers' or 'authority', never 'rights.'" *Emerson*, 270 F.3d at 228. This Court has never held that the use of the term "the people" in other amendments renders the rights protected in those amendments collective rights rather than individual ones. It is illogical to hold otherwise for the Second Amendment when nothing in its language dictates such a drastic difference from the rest of the Bill of Rights.

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[10] As President George Washington remarked to Congress, "A free people ought . . . to be armed." G. Washington, First Annual Meeting Message to Congress (January 8, 1790).

[11] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to *the states* respectively, or to *the people*." U.S. Const. amend. X (emphasis added).

The right belongs to "the people" not because it is a collective right ensuring the proper equipping of organized militias, but rather because it is a right held by the people *vis-à-vis* the government. The founding generation felt that individual arms ownership deterred government usurpation of the people's rights. As Justice Story put it in his *Commentaries* in 1833:

> The *right of the citizens* to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Story, *Commentaries,* at § 1890 (emphasis added).

C. "[T]o keep and bear arms"

Further evidence supporting the view that the Second Amendment protects an individual right to gun ownership is found in the language "to keep and bear arms." Petitioners cling to this language, claiming that it was used exclusively in the military context during the founding era.[12] *See* Petitioner's Brief, at 16. This would be a compelling argument if it was true, but it is easily refuted both by the language of amendment and several ready examples from the time of its framing.

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[12] *See* Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* 35 (2002); Garry Wills, *Why We Have No Right To Keep and Bear Arms, The New York Review of Books,* at 62 (Sept. 21, 1995).

To begin with, the amendment does not just say "the right . . . to bear arms"; it says "the right . . . *to keep* and bear arms." (Emphasis added). Keeping arms has a distinctly individualistic denotation. This is most readily seen in the Massachusetts' minority's proposed amendment on this subject, which provided in pertinent part: "[T]hat the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from *keeping their own arms.*" Massachusetts Minority of the Massachusetts Ratifying Convention, February 6, 1788 *reprinted in CBR*, at 181 (emphasis added). "[T]o keep . . . arms" is used in the ordinary sense of possession or ownership of arms.

Similarly, to "bear arms" has the plain meaning of "carrying" weapons for use. Noah Webster's 1828 *American Dictionary of the English Language* lists 20 definitions of "bear," the second of which is "to carry," while none of the rest give a military use for the term.[13] *See* N. Webster, *American Dictionary of the English Language*, available at http://1828.mshaffer.com/ (last visited February 7, 2008).

State ratifying convention proposals on this subject employed the phrase "to bear arms" in non-military contexts as well. For example, the aforementioned

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[13] The definition closest to Petitioners' meaning is Webster's third definition: "To wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat." Yet, bearing a weapon as a sign of rank is hardly the same thing as bearing a weapon as a soldier in battle.

Pennsylvania minority's proposal[14] provided, in pertinent part: "That the people have a right *to bear arms for the defense of themselves* and their own state, or the United States, or for *the purpose of killing game*; . . . ." The Pennsylvania Minority of the Pennsylvania Ratification Convention (Dec. 12, 1787), *in CBR*, at 182.[15] Moreover, the right-to-arms proposals made by New York, North Carolina, Virginia, and Rhode Island did not expressly limit the right to "the common defense" or "the defense of the state."[16] *See CBR*, at 181-82.

There is even direct evidence that Madison was familiar with bearing arms language being used in non-military contexts. Madison presented "A Bill for the Preservation of Deer" on behalf of Thomas Jefferson in the Virginia legislature in 1785. The bill prohibited the hunting of deer under certain circumstances, and concluded by commanding:

> . . . and if, within twelve months after the date of the recognizance he shall *bear a gun out of his*

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[14] *See* discussion *supra* pp. 13-14.

[15] It was not just a minority of Pennsylvanians who understood the phrase this way, as the Pennsylvania Constitutions of both 1776 and 1790 used it in the same manner. *See CBR*, at 184: Pennsylvania Declaration of Rights, Art. XIII (1776) ("That the people have a right *to bear arms for the defense of themselves* and the state; . . . ."); Pennsylvania Constitution, Art. IX, § 21 (1790) ("That the right of citizens *to bear arms, in defense of themselves* and the state, shall not be questioned."). The Vermont Constitution of 1777 contained language identical to that found in the Pennsylvania Constitution of 1776. *See* Vt. Const., ch. I, art. XV.

[16] The Massachusetts Constitution did qualify the right in this way. *See* Massachusetts Const., Part I, Art. XVII (1780).

> *inclosed ground, unless whilst performing military duty*, it shall be deemed a breach of the recognizance, and be good cause to bind him a new, and every such *bearing of a gun* shall be a breach of the new recognizance and cause him to be bound again.

Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?* 83 Tex. L. Rev. 237, 244 (2004), *quoting* 2 *The Papers of Thomas Jefferson* 443, 444 (Julian P. Boyd ed. 1950) (emphasis added).

The bill employs the more specific phrase "bear a gun," but this only heightens the fact that it is explicitly used in a non-military sense. "Bear[ing] arms" broadens the types of weapons covered; it does not change the context of the uses for such weapons. Especially when one considers the other language in the amendment, the conclusion is inescapable that the phrase "to keep and bear arms" carried a non-military meaning in the Second Amendment at the time of its adoption.

D. The text and reasonable restrictions

Despite, or perhaps because of, the overwhelming evidence that a textual reading of the Second Amendment guarantees an individual right to possess and use firearms, Petitioners contend that, if the Second Amendment applies in this case, the code provisions at issue are "reasonable regulations of guns." *See* Petitioners' Brief, at 42.

However, as the court below acknowledged, the issue in this case is not about "reasonable restrictions." *Parker*, 478 F.3d at 399. The Second

Amendment explicitly states that the right to keep and bear arms "shall not be infringed." There may be some laws regulating arms that may be passed without "infring[ing]" on the right to keep and bear arms.[17] But the Court need not concern itself with what is a reasonable or unreasonable regulation in this case. The provisions at issue are not mere "regulations," but an outright ban on personal firearms in the District of Columbia. If *anything* qualifies as an infringement on the right to keep and bear arms, these gun laws must fall into that category because they prevent virtually any exercise of the individual "right of the people" protected by the Second Amendment.

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[17] As the court below observed, "Indeed, the right to keep and bear arms—which we have explained pre-existed, and therefore was preserved by, the Second Amendment—was subject to restrictions at common law." *Parker*, 478 F.3d at 399.

CONCLUSION

For the reasons stated, this Honorable Court should affirm the decision of the District of Columbia Court of Appeals and invalidate the D.C. code provisions at issue as blatant violations of the Second Amendment.

Respectfully submitted,

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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF
THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit**

◆

BRIEF FOR GEORGIACARRY.ORG, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

◆

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment right of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

GeorgiaCarry.Org, Inc. submits this *amicus curiae* brief in support of Respondents. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

GeorgiaCarry.Org, Inc. is a non-profit corporation organized under the laws of the state of Georgia. It is dedicated to preserving and protecting the rights of its members to keep and bear arms.

◆

SUMMARY OF ARGUMENT

The Petitioners recite a selective portion of the history of gun control laws in the District of Columbia, but omit portions of that history which demonstrate that the Petitioners' laws are deeply rooted in a racist attempt to keep arms out of the hands of the politically and economically disadvantaged. This brief will explore the racist history of gun control in the District of Columbia and throughout the country. It also will show how the principles of black oppression via gun control laws of yesterday are used to oppress the politically weak today via those same, and additional, laws.

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[1] All parties filed blanket consents for briefs *amici curiae* to be filed. GeorgiaCarry.Org, Inc. provided at least ten days' notice to all parties of its intention to file an *amicus curiae* brief. GeorgiaCarry.Org, Inc. represents that no counsel for any party authored this brief in whole or in part, and no person or entity, other than GeorgiaCarry.Org, Inc., its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

◆

ARGUMENT

I. Gun Control in the District of Columbia

Gun control in colonial America was virtually unheard of, with the exception of laws that required people to be armed, such as Georgia's 1770 law requiring all males between the ages of 16 and 60 to bear a gun or two pistols while attending church, under the penalty of a fine for failing to be armed. Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," *82 Michigan Law Review* (1983), pp. 216-217.

The unfettered right to keep and bear arms was so commonly accepted that the Founders undoubtedly would find the instant case puzzling indeed. There was, however, a common exception:

> No negro or other slave within this province shall be permitted to carry any gun or any other offensive weapon from off their master's land, without license from their said master, and if any negro or other slave shall presume to do so, he shall be liable to be carried before a Justice of the Peace and be whipped, and his gun or other offensive weapon shall be forfeited to him that shall seize the same. . . .

Laws of Maryland, 1715; Ch. 44, Sect. 32. This provision of Maryland law was incorporated into the law of the District of Columbia:

> The laws of the State of Maryland, as they now exist, shall be and continue in force, in that part of the said District [of Columbia], which was ceded by that State to the United States, and by them accepted, for the permanent seat of government of the United States.

Laws of the United States, 1801, Feb. 27; Sect. 1.

The former DC ban against "negro or slave" gun possession was not enforceable after adoption of the Thirteenth and Fourteenth Amendments. President Andrew Johnson reacted to the ensuing formation of independent black militias in the District of Columbia by ordering General (later President) Grant to disband them, in November 1867. Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Praeger, 1998), p. 76.

The president's authority to issue this order was hotly debated. The District's military commander told Grant it would be illegal to follow the president's order, absent the existence of martial law. Halbrook, p. 77. The *New York Tribune* opined that the disbanding of the black militias and seizing of arms:

> . . . would be one of the most flagrant and despotic [acts of] usurpation. . . . Even Congress itself has no authority to infringe upon 'the right of the people to keep and bear

> arms. . . .' [N]or can it without a violation of the Constitution, take away any man's musket while he 'keeps it' and 'bears it' for lawful purposes.

"The Militia Disbandment," *New York Tribune,* Nov. 13, 1867, p. 4. *The* (Baltimore) *Sun* added, "Under no construction of the order has it ever been contemplated to interfere with the rights of citizens to possess arms as individuals." "Letter from Washington," *The Sun*, Nov. 9, 1867.

The District's *Daily Chronicle* said:

> [I]n the Constitution of the United States, the right to bear arms is expressly reserved. . . . If the President may order their disbandment, he may also disperse a religious society or a debating club. If he can take away the arms of a citizen, why may he not also take away his clothes or his Bible.

"Volunteer Military Organizations," *Daily Chronicle*, Nov. 12, 1867, p. 2.

The militias stopped their public parades, but they did not disband. They threatened court action, but no outcome of such action is known. Because this event took place just before Johnson's impeachment trial, it soon became overshadowed.

Congressional race-neutral prohibitions in the District began in 1892 when it was made unlawful to have weapons "concealed about their person" outside one's home or place of business, without a license. Act. of July 13, 1892, ch. 159, 27 Stat. 116. In 1943, in the height of World War II, Congress made it a crime to carry a firearm either openly or concealed outside one's home or place of business without a license. Act of Nov. 4, 1943, ch. 296, 57 Stat. 586. Finally, after Congress gave the District home rule in the 1970s, the present-day bans were enacted. Brief of Petitioners, p. 4.

As will be elucidated in the remainder of this brief regarding gun control laws outside of DC, the advent and evolution of facially race neutral laws does not reflect the true practice and effect of those laws. The potential for future orders of disbandment or similar oppression of particular groups through ostensibly neutral laws is very much alive today.

II. Gun Control in the United States

The history of gun control in the District of Columbia closely parallels the experience of the several states, particularly (though not peculiarly), the southern states. Gun control was used as a tool to subjugate blacks.

> [T]he simple truth-born of experience is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process. In the North, by contrast, blacks exercised

> their right to bear arms to defend against racial mob violence. Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist.

Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinzki, J., dissenting from denial of rehearing en banc) (citations omitted).

The history of gun control can be summarized as consisting of four time periods: 1) pre-Civil War bans either non-existent or applying only to slaves or free blacks, accompanied by widely-held beliefs (and appellate court opinions) that all (white) people had the unrestricted right to keep and bear arms; 2) immediate antebellum and early Reconstruction-era civil unrest associated with armed, black self-defense incidents, and court opinions reversing earlier expansive views on the right to keep and bear arms; 3) late Reconstruction/Industrial Age legislation that was facially race-neutral, ostensibly restricting gun rights for the first time for the population generally, but with those restrictions commonly applied only to black citizens; and 4) mid-20th Century expansion of application of gun control laws to all citizens, accompanied by stricter laws generally.

A. Pre-Civil War Gun Control

To Americans in the late British colonial period and in the early republic, the right to bear arms differentiated free men and slaves. James Burg, Political Disquisitions ("The possession of arms is the distinction between a freeman and a slave. He . . . who himself belongs to another, must be defended by him, whose property he is, and needs no arms.") Consistent with this thought, early American gun control was an overtly and unapologetically racist regime. Colonial Virginia barred free blacks from owning firearms. 7 Statutes at Large; Being a Collection of all the Laws of Virginia, from the First Session of the Legislature, in the Year 1619, p. 95. South Carolina had a similar ban. 7 Statutes at Large of South Carolina, p. 353-54 (1712). In 1751, Louisiana colonists were to stop and beat "any black carrying any potential weapon," and to shoot to kill a black on horseback that refused a command to stop. Thomas N. Ingersoll, "Free Blacks in a Slave Society: New Orleans, 1718-1812," William and Mary Quarterly, 48:2 [April, 1991], 178-79. Louisiana later prohibited slave use of firearms altogether. Black Code, Ch. 33, Sec. 19, Laws of La. 150, 160 (1806).

Maryland and Mississippi restricted the rights of free blacks to own dogs, for fear they could be trained as weapons. Theodore Brantner Wilson, *The Black Codes of the South* (University of Alabama Press: 1965), 26-30.

On the Kentucky frontier, the practical necessity of pervasive firearms use resulted in slaves and free blacks being permitted to carry guns, but they had to have a permit to do so (unlike whites, who needed no permit). Juliet E.K. Walker, *Free Frank: A Black*

Pioneer on the Antebellum Frontier (University Press of Kentucky: 1983), p. 21.

Florida law authorized white patrols to "enter into all negro houses . . . and search for arms . . . any may lawfully seize and take away all such arms . . . " unless the owner had a license, which had to be issued weekly. 1825 Acts of Fla. 52, 55. Florida later repealed the possibility for free blacks to obtain licenses. Act of 1831 Fla. Laws 30.

Occasional outbreaks of racial violence fostered widespread fear of armed blacks, both slave and free. In 1739, 80 slaves from Stono, South Carolina rebelled and killed 25 whites before they were put down by the militia. Donald Grant, *The Way It Was in the South – The Black Experience in Georgia* (University of Georgia Press, 2001), p. 8. More famously, in 1831, Nat Turner and a band of slaves and freedmen rebelled in Southampton County, Virginia, resulting in the deaths of dozens of white people (varying accounts list the number of deaths between 50 and 60). Virginia's response to the resulting hysteria was to prohibit free blacks to "keep or carry any firelock of any kind, any military weapon, or any powder or lead." Stanley Elkins, *Slavery* (Chicago, University of Chicago Press: 1968), 220. Virginia was not alone, however, as several other states enacted similar regulations affecting the right to bear arms in the next few years following Nat Turner's rebellion.

Georgia passed its first gun ban in 1833, presumably also in response to Nat Turner's rebellion, with "it shall not be lawful for any free person of colour in this state to own, use, or carry fire arms of any description whatever." 1833 Ga. Laws 226.

In 1834, Tennessee changed its constitution to achieve a similar result. Article XI, Section 26 of the 1796 Constitution said, "That the freemen of this State have a right to keep and bear arms for their common defence." Tennessee changed that provision to state "That the free ***white*** men of this State have a right to keep and bear arms for their common defence." [Emphasis added]. It is interesting to note that this "common defence" language was at the root of the *Aymette v. Tennessee* case cited by this Court in its decision in *U.S. v. Miller,* 307 U.S. 174 (1939). Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America* (Washington, Government Printing Office: 1909), reprinted (Grosse Pointe, Mich., Scholarly Press: n.d.), 6:3428.

Mississippi's pre-war constitution guaranteed a right to bear arms to "every citizen." Mississippi Constitution of 1817, Art. I, § 23. This provision did not apply to slaves, as slaves were not citizens.

Florida likewise passed a law making it "unlawful for any Negro, mulatto, or person of color to own, use, or keep in possession or under control any bowie-knife, dirk, sword, firearms or ammunition of any kind, unless by license of the county judge." The penalty for violators was an hour in the pillory or 39 stripes. W.E.B. DuBois, *Black Reconstruction in America* (1962).

At about the same time, various state supreme courts were declaring expansive rights to keep and bear arms, and later finding the rights not as expansive when blacks were involved. The Supreme Court of North Carolina declared, in 1843, that the state constitution guaranteed an individual right to carry arms. *State v. Huntly,* 3 Iredell 418, 422-423 (N.C. 1843). The next year the same court reviewed the conviction of a black man for violating a North Carolina law that provided:

> That if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger, or bowie-knife [without a license] . . . he or she shall be guilty of a misdemeanor. . . .

In upholding Elijah Newsom's (a "free person of color") conviction, the court said:

> We cannot see that the act . . . is in conflict [with the state constitution]. . . . Its only object is to preserve the peace and safety of the community from being disturbed by an indiscriminate use, on ordinary occasions, by free men of color, of fire arms or other arms of an offensive character. ***Self preservation is the first law of nations, as it is of individuals.***

[Emphasis supplied]. *State v. Newsom*, 5 Iredell 181, 27 N.C. 250 (1844). The thought embodied in the emphasized language would become the rationalization for the widespread application of gun control laws more than a century later.

The Supreme Court of Georgia had a similar reversal of opinions at about the same time. In colorful prose, the court declared a widespread, time-tested, absolute right to keep and bear arms:

> The right of the whole people, old and young, men, women, and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all of this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right, originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta! And Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans, plead eloquently for this interpretation!

Nunn v. Georgia, 1 Ga. 243, 250 (1846). Just two years later, the same court limited this right to white citizens only, holding that "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." *Cooper and Worsham v. Savannah,* 4 Ga. 68, 72 (1848). This case later would be the basis for ejecting Reconstruction-era black legislators from the state's General Assembly, an event that sparked heavy gun control legislation in Georgia that persists to this day.

The viewpoint of the Supreme Court of Georgia in *Cooper and Worsham* was by no means limited to state courts. This Court adopted the same line of reasoning in the infamous *Dred Scott* decision. Chief Justice Taney, stated that the right to bear arms (which he called "carrying" them) applied to citizens in the territories, and opined that recognizing blacks as citizens would:

> give to persons of the negro race . . . the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation . . . and to keep and carry arms wherever they went.

Scott v. Sandford, 60 U.S. 393, 417 (1856).

In sum, pre-Civil War America recognized the constitutional right of white citizens to keep and bear arms without restriction or limitation but asserted that free blacks and slaves had no right to keep and bear arms or exercise other constitutional rights. No less today, subjects of any sovereign (slave owner or government) who must depend on the charity of their master for the protection of their life, are not really free. At the very essence of life, be it in the jungle or the urban city, is the right to defend it or choose for whom it will be sacrificed.

B. Reconstruction Era Gun Control

As a condition of re-entry to the Union, Congress required all confederate states but Tennessee to modify their constitutions to comport with the United States Constitution, including the Fourteenth Amendment. 14 Stat. 428 (1867). Until such modifications were accomplished, the states were not entitled to congressional representation, were subject to military rule, and their local governments were deemed "provisional" and subject to abolition by the federal government. *Id.* Against this backdrop, the confederate states held constitutional conventions.

At a Maryland constitutional convention in 1867 (after Maryland had rejected adoption of the Fourteenth Amendment), there was a proposal to insert a right to keep and bear arms for "every citizen." The delegates debated whether "white" should be inserted before "citizen," but the popular opinion was that such an inclusion would be redundant. Ultimately, the measure failed altogether out of fear that the guarantee would allow blacks, drunks, or both, to carry arms. Perlman, *Debates of the Maryland Convention of 1867*, pp. 79, 151.

Mississippi adopted a provision at its constitutional convention of 1868 guaranteeing that "All persons shall have a right to keep and bear arms for their defense," [Mississippi Constitution, Art. I, § 15 (1868)] thus invalidating the racially-based prohibition passed after the war, "that no freedman, free negro or mulatto, . . . not licensed to do so by the board of police of his or her county, shall keep or carry firearms of any kind." Laws of Mississippi 165 (1865).

North Carolina and Georgia adopted provisions at their conventions that closely mirrored the Second Amendment, apparently believing this necessary for readmission to the Union. N.C. Constitution of 1868, Art. I, § 24; Ga. Constitution of 1868, Art. I, § 14.

Interestingly, one expressed reason for adopting the Fourteenth Amendment to the United States Constitution was the penchant of the southern states for violating the right to keep and bear arms of the newly freed slaves. In debate, Rep. George W. Julian complained that the southern states were ignoring the Civil Rights Act of 1866. "Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact." Cong. Globe, 39th Cong., 1st Sess., 2765, 3210 (1866).

The draftsman of Section 1 of the Fourteenth Amendment, Rep. John Bingham, later commented that one of the reasons for the adoption of the Fourteenth Amendment was to make the Second Amendment enforceable against the States [Cong. Globe, 42nd Cong., 1st Sess. 337 (1871)] (under the privileges and immunities clause, rather than the due process clause).

Not long after adoption of the Fourteenth Amendment, Congress took up the matter of enforcement legislation, including the "Anti-KKK Bill." Passed as the Enforcement Act, 17 Stat. 13, portions of it survive to this day in 42 U.S.C. § 1983.

A report by Rep. Benjamin F. Butler (R-MA) on violence in the South provided much of the genesis for the Anti-KKK Bill. Among other incidents, Rep. Butler's report cited instances of armed "confederates" terrorizing blacks, and "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to keep and bear arms, which the Constitution expressly says shall never be infringed." H.R. Rep. No. 37, 41st Cong., 3rd Sess. 3 (1871). An express provision making it a crime to disarm blacks was dropped from the proposed legislation, much to the dismay of Sen. John Sherman (R-OH), who said, "Wherever the negro population preponderates, there [the KKK] hold their sway, for a few determined men . . . can carry terror among ignorant negros . . . without arms. . . ." Cong. Globe, 42nd Cong., 1st Sess. 154 (1871).

Opponents of what is now 42 U.S.C. § 1983 were concerned that it could be used as a legal weapon to redress confiscation of black-owned guns. Rep. Washington C. Whitthorne (D-TN) summarized the fear as, "[I]f a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol . . . and by virtue of any ordinance, law, or usage, either of the city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution. . . ." Cong. Globe, 42nd Cong., 1st Sess. 337 (1871). *Thus, congressmen on both sides of the aisle recognized and firmly believed that 1) the Second Amendment guarantees an individual right that cannot be infringed; 2) the Fourteenth Amendment applied the Second Amendment to the states; and 3) the Civil Rights Act creates a private right of action for citizens having weapons seized or their Second Amendment rights otherwise infringed.*

With the adoption of the Civil War Amendments, particularly the Fourteenth Amendment, and coupled with the southern state constitutional changes, racially discriminatory laws were subject to serious constitutional challenge. In response, states began passing race-neutral gun control laws, but enforcing them only against blacks. This selective and obviously racist enforcement was widely upheld in state appellate courts.

On September 3, 1868, the Georgia legislature expelled its black members on the grounds that they were ineligible to hold office under the state constitution (notwithstanding the ratification of the Fourteenth Amendment a mere two months earlier). Ed Jackson and Charly Pou, "This Day in Georgia History," Carl Vinson Institute of Government, the University of Georgia, http://www.cviog.uga.edu/Projects/gainfo/tdgh-sep/sep03.htm.

Two weeks later, several hundred black and Republican protestors marched from Albany to Camilla, Georgia, many of them armed. *Atlanta Constitution,* "Difficulty with Negroes in Mitchell County," Sept. 22, 1868, p. 1. As the marchers arrived at the Mitchell County Courthouse, they were ambushed by a posse of whites organized by the Mitchell County sheriff. The protestors were routed, but the posse later was heard to complain that the marchers could have been annihilated if they had not been armed. Still, over a dozen blacks were killed and more than 30 wounded.

In response to the Camilla Massacre, Georgia adopted a (facially) race-neutral law that provided that "no person in said State of Georgia be permitted or allowed to carry about his or her person any dirk, bowie knife, pistol or revolver, or any kind of deadly weapon, to any court of justice, or any election ground or precinct, or any place of public worship, or any other public gathering in this State. . . ." Ga. Laws 1870, Vol. 3, p. 42. Passed in October, the law was ignored by, and not enforced against, armed white supremacists gathered in a largely successful effort to prevent blacks from voting in the November, 1870 election. Grant, p. 32. Sadly, Georgia's public gathering law remains on its books even today.

Texas also found a pre-war constitutional right that later was eviscerated with facially race-neutral laws. The Supreme Court of Texas found a state and federal constitutional right to carry arms in 1859. *Cockrum v. State,* 24 Tex. 394, 401 (1859).

The Texas Attorney General opined that Texas had "Pretended Laws of 1866 against the Freedmen" intended to "the restoration of African slavery, in the modified form of peonage." As an example, he cited a law that "makes the carrying of fire-arms on enclosed land, without the consent of the land-owner, an offense. It was meant to operate against the freemen alone." *Journal of the Reconstruction Convention Which Met at Austin Texas*, 953-55 (1870).

This Court caused confusion on the issue of the Fourteenth Amendment when it issued the opinion of *U.S. v. Cruikshank*, 92 U.S. 542 (1876). In that opinion, the court held that the first eight amendments to the Constitution restrained only Congress. Turning to the Fourteenth Amendment, however, this Court held that the Fourteenth Amendment restrains state action, but did not apply to the case because there was no state action, i.e., the right to bear arms had been violated by private actors, not state actors. *Id.* at 554. The confusion on this issue remains to this day, with the Supreme Court of Georgia recently citing to *Cruikshank* for the proposition that the Second Amendment of the United States Constitution contains no rights that the State of Georgia is bound to respect. *Brewer v. State*, 281 Ga. 283 (2006).

By the end of the reconstruction era, *Cruikshank* and the Slaughterhouse cases had effectively gutted any protection of the right to bear arms that the Fourteenth Amendment may have extended to the newly freed slaves, with the result that southern states adopted extensive gun controls, while, ironically, the northeastern states mostly avoided such gun controls until the early twentieth century.

C. Late Reconstruction/Industrial Age Gun Control

A dissenting opinion in the Ohio Supreme Court, which upheld the conviction of a Mexican for concealed carry ***in his own bed***, neatly summarizes the state of racist enforcement of gun laws across the country following the early Reconstruction:

> I desire to give some special attention to some of the authorities cited, supreme court decisions from Alabama, Georgia, Arkansas, Kentucky, and one or two inferior court decisions from New York, which are given in support of the doctrines upheld by this court. The southern states have very largely furnished the precedents. It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to

> entirely disarm the negro, and this policy is evident upon reading the opinions.

State v. Nieto, 101 Ohio St. 409, 430, 130 N.E. 663 (1920) (Wanamaker, dissenting). Continuing, Justice Wanamaker made a modest proposal, a variation of which easily could be applied to the instant case:

> I hold that the laws of the state of Ohio should be so applied and so interpreted as to favor the law-abiding rather than the law-violating people. If [instead] this decision shall stand as the law of Ohio, a very large percentage of the good people of Ohio to-day are criminals, because they are daily committing criminal acts by having these weapons in their own homes for their own defense. The only safe course for them to pursue, instead of having the weapon concealed on or about their person, or under their pillow at night, is to hang the revolver on the wall and put below it a large placard with these words inscribed:
>
> "The Ohio supreme court having decided that it is a crime to carry a concealed weapon on one's person in one's home, even in one's bed or bunk, this weapon is hung upon the wall that you may see it, and before you commit any burglary or assault, please, Mr. Burglar, hand me my gun."

Id. It is worth noting that the Circuit Court below in the instant case relied on some of these southern state court opinions when it stated in dicta that states can regulate strictly where firearms may be possessed. *Parker v. District of Columbia*, Case No. 03CV00213, Opinion issued March 9, 2007 (D.C. Cir.), *citing State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921).

A Florida Supreme Court justice candidly observed the racist intentions of Florida's gun laws, in particular a prohibition against carrying a concealed weapon:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied.

Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

Another tactic implemented by several states was to put into place economic disincentives to keeping and bearing arms. Tennessee became one of the first states to implement such a tactic, with its "Army and Navy Law" of 1879. Under this law, the sale of all handguns except the "Army and Navy model handgun" was prohibited. This revolver was in common ownership by whites, especially wealthy whites that were former military officers. The revolvers were too expensive for most blacks. William R. Tonso, "Gun Control: White Man's Law," *Reason,* December 1985. The law was upheld by the Supreme Court of Tennessee. *State v. Burgoyne,* 75 Tenn. 173 (1881).

A U.S. senator from Tennessee, apparently happy with the success of his state's law, proposed that Congress allow the "dominant race" to prevent "the carrying by colored people of a concealed, deadly weapon, most often a pistol." 65 Cong. Rec. 3945, 3946 (Mar. 11, 1924, statement of Sen. Shields).

Arkansas passed a virtually identical law in 1881, and that law was upheld by the Supreme Court of Arkansas. *Dabbs v. State*, 39 Ark. 353 (1882).

In a more blatant effort at "economic" gun control, South Carolina banned pistol sales to anyone but sheriffs and their special deputies, which included members of the Ku Klux Klan, strike breakers, and private bodyguards. Kates, "Toward a History of Handgun Prohibition in the United States," *Restricting Handguns: The Liberal Skeptics Speak Out,* p. 15 (1979).

In 1906, Mississippi implemented a registration system, allowing for race based confiscation. Kates, p. 14.

In 1907, Texas implemented a heavy taxation system on handgun sales. Again, mostly-poor blacks suffered most under this measure. Tonsom *supra*.

New York passed its famous Sullivan Law in 1911, which requires a permit to own a firearm. N.Y. Penal Law § 1897. The permits, issued at police discretion, were commonly denied to unpopular minorities. Tonso, *supra*.

D. Atlanta Race Riots Resulted in Black Disarmament

A series of incidents in 1906 collectively called the Atlanta Race Riots led to widespread confiscation of firearms from blacks in and around the city. Throughout that year, the *Atlanta Journal, Atlanta Constitution*, and other newspapers published articles about a "Negro Crime Wave" involving black men sexually assaulting white women. Rebecca Burns, "Four Days of Rage," *Atlanta Magazine,* Sept. 1906, pp. 142-143; Mark Bauerlein, *Negrophobia: A Race Riot in Atlanta, 1906,* Encounter Books, 2001, pp. 135-173.

The articles brought matters to a head on September 22, 1906, with "Extras" being distributed in downtown Atlanta to a crowd of 5,000 white men and boys. The headlines included "Bold Negro Kisses White Girl's Hand," "Negro Attempts to Assault Mrs. Mary Cafin Near Sugar Creek Bridge," "Two Assaults," and "Third Assault." Burns and Bauerlein, pp. 141-155 and 135-173, respectively. The mob rioted at the news, with roving bands attacking any blacks that they encountered. The next morning's *Atlanta Constitution* had headlines of "Atlanta Is Swept by

Raging Mob Due to Assaults on White Women: 16 Negroes Reported to Be Dead." September 23, 1910, p. 1. Another newspaper reported, "Race Riots on the Streets Last Night the Inevitable Result of a Carnival of Crime Against Our White Women." Bauerlein, pp. 174, 177.

The next day, September 24, black residents armed themselves with guns smuggled into their neighborhoods hidden in rags, caskets, and lumber wagons to defend themselves against future attacks. Bauerlein, pp. 179-186, 205. The black citizens banded together to patrol the streets and protect their neighborhoods. One such area was in Brownsville, on the South Side of Atlanta. *Id.*

That night, seven county policemen and three armed white citizens arrived in Brownsville and saw 25 armed black men together in the street. The white group attacked. When the fighting ended, one police officer was dead and several more were wounded. Six blacks were arrested for carrying concealed weapons. Two of the arrested men were later killed by a mob (while the arrestees still were in shackles). It is unknown how many black casualties there were. Bauerlein, pp. 197-199, 249-252; Burns, p. 158.

As a result of the incident, the Governor dispatched the state militia and some law enforcement units to Brownsville the next day, with orders to confiscate arms from blacks. The residents of Brownsville were taken from their homes and assembled in the street at bayonet point, with a gatling gun trained on them while their houses were searched. A black man wounded from the night before was found and the law enforcement officers murdered him in front of his family. *Atlanta Journal*, "Town of Brownsville Is Taken By Militia," September 25, 1906; Bauerlein, pp. 201-204.

The *Atlanta Constitution* reported later that day that "Riot's End All Depends on Negroes." Another paper said, "The deepest spot in this crisis is in the existence and liberty at large of Negroes heavily armed and full of malice and vengeance." Bauerlein, p. 204. The *Atlanta Journal* editor James Gray then provided the solution Georgia would ultimately choose to follow in an editorial entitled "Disarm the Negroes." The basis for Mr. Gray's suggestion was his opinion that "A good negro is contaminated by the possession of a weapon in a time like this; a bad negro is made very much worse the moment he places a pistol in his pocket." *Atlanta Journal*, September 25, 1906, p. 6.

Georgia solved its armed black "problem" shortly thereafter, by creating a licensing system that made it a crime to carry a pistol or revolver without a license. Licenses were issued at the discretion of the county "ordinary" (the present-day probate judge), and applicants had to post a bond for $100. Ga. Laws 1910, Vol. 1, p. 134.

While few blacks at the time could have afforded to post a $100 bond, having licenses issued by white men (the only people eligible to hold office – the ruling in *Cooper and Worsham v. Savannah* that formed the legal basis for expelling Georgia's black legislators) ensured that blacks would not receive licenses. It also is not clear that the law prohibiting unlicensed carrying of firearms was enforced against whites for many years. Not surprisingly, the first arrest under the new statute was of a black man. *Atlanta Constitution*, Dec. 23, 1910, p. 9.

No less than poll taxes with grandfather clauses, these laws sought through economic means to target specific minorities for denial of their rights.

III. Modern Application of Gun Control

As the 20th Century unfolded, gun control was virtually the exclusive province of state and local governments. Infringements on the right to keep arms were few, and infringements on the right to bear arms were limited, and still tended to be applied to racial and other minorities.

All that changed in 1934 with the passage of the National Firearms Act (26 U.S.C. § 5801, *et seq.*). The NFA established a national registry of machine guns and other types of weapons, and imposed taxes on the transfer of such weapons. Notably, for the first time, devices that are not themselves guns (silencers) were defined to be "firearms." The reason for imposing a registry and tax, rather than a ban on the weapons that fell within the ambit of the Act, was the presumption by Congress and United States Attorney General Homer Cummings that a ban would violate the individual right contained in the Second Amendment. *See* The National Firearms Act of 1934: Hearings on H.R. 9066 Before the House Comm. On Ways and Means, 73rd Cong. 6, 13, 19 (1934).

Even with passage of the NFA, "sporting guns" (i.e., those not regulated by the NFA) continued to be readily available for purchase at gun stores, hardware stores, department stores, and mail order. The assassinations of President John Kennedy, Martin Luther King, Jr., and Senator Robert Kennedy led Congress to pass the Gun Control Act of 1968 (P.L. 90-618, 82 Stat. 12113, 18 U.S.C. § 921, *et seq.*). The GCA imposed a comprehensive scheme of gun control, including regulation of who may possess a gun, who may sell a gun, and where and how they may be transferred.

Race neutral on its face, the GCA has been described with other motives by an avid gun control ***advocate***:

> The Gun Control Act of 1968 was passed not to control guns but to control blacks, and inasmuch as a majority of Congress did not want to do the former but were ashamed to show that their goal was the latter, result was they did neither. Indeed, this law, first gun-control law passed by Congress in thirty years, was one of the grand jokes of our time. First of all, bear in mind that it was not passed in one but was a combination of two laws. The original Act was passed to control handguns after the Rev. Luther King, Jr.,

> had been assassinated with a *rifle*. Then it was repealed and repassed to include the control of *rifles and shotguns* after the assassination of Robert F. Kennedy with a *handgun*. . . . The moralists of our federal legislature as well as sentimental editorial writers insist that the Act of 1968 was a kind of memorial to King and Robert Kennedy. If so, it was certainly a weird memorial, as can be seen not merely by the handgun/long-gun shell game, but from the inapplicability of the law to their deaths.

Robert Sherrill, *The Saturday Night Special and Other Guns,* p. 280 (1972).

With school integration widely implemented throughout the country during the late 1960s and throughout the 1970s, the "white flight" to the suburbs ensued. Inner cities were left without sufficient tax bases to support their infrastructures, leading to well-publicized urban decay and higher rates of poverty and crime.

In an ostensible effort to stem crime, some states began passing various laws aimed at restricting the availability of inexpensive handguns. Among these were the so-called "melting point laws."

The idea behind the melting point laws was that less expensive handguns tended to be made from die cast metals that melted at lower temperatures than their more expensive counterparts. Thus, laws were passed that prohibited the sale of guns that melted below a specified temperature.

Illinois, Hawaii, Maryland, and Minnesota all passed such laws in the 1980s. T. Marcus Funk, "Comment – Gun Control and Economic Discrimination: The Melting Point Case-in-Point," Northwestern University School of Law, 85 J. of Crim. L. & Criminology, 7640806 (1995).

Of course, the effect, if not the purpose, of such laws is to restrict the availability of guns to the poorest citizens – those with no choice but to live in high crime areas and who arguably need guns the most. A National Institute of Justice Study found that:

> The people most likely to be deterred from acquiring a handgun by exceptionally high prices or by the nonavailability of certain kinds of handguns are not felons intent on arming themselves for criminal purposes (who can, if all else fails, steal the handgun they want), but rather the poor people who have decided they need a gun to protect themselves against the felons but who find that the cheapest gun in the market costs more than they can afford to pay.

Funk, p. 794.

In a case stemming from the attempted assassination of President Reagan, the United States District Court for the District of Columbia analyzed the theory and application of policies banning "Saturday Night Specials," and rejected the theory as unsound:

> [T]his Court wonders whether the theory discriminates against those law abiding citizens,

> who purchase a handgun for self defense, but who cannot afford a $200 or $300 weapon and who must resort to the purchase of a cheap handgun. . . .

Delahanty v. Hinckley, 686 F. Supp. 920, 928 (1986), *affirmed* by *Delahanty v. Hinckley,* 900 F.2d 368 (D.C. Cir. 1990). In rejecting a decision of a Maryland court, the District Court explained:

> The effect of such a ruling would be to limit the supply of cheap handguns in the marketplace. While this Court understands that the effort of the Maryland court may be to reduce the number of cheap guns available to criminals, the result is that it may reduce the number of cheap guns available to law abiding citizens as well. The court in quoting comments relating to the "ghetto" and the assertion that such cheap weapons are "ghetto guns" does not define "ghetto." Is a "ghetto" a low income area, or an area made up of persons of a particular race or nationality, or an area where there is an abnormally high crime rate, or all or some of the above. Although the Maryland court does not attempt any definition of "ghetto," it does appear that the salesman who was quoted had very definite ideas as to what he meant by the reference to "ghetto," although he did not define the word. Other sources have defined "ghetto" as "a quarter of a city in which members of a minority, racial or cultural group live especially because of social, legal, or economic pressure." Webster's Third New International Dictionary (1976) at 955. The

> salesman who was quoted seems to assume that anyone residing in a "ghetto" is criminal or suspect. The fact is, of course, that while blighted areas may be some of the breeding places of crime, not all residents of them are so engaged, and indeed, most persons who live there are law abiding but have no other choice of location. But they, like their counterparts in other areas of the city, may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city. Since one of the reasons they are likely to be living in the "ghetto" may be due to low income or unemployment, it is highly unlikely that they would have the resources or worth to buy an expensive handgun for self defense. To remove cheap weapons from the community may very well remove a form of protection assuming that *all* citizens are entitled to possess guns for defense. This may be *one* explanation why the Saturday Night Special has a high rate of sale in the low income community. It also raises a question concerning the validity of legislation or court decisions which seek to remove cheaper guns from the market place without taking similar action against higher priced weapons.

Id. at 929.

Patrick Murphy, Police Commission of the City of New York, speaking about "Saturday Night Specials," has stated:

> There is absolutely no legitimate reason to permit the importation, manufacture, or sale of these weapons, or their parts. They are sought only by people who have illicit motives, but who may have some difficulty securing a better gun. No policeman, no Army officer, no security guard, no businessman or merchant, and no sportsman would purchase one of these weapons for any lawful purpose.

Kelley v. R.G. Industries, Inc., 304 Md. 124, 146, 497 A.2d 1143, 1154 (1983). The commissioner apparently offered no opinion regarding whether a poor inner city resident would purchase one for a lawful purpose.

Even the name "Saturday Night Special" derives from a racist pejorative. "It is difficult to escape the conclusion that the Saturday Night Special is emphasized because it is cheap and it is being sold to a particular class of people. The name is sufficient evidence. The reference is to "Niggertown Saturday Night." Barry Bruce-Briggs, "The Great American Gun War," 45 *Public Interest* 37, 50 (1976).

It was at this same time that Petitioners passed their laws under scrutiny in this case. Essentially banning private ownership of guns in various configurations, the laws affect most significantly the 60% black population of the District of Columbia (U.S. Census Data, 2000). When the government employees go home to the suburbs and night falls on the nation's capital, its residents are the ones left to deal with street crime and home invasions.

◆

CONCLUSION

American history, from colonial times to the immediate past, is replete with evidence that gun control has frequently been implemented with a nefarious purpose of subjugating blacks and other minorities. Even today's gun control laws are often vestiges of, or the continuation of, the nation's Jim Crow past. At best, many such laws have greater effects on minorities and the economically disadvantaged. As the parties and other *amici* no doubt will argue, the Framers put into place a constitutional guarantee that the right ***of the people*** to keep and bear arms shall not be infringed. It clearly was the intent of the drafters of the Fourteenth Amendment to ensure that this guarantee applied to ***all*** people and against the states as well as the federal government.

This Court should apply the Second Amendment as it was intended, and eradicate any vestiges of Jim Crow in the District of Columbia's firearms laws.

Respectfully submitted,

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BRIEF

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AMICUS CURIAE BRIEF OF THE GOLDWATER INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Goldwater Institute,[1] established in 1988, is a nonprofit, independent, nonpartisan research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advances public policies founded upon the principles of limited government, economic freedom and individual responsibility. A core purpose of the Goldwater Institute and its Center for Constitutional Litigation is the preservation of constitutional liberties, including the right to keep and bear arms. A substantial number of the Institute's members are gun owners.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses the government's failure of principle and logic in this case. The United States' brief (hereinafter "Gov't Br.") argues correctly that the Second Amendment protects a fundamental personal right to keep and bear arms, but then fails to acknowledge and advocate the simple and necessary conclusions that follow from that premise.

---

[1] Pursuant to Rule 37.6, counsel for the Goldwater Institute states that no counsel for a party authored this brief in whole or in part and that no person, other than the Goldwater Institute, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. General letters of consent to the filing of *amicus* briefs by both parties have been lodged with the Clerk of Court pursuant to Rule 37.3, and the Goldwater Institute gave timely notice to the parties of its intent to file pursuant to the terms of those letters.

The government correctly concludes that the Constitution establishes and requires this Court to protect the right to keep and bear arms as a personal right. The reasons provided by the D.C. Circuit, respondent, and the government itself support and compel this conclusion. Even so, the government urges this Court to apply a lower, "intermediate" or "heightened" standard of review to measures that impair this right, rather than the strict scrutiny that traditionally attaches to fundamental personal rights enumerated in the Constitution. The government also would have this Court decline to apply and vindicate the right, and instead leave that task to a lower court on remand.

No basis in law or logic supports those outcomes. The Second Amendment right does not deserve second class status, and this Court should perform its traditional role of deciding cases and giving meaningful guidance to the lower courts. Application of strict or even intermediate scrutiny should be straightforward: the Second Amendment right would be without meaning if a flat ban on the most prevalent and important form of the right's exercise were constitutional. This Court should apply the traditional constitutional standard to the simple facts and affirm the D.C. Circuit's judgment.

Until this case, the government accepted the necessary implications of the Second Amendment's recognition of a personal right to keep and bear arms. In November 2001, the Attorney General applauded the Fifth Circuit's implementation of its finding, in *United States* v. *Emerson*, 270 F.3d 203 (5th Cir. 2001), that the Second Amendment protects a personal right to keep and bear arms. He stated that "the *Emerson* opinion, and the balance it strikes, generally reflect the correct understanding of the

Second Amendment." Memorandum from the Attorney Gen. to U.S. Attorneys at 1 (Nov. 9, 2001) (hereinafter "AG Mem."). Soon thereafter, in urging this Court not to review *Emerson*, the government confirmed that the United States believed that "the Second Amendment more broadly protects the rights of individuals" and that *Emerson* applied "strict scrutiny" and "did not purport to apply a relaxed standard of review." Brief for the United States in Opposition at 19 n.3, 21, *Emerson* v. *United States*, 536 U.S. 907 (2002) (No. 01-8780) (hereinafter "Opp'n Br."). Without acknowledging its change of course to this Court, the government now advocates the very "relaxed standard of review" it declined to endorse before this Court just five years ago.[2]

The government's uncomfortable straddle—finding a personal, enumerated Constitutional right without finding that the courts should protect that right as such—rests, as one would expect, on a series of flawed arguments. *First*, the government's arguments crudely mischaracterize the D.C. Circuit's opinion. The government claims that the D.C. Circuit applied a "categorical" or "per se" test in striking down the D.C. handgun ban. The government thus argues that the Court must adopt a more flexible standard that would enable this Court to consider a range of relevant factors and would not undermine various federal arms regulations not currently before this Court. Similarly, the government argues that a remand is necessary because the proper standard diverges markedly from the "per se" test. Yet the D.C. Circuit's opinion clearly shows that it adopted no such "per se" or "categorical" standard. Instead, it applied traditional strict scrutiny to the core right protected by the Second Amendment, while devoting pages to outlining the circumstances under which the government may regulate arms outside that core without offending the Constitution.

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[2] Indeed, the government now claims that the Attorney General in 2001 found that the Second Amendment right "is subject to reasonable restrictions," Gov't Br. at 3, which misleadingly invites the inference that the United States endorsed something less than strict scrutiny. But the government omits the words after "reasonable restrictions" in the Attorney General's memorandum and in filings before this Court; that reference was to "reasonable restrictions *designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse*." Opp'n Br. at 19 n.3 (emphasis added); AG Mem. at 1. These particular "reasonable restrictions" are entirely compatible with the strict judicial scrutiny mandated by *Emerson* and the D.C. Circuit in the decision under review. *See infra* at 13-17.

Properly understood, the D.C. Circuit's standard provides the flexibility for this Court to consider all relevant factors surrounding the right and regulations at issue, including those the government believes should be accommodated in the standard of review. Strict scrutiny, as applied by the D.C. Circuit and *Emerson*, would not automatically void reasonable, historically accepted restrictions such as, among others, those precluding certain classes of persons from securing arms. What strict scrutiny will guard against, however, are government prohibitions that "impair the core conduct upon which the right was premised." Pet. App. 52a. The D.C. handgun ban, because it flatly forbids citizens from using the most common means of exercising the right to defend one's home and family protected by the Second Amendment, is such a prohibition.

Second, the government's most important claims are unsupported or based on flawed premises. The government implicitly bases its "intermediate review" standard on the adverse implications of a "per se" or "categorical" standard of review, but *not one sentence* in the brief addresses why strict scrutiny would not be appropriate. Similarly, the government's claim that a remand is required in this case fails to address the many instances in which this Court has applied new standards to reach final judgments, often in contexts far more fact-laden and employing far less traditional legal standards than either "heightened" or strict scrutiny. In fact, finally resolving this case should be straightforward under either strict or intermediate scrutiny: if the Court recognizes a personal right to keep arms, including handguns, in self-defense, then the Constitution cannot tolerate a measure that unqualifiedly prohibits such a common means of exercising the right. This point has been fully litigated in the courts below, and requires no fine determinations of fact to decide.

Third, the government's arguments reflect an extremely crabbed conception of this Court's role and capabilities in upholding the Constitution. The government would have this Court find that the Bill of Rights expressly protects a personal, fundamental right, and then decline to afford it the standard of judicial protection afforded to all other such rights. No other personal right, at its core, is protected through only "intermediate" scrutiny. Instead, that level of scrutiny is afforded in circumstances that less clearly implicate the essence of an enumerated personal right, or in circumstances where some *upward* adjustment to rationality review is required. Similarly, the government suggests that this Court is incapable of applying fact to law to resolve the case before it, and seeks a remand instead. This is so, the government argues, because a decision from this Court (but presumably not a lower court on remand) would risk "broad-based pronouncements" that "could unduly skew the future course of Second Amendment adjudication." Gov't Br. at 30. Slightly more confidence in this Court and its ability to fashion appropriate principles of law suggests that applying the Constitution to the D.C. statute would provide guidance to lower courts and facilitate rather than "skew" the development of law in this area.

Part I of this brief addresses the government's claims that "intermediate" or "heightened" scrutiny applies. It argues that this Court should apply the traditional, strict scrutiny employed to protect other personal rights recognized by the Constitution, and that this standard, as articulated by the D.C. Circuit below, enables the Court to consider an appropriate range of factors and does not threaten the wholesale invalidation of federal firearms regulations suggested by the government. Part II addresses the government's argument for a remand. It shows that this Court's customary practice does not favor a remand and, together with other factors, supports this Court's straightforward affirmance of the D.C. Circuit's judgment—under any standard of review.

ARGUMENT

I. THE SECOND AMENDMENT RIGHT DESERVES PROTECTION EQUIVALENT TO OTHER FUNDAMENTAL INDIVIDUAL RIGHTS ENUMERATED IN THE BILL OF RIGHTS, NOT THE "INTERMEDIATE" SCRUTINY PROPOSED BY THE GOVERNMENT.

The government's advocacy of intermediate scrutiny fails to accept, much less address, the judiciary's role in protecting personal rights enumerated in the Constitution. Courts discharge that role by applying strict scrutiny to government restrictions on the core aspects of such fundamental rights. See *infra* at 10-13. The right to self-defense is a natural and fundamental right that pre-dates its recognition in the Constitution, as the government recognizes. Gov't Br. 12-13. The Bill of Rights protects that right directly in the Second Amendment and in the protections it affords the home, property, liberty and other rights held by the people. See U.S. Const. amends. II-V. The right of the people to keep and bear arms, subject only to certain historically accepted, reasonable restrictions or those that serve compelling government interests in a narrowly tailored fashion, preserves not only the right to self-defense, but also the other liberties reflecting personal autonomy. As the Framers intended, see *The Federalist* No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961), federal courts have assumed a vital role in protecting individual constitutional rights. The government once endorsed this important role with respect to the Second Amendment as well as other, related rights, see *supra* at 2-3 & n.2, but now has changed its position for reasons unstated and would, for this one enumerated right, have this Court abandon that role.

The government's arguments for intermediate scrutiny proceed from mischaracterization of the D.C. Circuit's opinion. The government claims that the D.C. Circuit applied a "categorical" or "per se" test, and argues that the proper test is instead one that "does not render all laws limiting gun ownership automatically invalid." Gov't Br. at 8-9, 24. But this is not what the D.C. Circuit held, nor what its ruling would do.

The court of appeals' test readily allows courts to consider relevant factors that include a range of government interests, and provides an appropriate framework to enable subsequent courts to address the principal federal regulations identified by the government, including the federal ban on machine guns. The D.C. Circuit's decision permits "reasonable restrictions" in a range of circumstances supported by our Nation's history and traditions, but prohibits measures that "impair the core conduct upon which the [Second Amendment] right was premised." Pet. App. 52a. This is the same standard applied by the Fifth Circuit in *Emerson.* No basis exists for providing the Second Amendment right with the second-class status the government recommends.

A. The D.C. Circuit Applied The Proper Standard Of Scrutiny For Fundamental Individual Rights, And Did Not Apply A "Per Se" Or "Categorical" Rule.

Claiming that the D.C. Circuit's decision "could be read to hold that the Second Amendment *categorically* precludes any ban on a category of 'Arms' that can be traced back to the Founding era," Gov't Br. at 9, and that the D.C. Circuit adopted a "per se" or "categorical" test, *id.* at 9, 21, 24-25, the government devotes the latter half of its brief to arguing that "the Second Amendment's protection of individual rights does not render all laws limiting gun ownership automatically invalid." *Id.* at 8.

The D.C. Circuit expressly disavowed the position the government attributes to it and instead applied the traditional test for measures impairing individual rights recognized under the Constitution. The court rejected the view "that the government is absolutely barred from regulating the use and ownership of pistols," and emphasized that "[t]he protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." Pet.

App. 51a (citing *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)); see Pet. App. 51a-52a (canvassing such restrictions); *infra* at 13-17. The D.C. Circuit also recognized that the government is empowered to advance the "interest in public safety consistent with our common law tradition." *Id.* The court contemplated restrictions of weapons other than commonly used "lineal descendant[s]" of arms used in support of the Founding era militia. *Id.* at 51a.

These regulations are, however, subject to the traditional Constitutional principle that "they not impair the core conduct upon which the [Second Amendment] right was premised." *Id.* at 52a. The D.C. Circuit's decision reflects a straightforward application of that unexceptional principle. The court observed that "the pistol is the most preferred firearm in the nation to 'keep' and use for the protection of one's home and family," and that "the Second Amendment's premise is that guns would be kept by citizens for self-protection (and hunting)." *Id.* at 53a-54a. D.C.'s flat ban on handguns, even for home protection, fell far outside historically-supported forms of regulation and clearly "impair[ed]" the "core conduct" protected by the Constitution. *Id.* at 52a-55a.[3] As long as the Second Amendment protects a personal right, the D.C. ban could not be upheld.

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[3] Indeed, the government at points in its brief suggests that it agrees with this holding. *See* Gov't Br. at 9 ("Given that the D.C. Code provisions at issue ban a commonly-used and commonly-possessed firearm in a way that has no grounding in Framing-era practice, those provisions warrant close scrutiny under the analysis described above and may well fail such scrutiny."); *id.* at 27-28.

The court of appeals applied no "categorical," "per se," or "automatic[ ]" rule. See, *e.g.*, Gov't Br. at 8-9, 24. Indeed, its rule is indistinguishable from the one set forth in *Emerson*, which until this case the Department of Justice had endorsed. See *Emerson*, 270 F.3d at 261 (the Second Amendment right is subject to "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country"); *supra* at 2-3 & n.2. That rule is correct and should be affirmed.

B. Core Second Amendment Rights Should Be Accorded The Full Protection Due Other Individual Rights Enumerated In The Constitution.

The government acknowledges, as it must, that "the Second Amendment right is like rights conferred by the surrounding provisions of the Bill of Rights and enjoyed by individuals." Gov't Br. at 20. These fundamental rights are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty," and are, at their core, subject to strict scrutiny, meaning they may be infringed only by government action that "is narrowly tailored to serve a compelling state interest." *Chavez* v. *Martinez*, 538 U.S. 760, 775 (2003) (internal quotation marks omitted). Such liberties include "'the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on. . . . [They] require particularly careful scrutiny of the state needs asserted to justify their abridgment.'" *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 848-49 (1992) (quoting *Poe* v.

Ullman, 367 U.S. 497, 543 (Harlan, J., dissenting on other grounds)) (emphasis added).

The government neither addresses nor distinguishes these and many other cases that "requir[e] strict judicial scrutiny" whenever a measure "impinges upon a fundamental right explicitly . . . protected by the Constitution." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 17 (1973). Indeed, strangely, when the government illustrates the review it believes appropriate, it cites authority that employs strict scrutiny. See Gov't Br. at 24 n.6 (endorsing approach of *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995), which adopts strict scrutiny).[4]

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[4] The government's sole justification for an intermediate standard of review is reliance, without explanation, on election-law cases. *See* Gov't Br. at 8 (citing *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992)); *id.* at 24 (citing *Burdick* and *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997)); *id.* at 27-28 (citing *Burdick*). Those cases are inapposite because they involve States' power and necessity, recognized by Article I, to regulate the manner in which elections are conducted. *See Burdick*, 504 U.S. at 433 ("[T]he right to vote in any manner and the right to associate for political purposes" is not "absolute" because "States retain the power to regulate their own elections" under Art. I, § 4, cl. 1.); *Timmons*, 520 U.S. at 357-58. Moreover, even in that unique context, strict scrutiny is appropriate when the burden imposed by the regulation is severe. *See Burdick*, 504 U.S. at 434 ("when those rights are subjected to 'severe' restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance" (internal quotation marks omitted)); *Timmons*, 520 U.S. at 358 ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."). The government implicitly recognizes this sliding scale of review. *See* Gov't Br. at 8 ("the 'rigorousness' of the inquiry depends on the degree of the burden on protected conduct" (quoting *Burdick*, 504 U.S. at 434)); *id.* at 24, 27-28.

Thus, even though the government never addresses strict scrutiny in its brief, it indirectly acknowledges (as it must) that strict scrutiny applies to measures that threaten fundamental personal rights recognized by the Constitution. There is simply no other individual liberty enshrined in the Bill of Rights as to which the core aspects are categorically subject to lenient judicial protection in the manner suggested by the government for the Second Amendment.

Strict scrutiny is especially appropriate in the Second Amendment context. As both parties in this case agree, the Second Amendment is rooted in a singular distrust of the government. See, *e.g.*, Pet'r Br. at 9, 21-22; Resp. Br. at 3-4, 30-32. Indeed, the government itself recognizes that "Framing-era discussions of the need for the Second Amendment frequently described an armed citizenry as a deterrent to abusive behavior by the federal government itself." Gov't Br. at 18; see also *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel 71, 79-81, 83-84 (Aug. 24, 2004), http://www.usdoj.gov/olc/secondamendment2.pdf (hereinafter "OLC Opinion").

The government does not attempt to explain why the Second Amendment right should be a second-class right subject to wider legislative discretion than other fundamental rights. Nor could it do so. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

Here, of course, the burden on the protected right clearly is severe.

No less than other personal rights enshrined in the Bill of Rights, the right recognized by the Second Amendment is entitled to such protection.

C. Strict Scrutiny Will Not Automatically Invalidate Federal Firearms Regulation.

Having mischaracterized the court of appeals' holding as somehow imposing a "categorical" test for Second Amendment violations, the government launches a parade of horribles in the form of a list of federal arms regulations that might be "automatically invalid" if personal Second Amendment rights were accorded full protection. Gov't Br. at 8. This argument is wrong. The D.C. Circuit appropriately recognized that the right to keep and bear arms is "subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." Pet. App. 51a. The court's decision shows that full Constitutional protection for core Second Amendment rights still allows state and federal firearms regulations when they are consistent with traditional limitations on the right or are otherwise narrowly tailored to serve compelling state interests. No denigration of the Second Amendment right is needed to achieve an appropriate balance.

As the court of appeals recognized, the speech right, like the right to keep and bear arms, is recognized by the Constitution as a fundamental right, but is nonetheless subject to a variety of restrictions. The "core" of the right is protected by strict scrutiny; the government may not interfere unless its action is narrowly tailored to achieve a compelling state interest. *McIntyre*, 514 U.S. at 345-47. There are, however, traditional and historical exceptions to this core right, and such speech is subject to lesser protections, *Central Hudson Gas & Elec. Corp.* v.

Public Serv. Comm'n of N.Y., 447 U.S. 557, 562-64 & n.5 (1980) (commercial advertising), or no protections at all, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942) ("the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"). Speech is also subject to reasonable "time, place, or manner" restrictions. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

As with the First Amendment's free speech right, the Second Amendment's personal right is subject to a range of reasonable restrictions even though strict scrutiny applies to the core of the protected conduct. Despite this, the government attempts to contrast the supposed "per se rule suggested by the court of appeals" with a standard of review that allows a reviewing court to consider "the practical impact of the challenged restrictions on the plaintiff's ability to possess firearms for lawful purposes" and "the strength of the government's interest in enforcement of the relevant restriction." Gov't Br. at 24. As explained *supra* at 8-10, this dichotomy is false. Not only *can* a court consider these factors under the test set forth by the D.C. Circuit, but it *must* do so, allowing "reasonable restrictions" such as those derived from traditional common law limitations on the right to keep and bear arms; time, place, and manner regulations; and limitations relating to the regulation of the militia. See Pet. App. 51a-52a.

Under the D.C. Circuit's decision, a reviewing court would necessarily assess the strength of the government's interest underlying regulations going to the core of the right, and determine whether the government's chosen means of regulating was narrowly tailored to advance a compelling interest. This would, of course, be subject to well-understood historical exceptions and reasonable restrictions on time, place, and manner—just as is the case with other constitutionally enumerated rights. In all events, the limiting principle on government regulation would remain whether the regulations are "consistent with our common law tradition" in that they do not "impair the core conduct upon which the [Second Amendment] right was premised." *Id.* at 52a. In this case, the D.C. Circuit undertook precisely that inquiry when it found that "the pistol is the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," meaning that D.C.'s categorical and untailored handgun ban impaired the Second Amendment's core function of enabling self-protection. *Id.* at 52a-55a.

There is no reason to suppose that the regulations the government canvasses—unlike the D.C. handgun ban—would be "automatically invalidated" by the fully protective standard enunciated by the D.C. Circuit. Gov't Br. at 8. The government repeatedly invokes the federal ban on machine guns, see *id.* at 2, 9, 21-25, but nothing in the D.C. Circuit's opinion or its standard of review suggests that the Second Amendment would undermine a machine gun ban. As a threshold matter, a machine gun would be very unlikely even to fall within the ambit of the Second Amendment's protection as an "Arm[ ]," since it fails both prongs of the *Miller* test the D.C. Circuit applied. See Pet. App. 48a-49a (citing *United States* v. *Miller*, 307 U.S. 174, 178-79 (1939)). Machine guns, unlike handguns, are not "a lineal descendent of [a] founding-era weapon" that was needed for "the preservation or efficiency of a well regulated militia," nor are they in common use today. Pet. App. 51a. The common law also exempted from the right to keep and bear arms "dangerous or unusual weapons," for they would "terrify[ ] the good people of the land." 4 William Blackstone, *Commentaries* *149.

Moreover, under the D.C. Circuit's reasoning, the government may regulate the time, place, and manner of firearm use, which includes prohibitions on use of weapons "in a manner calculated to inspire terror," Pet. App. 51a-52a, such as the everyday display or use of a machine gun. See also *Emerson*, 270 F.3d at 232 n.31 (there is no right of individuals to bear arms "'merely to terrify the people or for purposes of private assassination'" (quoting *Aymette* v. *State*, 21 Tenn. (2 Humph.) 154, 158 (Tenn. 1840))). More importantly, machine guns do not serve the function in today's society that handguns do for "the protection of one's home and family," and thus a ban on common ownership of machine guns would hardly "negate the lawful use upon which the [Second Amendment] right was premised—*i.e.*, self-defense." Pet. App. 54a-55a.

The other federal arms regulations cited by the government provide even less reason to depart from the D.C. Circuit's analysis or lessen the traditional protection afforded to the core aspects of fundamental individual liberties guaranteed by the Bill of Rights. The government argues at some length that certain classes of individuals, such as felons, were not entitled to the common law right to keep and bear arms at the time of the Founding and may be prohibited from possessing firearms. Gov't Br. at 25-26. This is hardly a challenge to the D.C. Circuit's reasoning, which clearly indicated that the personal right protected by the Second Amendment was subject to the limitations and regulations recognized at common law. The D.C. Circuit also understood this Court to have already decided that felons could be barred from possessing arms, Pet. App. 52a (citing

Lewis v. *United States*, 445 U.S. 55, 65 n.8 (1980)), and, in any event, held that the "reasonable restrictions" the government could undertake as part of its power to regulate the militia extended to regulating on the basis of "[p]ersonal characteristics, such as insanity or felonious conduct, that make gun ownership dangerous to society" (and "unsuitable for service in the militia"). *Id.*

Similarly, the government frets over the status of licensing requirements and "[g]overnment restrictions on the importation and interstate transportation of firearms." Gov't Br. at 26-27. The D.C. Circuit's discussion of "reasonable restrictions" expressly encompassed and approved of the government's power over the "registration of firearms," the regulatory powers recognized at the time of the Second Amendment's adoption, and other "regulations [that] promote the government's interest in public safety consistent with our common law tradition." Pet. App. 52a. This approach would readily accommodate traditional and adequately justified regulations.

In sum, there is simply no warrant for departing in this case from the level of judicial scrutiny and protection traditionally afforded to fundamental rights enumerated in the Constitution.

D. No Basis Exists For Adopting An "Intermediate" Level Of Scrutiny For Second Amendment Rights.

The government's attempt to support intermediate level review by distinguishing it from a "per se" standard it alleges the D.C. Circuit adopted, see Gov't Br. at 24, 28 ("intermediate scrutiny" is appropriate instead of "rul[ing] categorically," as the court of appeals did), is a complete *non sequitur*. There is, of course, a standard between a "per se" rule and "intermediate review"—strict scrutiny—that courts traditionally apply to protect enumerated rights. The government's brief contains not one word addressing why strict scrutiny is inappropriate in this context.

As explained *supra* at 10-13, strict scrutiny is appropriate and essential to protecting the individual's fundamental right to keep and bear arms protected by the Second Amendment—a fundamental right the government acknowledges and supports. Intermediate scrutiny is reserved for use in very different contexts, not for protecting the core aspects of individual constitutional rights.

Although the Court has "never provided a coherent explanation of the characteristics which . . . trigger intermediate review," Laurence H. Tribe, *American Constitutional Law* § 16-33 (2d ed. 1988), the categories of cases in which intermediate scrutiny is typically applied are instructive. See, *e.g.*, *Clark* v. *Jeter*, 486 U.S. 456 (1988) (illegitimacy and parentage); *Craig* v. *Boren*, 429 U.S. 190 (1976) (gender); *Graham* v. *Richardson*, 403 U.S. 365 (1971) (alienage). None of these classifications relates to a specific textual constitutional right, and they would thus ordinarily be subject to rational basis review. See *Romer* v. *Evans*, 517 U.S. 620, 631 (1996); *Heller* v. *Doe*, 509 U.S. 312, 319-20 (1993). The recognition that they are "quasi-suspect," see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985), leads to more searching review than would ordinarily be had.

At base, intermediate scrutiny is simply an extension of rational basis review. See *Plyler* v. *Doe*, 457 U.S. 202, 217 n.16 (1982) ("'intermediate' scrutiny permits us to evaluate the rationality of the legislative judgment" concerning quasi-suspect classes). It raises the level of judicial scrutiny in areas where legislatures are otherwise free to regulate; it does not lower the protection given to rights that are meant to be immune from legislative infringement. Intermediate scrutiny is not, and is not intended to be, a substitute for strict scrutiny applied to core individual rights and liberties explicitly enumerated in the Constitution.

Rational basis and intermediate scrutiny, moreover, provide the legislature with varying (but not insubstantial) latitude in exercising its power. Rationality review confers "a strong presumption of validity" to legislative enactments, and almost any law will survive such a challenge. *Heller*, 509 U.S. at 319-20. Intermediate scrutiny requires more, but still affords the legislature substantial room to experiment and regulate, so long as the purpose is "important." *Clark*, 486 U.S. at 461.

This degree of legislative latitude is especially inappropriate and inadequate when dealing with rights and liberties enumerated in the Bill of Rights, including the Second Amendment. The Founders were so suspicious of legislative encroachments that they engrafted these specific, enumerated rights onto the Constitution in order to secure its ratification. Lenient judicial review is incompatible with this Court's traditional role in upholding fundamental rights that are, by definition and historical practice, held against the legislature.

II. THIS CASE SHOULD NOT BE REMANDED TO THE COURT OF APPEALS.

Remand from an appellate court may be appropriate "where justice demands that course in order that some defect in the record may be supplied" and "evidence [is] to be taken or additional findings [are] to be made upon essential points." *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939). This case—decided on a full summary judgment record with no genuine dispute between the parties on the essential facts—does not require a remand. Once this Court determines that the Second Amendment sets forth a personal right to keep and bear arms, a straightforward application of any heightened standard of review (be it the traditional test or the government's relaxed standard) would lead to a finding that the D.C. laws at issue are unconstitutional. This Court can (and should) reach that conclusion as readily as the D.C. Circuit would on remand.

A. No Remand Is Necessary If The Court Applies Strict Scrutiny.

A remand would clearly be unnecessary if the Court affirms the standard of review applied by the court of appeals. The primary issues in this case are legal, concerning the scope of the individual right under the Second Amendment and the level of scrutiny applied to deprivations of that right. If this Court applies the same standard as the D.C. Circuit, it should readily reach the same conclusion.

It is unsurprising that the court of appeals devoted the lion's share of its opinion to deciding the legal issues before it, because the relevant facts supporting its legal conclusion are simple and undisputed. Handguns are the "lineal descendant[s]" of pistols, and citizens widely use them today in their self-defense. Pet. App. 51a. Officer Heller wishes to "keep" a handgun in his home, but he cannot lawfully do so under D.C.'s law forbidding handgun possession. Pet. App. 4a, 97a-98a. Even were he allowed to keep a handgun, he would still be required to keep the firearm disassembled or trigger-locked in his home—and therefore of little use for the self-protective functions at the core of the right. *Id.* at 4a, 8a. These undisputed facts lead directly to the legal conclusion that the D.C. ban unconstitutionally interferes with the core right protected by the Second Amendment.

Strict scrutiny requires this result because a flat ban on a prevalent form of exercising the core personal right is clearly not narrowly tailored, nor could any state interest justify an infringement that effectively eliminates the right. The conceivable exercise of some alternative means of self-defense, such as use of long guns, does not change this outcome. See, *e.g.*, *McIntyre*, 514 U.S. at 341-42, 357 (protecting core right to anonymous pamphleteering, even though other forms of expression existed); *Texas* v. *Johnson*, 491 U.S. 397 (1989) (same for flag burning as political expression); *Cohen* v. *California*, 403 U.S. 15 (1971) (same for use of profanity as political expression). A contrary conclusion would be equivalent to holding that the First Amendment permits the government to ban newspapers because magazines and leaflets remain available as conduits of speech, to ban letters written to Members of Congress because email is available, or to ban collective prayer because other means of exercising one's religion exist.

B. No Remand Would Be Necessary Even If The Court Applied The Government's Proposed Standard Of Review.

Even if this Court were to apply intermediate scrutiny to measures affecting Second Amendment rights, affirmance would be required for similar reasons, and application of that standard would be equally straightforward on the record below. If D.C.'s handgun ban were to be affirmed under intermediate scrutiny, then it is difficult to conceive of a restriction on personal gun ownership that would not also survive. Intermediate scrutiny would, if applied in this manner, afford no protection to the right and, in effect, serve to nullify it. Here, the infringement of the right is clear and broad, and that conclusion rests on precisely the factors considered by the D.C. Circuit. The nature of the government interest is, at base, a legal determination. And the factual predicate for that interest and the untailored nature of the ban have been addressed extensively in the proceedings below and rely on no complex or nuanced factual determinations. Each of the government's claims supporting a remand of this case is without merit.

1. A Remand Would Be Inconsistent With This Court's Customary Practice.

The government argues that a remand would be appropriate if the Court adopted a new, lax standard of review because that standard is "materially different from the more categorical approach[ ] . . . taken by the . . . court of appeals," and thus this Court's "customary practice" would support a remand. Gov't Br. at 28-29. Any honest reckoning of this Court's precedents reveals that the customary practice of this Court would *not* favor a remand in the circumstances of this case.

This Court routinely applies new legal standards and renders final judgments to provide concrete guidance to the lower courts, especially in relatively unsettled areas of law. It does so often in much more complicated, fact-laden disputes than that presented by this case, including in cases where the standard it applies differs from that of the court below far more starkly than the departure suggested by the government.[5] This is often evident in cases concerning fundamental constitutional rights. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-85 (1964) (adopting a new "actual malice" standard for proving defamation, and "review[ing] the evidence in the present record to determine whether it could constitutionally support a judgment for respondent"); *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2612-23 (2006) (evaluating extensive evidentiary record to determine whether redistricting plan unconstitutionally diluted minority voting strength); *Grutter* v. *Bollinger*, 539 U.S. 306, 318-20, 335-39 (2003) (evaluating evidence and testimony at trial to conclude that law school's affirmative action plan was not an unconstitutional quota); *Casey*, 505 U.S. at 876, 880-94 (adopting an undue burden standard for regulation of abortion and reviewing the evidentiary record to determine whether state-law restrictions imposed such a burden); *Miranda* v. *Arizona*, 384 U.S. 436, 445-56, 491-99 (1966) (reviewing extensive evidence of interrogation techniques, adopting a new Fifth Amendment standard governing custodial interrogations, and reviewing the evidence of record to determine compliance with this standard in several cases). The government does not explain why this case—with a thin record of simple, uncontested facts—should be an exception.

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[5] *See, e.g.*, *KSR Int'l Co.* v. *Teleflex Inc.*, 127 S. Ct. 1727 (2007) (overturning the Federal Circuit's test for obviousness as a ground for patent invalidity and examining an extensive record to determine whether the patent was invalid under the Court's new standard); *Volvo Trucks N. Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (reviewing an extensive evidentiary record and reversing the court of appeals' determination that Reeder-Simco established a violation of the Robinson-Patman Act); *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999) (overturning the court of appeals' determination that the *Daubert* factors did not apply to non-scientific expert testimony, and reviewing the record evidence to determine whether the expert's testimony was admissible); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (reversing the court of appeals' determination of the proper bases for a primary-line injury claim under the Robinson-Patman Act, and reviewing the extensive record to determine that there was nonetheless sufficient evidence to affirm).

This Court has also routinely resolved the merits rather than remanding for application of a heightened standard of review. In *Loving* v. *Virginia*, 388 U.S. 1 (1967), for example, this Court reversed a state court decision upholding Virginia's anti-miscegenation statute under rational basis review and instead applied strict scrutiny, finding the law unconstitutional without remanding. The Court followed the same course in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (adopting strict scrutiny for state laws prohibiting the use of contraceptives, reversing a state court decision that applied rational basis review, and finding the state law unconstitutional with no remand); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (same for the right to procreate); and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (applying intermediate scrutiny to a federal medical benefits law that discriminated on the basis of gender and reversing, without remand, the district court's determination that the law survived rational basis review). Even when the Court thinks *lesser* scrutiny is warranted than that applied by the lower court, the Court still typically applies the law to the facts and reaches a judgment without remanding. See, *e.g.*, *Romer*, 517 U.S. 620 (rejecting the lower court's use of strict scrutiny and instead applying rational basis review to conclude that Colorado's law barring protective legislation for homosexuals was unconstitutional).[6]

The government ignores these and many other cases like them, and instead cites only two cases in support of its claim that this Court's "customary practice" is to remand when adopting a "new legal standard." Gov't Brief at 28-29. Neither of those cases—*Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), and *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951)—supports the government's claim.[7] The government quotes dicta from *O'Leary* but neglects to mention that in the very next sentence, the Court rejected the government's argument and set forth a conclusion equally applicable to this case: "In this instance, however, we have a slim record and the relevant standard is not difficult to apply; and we think the litigation had better terminate now." 340 U.S. at 508.

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[6] Even in cases in which the Court has technically remanded after announcing a rule of constitutional law different from the one employed by the lower court, it has typically done so *after* applying the proper legal standard to the case and deciding whether the challenged action survives scrutiny. *See, e.g., City of Cleburne*, 473 U.S. 432 (discrimination against mentally ill); *Mills* v. *Habluetzel*, 456 U.S. 91 (1982) (statute of limitations on paternity actions); *Reed* v. *Reed*, 404 U.S. 71 (1971) (gender discrimination); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250 (1974) (durational residency requirement); *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (religious disqualification). The only apparent purpose of remanding in these cases is ministerial (*i.e.*, to enter judgment for the prevailing party).

[7] The government also cites, without explanation, *Merck KGaA* v. *Integra Lifesciences I, Ltd.*, 545 U.S. 193 (2005). *See* Gov't Brief at 32. The court of appeals in *Merck* rejected a sufficiency-of-the-evidence challenge to the jury's finding of patent infringement, relying on a statutory interpretation this Court concluded was inconsistent with the plain language and the jury's instruction. *Merck*, 545 U.S. at 208. This Court returned that evidentiary issue to the court of appeals for reconsideration. This case has virtually nothing in common with the circumstances in *Merck*.

In *Adarand*, the Court remanded largely because "unresolved questions remain concerning the details of the complex regulatory regimes" at issue, and factual disputes over the way these regulations were applied "should be addressed in the first instance by the lower courts." 515 U.S. at 238-39. Such concerns are simply not present in this case. True, the Court also noted that the court of appeals applied the wrong level of scrutiny, but this was not the principal reason for a remand, and it does not come close to establishing a "customary practice" of remanding factually straightforward cases to apply new standards.

There are, of course, certain situations in which it *is* the usual practice of the Court to remand, but none pertains here. The Court, for example, may remand a case to a state court when state-law issues remain to be decided, *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 479-83 (1975), or when it is unclear whether the state court relied on state or federal law in reaching its decision, *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000). A remand may also be appropriate to allow the lower court to fashion a remedy, *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 310 (1964); to allow the petitioner to assert a new claim when her existing claim has been mooted by a "change in the legal framework governing the case," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 482 (1990); or (under the Court's GVR procedure) to allow the lower court to reconsider its decision in light of an intervening change in law, *Lawrence* v. *Chater*, 516 U.S. 163, 166-67 (1996). And, as explained, it is sometimes appropriate to remand to allow a lower court to resolve difficult factual disputes on essential points. See *Adarand*, 515 U.S. at 238-39; *Ford Motor Co.*, 305 U.S. at 373.

None of these circumstances is present here, and the government does not seriously argue otherwise. This Court can and should resolve this case, and affirm the judgment of the D.C. Circuit.

2. A Remand Would Undermine This Court's Role In Giving Guidance To The Federal Judiciary.

The government presents three reasons related to the supposedly limited capabilities of this Court that, in its view, should lead to a remand of this case. In fact, this Court is well equipped to resolve the issues at hand in a final decision. Indeed, considerations surrounding this Court's role in the administration of the judicial system strongly favor such an approach.

First, the government makes the curious argument that a remand is appropriate because "broad-based pronouncements in the context of adjudicating the details of a law that is far from typical could unduly skew the future course of Second Amendment adjudication." Gov't Br. at 30. This argument has the point exactly backward. This Court's "pronouncements" do not "unduly skew" the jurisprudence in any area the Court addresses. Instead, this Court's decisions, especially compared to the D.C. Circuit's on remand, provide authoritative guidance to lower courts across the nation. Applying principles of law in the concrete context of particular disputes provides far more help to lower courts in deciding future cases than mere general statements of standards. This Court could decide no cases if it acted on the belief that its "pronouncements" would "skew" the law and that lower courts were more competent to shape constitutional law.

The government inconsistently urges that this Court address the very important issue whether the Second Amendment establishes a personal right, and establish the appropriate standard of review, but then shy away from a straightforward application of law to fact because that determination—in contrast to the others—is too momentous. Instead, the importance of an enumerated personal right, and the natural tendency of the government to construe the Second Amendment right narrowly in the absence of authoritative judicial guidance, make it all the more important that the Court itself address the issue directly and clearly. In applying the proper standard of scrutiny to resolve this case, this Court can readily craft principles of whatever breadth it believes appropriate and avoid "broad-based pronouncements" to the extent it desires.

Second, the government argues that remanding the case would "permit[ ] Second Amendment doctrine to develop in an incremental fashion as is necessary to decide particular cases that may arise." Gov't Br. at 29. A remand, in this view, would "[a]llow[ ] lower courts to develop doctrines to address issues concerning the scope of the Second Amendment" and, "[w]hen lower courts differ as to the proper resolution of concrete and particularized disputes, the Court can grant plenary review and develop the law incrementally, as it does in other contexts." *Id.* at 29-30.

Whatever force this argument might have had as a reason not to grant certiorari in this case, it is hardly a reason to avoid deciding this case now. This Court has before it a "concrete and particularized," and fully briefed, case or controversy. Nothing in this Court's discharge of its usual Article III function of deciding cases prevents "Second Amendment doctrine [from] develop[ing] in an incremental and prudent fashion." Gov't Br. at 29-30. The point of taking the case was, presumably, to resolve rather than perpetuate the circumstances that led "lower courts [to] differ as to the proper resolution" of this "concrete and particularized dispute[ ]." *Id.* at 30; see Sup. Ct. R. 10(a). The process of having lower courts develop the law incrementally, subject to "plenary review" by this Court, would function far more effectively if this Court provided lower courts with concrete guidance regarding not only the right at stake and standard of review, but how that right and that standard are applied in this Court's resolution of this case. The "benefits of providing guidance concerning the proper application of [the] legal standard and avoiding the systemic costs associated with further proceedings" counsel in favor of applying the right in this case, rather than simply announcing its existence. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993).

Third, the government suggests that application of its proposed standard of review would implicate matters more appropriately considered by the D.C. Circuit on remand. Again, this argument understates the Court's capabilities considerably and calls on this Court to abdicate responsibility for determinations that it routinely makes and are well within its competence.

The government argues that a remand might reveal whether (a) the D.C. trigger-lock provision can "properly be interpreted . . . in a manner that allows respondent to possess a functional long gun in his home"; and (b) some people might be capable of effectively using a long gun rather than a handgun for their self-defense. The first issue is a straightforward issue of law. The second is technically a question of fact, but one presented so hypothetically (*i.e.*, in an alternative universe without handguns, long guns might have evolved as a principal means of self-defense) and so readily resolved (some but not all persons, in some but not all circumstances, may be able to employ long guns for self-defense)[8] that it, too, provides no basis for remand.

More fundamentally, however, the government's suggestion on these points mistakes the nature of the issue posed by whether long guns might serve as an alternative means of self-defense. The answer rests on simple legal analysis rather than any detailed factual assessment: if the Court finds that the Second Amendment creates a personal right to keep and bear arms for purposes of self-defense and accepts, as it must, that handguns are "arms"—indeed, the most commonly used types of arms for self-defense, see Pet. App. 53a-54a—then D.C.'s broad prohibition on their being kept in the home must fail, under either strict or intermediate-level scrutiny. See *supra* at 20-22. That is, a flat ban on the most common exercise of the core, enumerated right cannot be sufficiently tailored to meet an important or compelling state interest. Facts could be mustered to detail the nature of alternative forms of protected conduct, but the inquiry is beside the point: it fails to recognize the force and existence of a fundamental, personal right protected by the Constitution. The D.C. Circuit was right to term the long gun alternative as "frivolous" in this context. Pet. App. 53a. That conclusion is clearly right under strict scrutiny, and adopting intermediate scrutiny would not change matters. The Court can readily resolve these issues without remanding the case.

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[8] A long gun by definition is larger and heavier than a handgun and thus is harder to maneuver, especially in enclosed places like homes, and especially for smaller or weaker persons. This Court has repeatedly invoked common sense in resolving cases. *See, e.g., United States Dep't of Justice* v. *Landano*, 508 U.S. 165, 175 (1993) (rejecting presumption because it does not "comport[ ] with 'common sense'" (citation omitted)); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 629-30 (1989); *United States* v. *Standard Oil Co.*, 384 U.S. 224, 225-26 (1966); *Preston* v. *United States*, 376 U.S. 364, 366-67 (1964) (considering "[c]ommon sense" in resolving Fourth Amendment question).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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No. 07-290

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* GRASS ROOTS OF SOUTH CAROLINA, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

Grass Roots of South Carolina, Inc. ("Grass Roots") is a nonprofit, nonpartisan organization whose mission is to protect the rights of law-abiding persons to possess and use firearms. Grass Roots advocates in favor of gun rights in both the legislative and judicial spheres. Grass Roots has several thousand members and contributors, most of whom are gun owners who stand to be directly affected by the Court's interpretation of the Second Amendment. Further, most Grass Roots members are members of the unorganized militia of South Carolina pursuant to S.C. Code Ann. § 25-1-60.

Grass Roots' specific interest in this case concerns the nature of the right conveyed by the Second Amendment. Grass Roots respectfully submits that its substantial experience regarding gun rights issues will be of aid to the Court. Further, Grass Roots' members' status as firearm-owning members of an unorganized militia provides a unique perspective which may be useful to the Court.

This brief will focus upon a single narrow issue: the question of how the Bill of Rights' penumbral right to privacy shapes the contours of the rights conveyed by the Second Amendment.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least seven days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

This case involves a citizen of the District of Columbia who wishes to keep and utilize firearms privately in his home for self defense. The laws of the District, specifically D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, prohibit such use.

The question before the Court is whether these provisions violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

SUMMARY OF ARGUMENT

The Constitution is not an exclusive repository of all rights possessed by the residents of the United States. The right to keep and bear arms in the privacy of one's home is a preexisting right much like the right to marry. It is unabridged by the Constitution and resolves this controversy in favor of the Respondent

But the right to keep and bear arms in the privacy of one's home is additionally protected by the Constitutional right to privacy, a penumbral right without an explicit textual anchor. The right to privacy gives life and substance to the guarantees of the Bill of Rights.

A careful analysis of the text of the Second Amendment resolves this case in favor of the Respondent. But even if the text were viewed as preserving a collective rather than individual right to keep and bear arms, the Respondent would nonetheless retain the right to keep and utilize firearms in the privacy of his home even though the Respondent is unconnected to a state militia.

The Second Amendment right of the people to keep and bear arms is amplified by the right to privacy such that mere possession and use of firearms in the privacy of the home cannot be constitutionally outlawed. This remains true regardless of whether the possession and use of firearms is connected to militia service.

Finally, the Second Amendment applies to the District of Columbia. The District's argument that the Second Amendment applies only to states is faulty. The Second Amendment does not operate to protect the rights of the several states to field armed militia against an encroaching federal government. The Militia Clauses[2] confirm that the states have never had a right to engage in armed resistance against the national government. The argument that the Second Amendment protects this unconstitutional "right" must accordingly fail.

An individual right to keep and bear arms in the privacy of one's home is a pre-Constitutional natural right both expressly protected by the plain text of the Second Amendment and implicitly protected by the penumbral right to privacy.

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[2] U.S. Const. art. I, § 8, cls. 15-16.

ARGUMENT

I. THE RIGHT TO KEEP AND BEAR ARMS IN THE PRIVACY OF THE HOME IS A NATURAL RIGHT UNABRIDGED BY THE CONSTITUTION.

This Court has long recognized unenumerated rights. The concept of unenumerated rights was a familiar one to the generation that drafted and ratified the Constitution and the Bill of Rights.[3] The concept was the animating force behind the Tenth Amendment and, arguably, the Ninth. In fact, much opposition to the Bill of Rights was by those who argued that all rights should generally remain unenumerated and that the attempt to enumerate rights would wrongly disparage the existence of other, unenumerated rights.[4]

Applying this principle to the case at bar, even if there had been no Second Amendment, the people would still retain the right to keep and bear firearms in the privacy of their own homes. The language of the Second Amendment, which declares that "the right of the people to keep and bear arms shall not be infringed," demonstrates a preexisting right.[5]

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[3] The Declaration of Independence similarly contains the familiar construction: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). Just as Thomas Jefferson did not endeavor to name each and every natural right, neither did the drafters and ratifiers of the Bill of Rights.

[4] *E.g.*, Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597, 603-10 (2005); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 333-40 (2004); *see also* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

The question, therefore, is whether this pre-Constitutional right, a natural right, protects the right to keep and use arms in the privacy of one's home. Comparing the laws of the District of Columbia to other American jurisdictions, the District is clearly an outlier with regard to restrictive gun laws. In practically every other jurisdiction, no law would bar the Respondent from what he seeks: to possess and use a firearm in the privacy of his home.

While the District of Columbia's outlier status is certainly not determinative of whether its laws infringe upon a natural right, such a fact is nonetheless relevant to the national view of the contours of that right. Almost all other American jurisdictions have chosen not to criminalize the possession and use of firearms in the privacy of the home. This is strongly suggestive of a national consensus that the right to keep and bear arms in the privacy of the home is a natural right.

Whatever one's view regarding the source of natural or fundamental rights, the inescapable fact is that the Framers believed in the existence of such rights and likewise believed these rights should be protected even in the absence of explicit language in the Constitution providing such protection.

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[5] *E.g.*, Stephen P. Halbrook, ***Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States***, 96 W. Va. L. Rev. 1, 11-37 (1993).

In this context, the right to keep and bear arms in the privacy of the home may be usefully compared to the right to marriage. Nowhere in the Constitution is the right to marry explicitly protected. However, the right to marry was rightly found to be a fundamental right. *E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967). "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* at 12 (citing, *inter alia*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

The right to keep and use arms in the privacy of the home is equally fundamental to the very existence and survival of the human race. One need not be an anthropologist to recognize the place that weapons have played in human history. The use of arms in defense of self and others has taken place since the beginning of history, establishing this activity as a natural right.

Early man did not survive merely through marriage and procreation. The necessity to defend the home was ever-present. The right to marry, the right to procreate, and indeed the right to life are all hollow if not underpinned by the right to maintain and use arms in defense of the home.

The use of weapons for defense is what separates man from animal. Common experience informs this point: brute force is the way of life for the uncivilized. The use of tools as defensive weapons evens the odds, providing civilization an opportunity to flourish. While the law of the jungle is that "might makes right," a civilized society understands that might does not make right. When tools are employed as weapons, the physically weak are no longer subject to the force of the strong.

This is particularly true with firearms. The right to use a firearm enables those with a bare minimum of physical ability to ably defend themselves against all but the most skilled aggressors.

The counterpoint may be made that whatever the extent of the right to use tools in self defense, the state retains the power to ban the use of any specific class of tools. This argument fails because the right to use tools in self defense is meaningless if the right does not extend to the tools reasonably likely to be effective when put to use. Otherwise, the right is without substance. The natural right is to use effective weapons in the defense of self and home. No weapon has proven more effective in the defense of self and home than a personal firearm.[6] The natural right to use effective tools in self defense therefore extends to firearms.

Finally, there is another useful comparison between the right asserted in this case and the right to marry. The District of Columbia, the United States, and other amici assert that a ruling by this Court in favor of the Respondent could deal a deadly blow to gun regulation in the United States, conjuring absurd images of private citizens fielding tanks and rocket launchers. But reasonable marriage regulations did not fall in the wake of cases like *Skinner* and *Loving*, nor will reasonable gun regulations fall in the wake of this case should the Respondent prevail.

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[6] *See generally* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. Crim L. & Criminology 150 (1995).

Because the regulations in this case burden a fundamental right, they must be subjected to strict scrutiny. Because the government has no interest in prohibiting law-abiding citizens from keeping and using firearms defensively and in the privacy of the home, the laws at issue must be struck down.

II. THE PREEXISTING RIGHT TO KEEP AND BEAR ARMS IS PROTECTED BY THE RIGHT TO PRIVACY EMANATING FROM THE SECOND AMENDMENT.

The above-described natural right to keep and bear arms is protected by the plain text of the Second Amendment. But even if the text of the Second Amendment were interpreted as securing only a "collective right" rather than an individual right, the individual right to keep and bear arms in the privacy of one's home would nonetheless be protected by the right to privacy.

The right to privacy underlies the great majority of the individual rights protected by the Bill of Rights. The First Amendment's religious liberties, freedom of speech, and freedom of assembly all have privacy components. The Third Amendment's prohibition on quartering soldiers in private homes obviously has a privacy aspect. The Fourth Amendment is plainly directed at privacy, while the Fifth and Sixth Amendments each have dimensions of privacy as well.

In fact, the only components of the Bill of Rights which do not have a clear privacy aspect are the

Seventh, Eighth, Ninth, and Tenth Amendments, which do not relate in any specific way to a right to privacy. Put simply, in the context of the Bill of Rights, where a privacy right can be inferred, it has been inferred by this Court and others.

This case revolves around questions of privacy. Not presented here is the question of whether the Second Amendment conveys a right to carry firearms outside the privacy of the home. Instead, this case implicates the issue of whether a government regulation may, for all intents and purposes, bar a citizen from keeping and utilizing a functional firearm in his own home for the defense of himself and his family.

This Court has repeatedly refused to allow government to meddle in the affairs of citizens conducted in the privacy of the home. Nowhere is the presumption against governmental power stronger than behind the closed door of a private residence. Here, the District of Columbia seeks not only to meddle in the privacy of the Respondent's home, but the District seeks to meddle in such a way that deprives the Respondent of his natural and constitutionally guaranteed right to keep and bear effective arms in the defense of himself and his family.

The privacy right protects a great many activities which are not expressly mentioned in the Constitution, including contraception,[7] abortion,[8] homosexuality,[9] and the right to refuse medical treatment,[10] among others. Severe inconsistency would result with a holding that a right with a textual basis, the individual right to keep and bear arms, is not protected by the right to privacy while the aforementioned non-textual rights are so protected.

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[7] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

It is true that government has a much freer hand in regulating private activity when that activity revolves around contraband. However, firearms are not, as a class, contraband, nor are they contraband in the District of Columbia. Further, *United States v. Miller*, 307 U.S. 174 (1939), strongly suggests that firearms fit for militia use may not be constitutionally designated as contraband. There is no dispute in this case that the District of Columbia's firearm regulations at issue apply to a great many weapons fit for militia use.

In sum, this Court has thus far found a privacy dimension in all of the individual rights in the Bill of Rights that could conceivably have a privacy dimension. There is no reason that the Court should take a different approach to the Second Amendment. A privacy element is inherent in the right to "keep" anything, and the question presented here deals only with conduct inside the Respondent's home. Accordingly, the Court should find that the right to privacy extends to the Second Amendment and provides an individual right to keep and bear arms in the privacy of the home.

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[8] *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

[9] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[10] *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

III. THE RIGHT TO KEEP AND BEAR ARMS IN THE PRIVACY OF THE HOME EXTENDS TO THE DISTRICT OF COLUMBIA.

The District of Columbia maintains the position that whatever rights are conveyed by the Second Amendment do not apply to it. The District's argument is that the aim of the Second Amendment was to provide the states with the right to maintain state militias for defense against the national government. For this argument, the District relies on the prefatory clause of the Second Amendment; specifically, the District points to the "security of a free State" language.

The District argues that "State," as used in the Second Amendment, refers to the states comprising the United States. The District's argument is that the purpose of the Second Amendment was to endow the several states with the right to maintain an armed militia for use against an encroaching national government. Therefore, the District's position is that the "State" reference in the Second Amendment refers only to the several states. This leads to the District's conclusion that whatever rights are conveyed by the Second Amendment are not conveyed to Americans who live outside one of the several states.

As explained in the District's brief, the District's position is inextricably bound to the idea that state militias could be legally used against the national government. This notion was rather soundly rejected by the Civil War. While this legal question was settled on the battlefield, the legal basis for such a conclusion is sound. The use of a state militia against the national government is necessarily unconstitutional.

If the states had the legal right to take up arms against the national government, the President would not have the unilateral authority to call the state militias into the service of the United States as granted by the Commander-in-Chief Clause.[11] The necessary implication of the grant of authority to the President to command the state militias is that the same state militias may not be used in opposition to the national government of the United States. The Constitution does not simultaneously provide the authority to the President to command the state militias and the right of the militias to attack other American military units.

Because state militias could not be constitutionally used in opposition to the national government, the Second Amendment could not possibly have been intended to protect that "right." The District's argument that the Second Amendment is limited to the protection of the states' rights to form militias accordingly fails.

The failure of the "collective right" theory necessarily settles this case in the Respondent's favor. But, as described above, even if the text of the Second Amendment should be interpreted to protect only a collective right, an individual right to keep and bear arms in the privacy of the home still finds protection both in the penumbral right to privacy and as a natural, pre-Constitutional right.

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[11] U.S. Const. art. II, § 2, cl. 1.

CONCLUSION

For the foregoing reasons, Grass Roots of South Carolina, Inc. respectfully requests that this Court affirm the judgment of the court of appeals.

Respectfully submitted,

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DISTRICT OF COLUMBIA, *ET AL.*,
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v.
DICK ANTHONY HELLER,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, MARYLAND SHALL ISSUE, INC., VIRGINIA CITIZENS DEFENSE LEAGUE, GUN OWNERS OF CALIFORNIA, INC., LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Gun Owners of America, Inc. ("GOA") (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOA is a citizens lobby to protect and defend the Second Amendment.

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax under IRC section 501(c)(3). Twenty-one years ago, GOF and the Center for Judicial Studies co-sponsored the only *amicus curiae* brief in the D.C. gun case, Sandidge v. U.S., 520 A.2d 1057 (D.C. 1987).

Maryland Shall Issue, Inc. ("MSI") (www.marylandshallissue.org) was incorporated in Maryland in 2005. It is an all-volunteer, non-partisan effort dedicated to the preservation and advancement of all gun owners' rights in Maryland, with a primary goal of reform to allow all law-abiding citizens the right to carry a concealed weapon and to educate the community to the awareness that "shall issue" laws have, in all cases, resulted in decreased rates of violent crime.

Virginia Citizens Defense League ("VCDL") (www.vcdl.org) was originally incorporated in Virginia in 1994 as the Northern Virginia Citizens Defense

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[1] The parties have filed blanket consents to the filing of amicus briefs, subject to seven-day notice, which was given. No counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

League and is exempt from federal income tax under IRC section 501(c)(4). VCDL is a non-partisan, grassroots organization dedicated to defending the human rights of all Virginians, the right to keep and bear arms.

Gun Owners of California, Inc. ("GOC") (www.gunownersca.com) was incorporated in California in 1982, and is exempt from federal income tax under IRC section 501(c)(4). Affiliated with GOA, GOC lobbies on firearms legislation in Sacramento and was active in the successful legal battle to overturn the San Francisco handgun ban referendum.

The Lincoln Institute for Research and Education ("Lincoln") (www.lincolnreview.com) was incorporated in the District of Columbia in 1978, and is exempt from federal income tax under IRC section 501(c)(3). Lincoln focuses on public policy issues that impact the lives of black middle Americans.

Conservative Legal Defense and Education Fund, ("CLDEF") (www.cldef.org) was incorporated in the District of Columbia in 1982, and is exempt from federal income taxation under IRC section 501(c)(3). CLDEF is dedicated to the correct construction, interpretation, and application of the law.

SUMMARY OF ARGUMENT

The issue in this case is whether three D.C. Code provisions violate a Second Amendment right to keep and bear arms for private use in one's home. Under long-standing rules limiting its jurisdiction, the Court should not entertain the Solicitor General's invitation to assess the constitutionality of the whole array of the current federal firearms statutes. Nor, in response to Petitioners and the Solicitor General, should the Court craft a standard of review not supported by the text to permit "reasonable" gun control. Rather, the Court should apply a standard of review dictated by the words and principles embodied in the Second Amendment, as directed by America's founders.

According to its text, context, and historic setting, the Second Amendment protects an individual right to private possession and use of handguns in one's own home. The individual right to keep and bear arms is essential to a "well regulated militia" — a self-bodying, self-governing association of people privately trained to arms, modeled after the colonial militia that took up their privately-owned firearms to defeat a tyrannical effort to confiscate their arms. In turn, a "well regulated militia" ensures the preservation of a "free state" by allowing all members of the American polity to exercise, if necessary, the sovereign right of the "people" to reconstitute their government.

In order to ensure its .purpose to preserve the people's liberties, the Second Amendment bans discriminatory legislation against classes of persons that, by nature, are rightful members of "the people." In order to ensure its means to defeat tyranny, the Second Amendment bans discriminatory legislation against firearms that are essential to a preserve those liberties. By discriminating against law-abiding D.C. citizens and against handguns, the D.C. Code provisions violate both of these standards and, therefore, unconstitutionally infringe upon the right of the people to keep and bear arms.

ARGUMENT

I. THE COURT SHOULD ADDRESS ONLY THE PRECISE FIREARMS ISSUES BEFORE IT, NOT FIREARMS LAWS GENERALLY AS THE SOLICITOR GENERAL HAS URGED.

As the Court has framed the issue in this case, the threshold question is whether the Second Amendment protects the "rights of individuals ... not affiliated with any state-regulated militia...." Before the Court is the thoughtful and exhaustively-researched opinion of the U.S. Court of Appeals for the District of Columbia, Parker v. District of Columbia, 478 F.3d 370 (2007). In his majority opinion, Judge Silberman has explained that — by this Court's refusal to decide United States v. Miller, 307 U.S. 174 (1939) on the ground that Miller had no Second Amendment right to keep and bear arms "which may be utilized for private purposes" — this Court has already "implicitly assume[d]" the "individual right position." *See* Parker, 478 F.3d at 392, 393. As the Parker ruling attests, the extensive scholarship conducted after Miller — including that of converts to the individual rights position, such as Harvard Law Professor Laurence Tribe — has demonstrated the wisdom of the Miller Court. *See* Parker, 478 F.3d at 380. Now, after a seven-decade hiatus, the Court has an opportunity to make explicit what is implicit in Miller: that the Second Amendment protects the individual right of the people to keep and bear arms, independent of any state-regulated militia.

The Court properly has phrased not only the opening question, but also the specific legal issue before it: Whether three designated provisions of the District of Columbia Code[2] violate "the Second Amendment rights of individuals ... who wish to keep handguns and other firearms for private use in their homes." In a politically-charged case such as this, the parties and their amici are tempted to address firearms and firearm regulations generally, instead of the specific firearms and code regulations in this case. To guard against this temptation, the Court has phrased the issue so as not to "'anticipate a question of constitutional law in advance of the necessity of deciding it,'" and so as not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" according to the Court's "rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies [with] no power to give advisory opinions." *See* Ashwander v. TVA, 297 U.S. 288, 345-47 (1936) (Brandeis, J., concurring).

Succumbing to a temptation to stretch these rules, however, the Solicitor General has taken advantage of its amicus opportunity to pole vault the entire array of federal firearms laws into this case in an effort to persuade the Court not to adopt a constitutional standard that could invalidate one or more provisions of the current federal firearms code. *See* Brief for the

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[2] D.C. Code § 7-2502.02(a)(4) (barring the registration of any pistol); D.C. Code § 22-4504(a) (prohibiting the carrying of a pistol without a license); and D.C. Code § 7-2507.02 (requiring any firearm to be kept unloaded and disassembled or locked unless kept at the registrant's place of business).

United States as Amicus Curiae ("U.S. Br."), pp. 20-32. In making this sweeping argument, the Solicitor General not only has disregarded the limits on this Court's Article III powers, but also the limits placed by the Tenth Amendment on Congress's legislative powers, having erroneously asserted that "Congress [has] general authority to protect the public safety by identifying and proscribing particularly dangerous weapons,"[3] a power not delegated to it. As this Court has ruled, Congress has no plenary police power over firearms, having established that, even pursuant to its power to regulate commerce, Congress may not establish gun-free school zones. *See* United States v. Lopez, 514 U.S. 549 (1995).[4]

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[3] U.S. Br., p. 21. It is especially noteworthy that the Solicitor General singles out "machineguns" for special mention as a legitimate exercise of Congress's nonexistent police power. *See* U.S. Br., pp. 21-22, 24. It is also noteworthy that Respondent does not seriously contest the Solicitor General's Second Amendment claims with respect to "machineguns." *Compare* U.S. Br., pp. 22-25 *with* Respondent's Brief ("Resp. Br."), pp. 50-52. It is a cardinal rule of constitutional litigation for this Court "not [to] pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding....'" Ashwander, 297 U.S. at 346 (Brandeis, J., concurring). This rule would be well-served in this case in light of the complex and technical differences in definition and function between various types of firearms. *See, e.g.*, 26 U.S.C. § 5845. The difference between a semi-automatic rifle and a fully-automatic rifle is a technical matter, not relevant to a resolution of the issue presented, nor informed by the record below. Moreover, in some subsequent case, fully-automatic arms of the type currently used by the U.S. military easily could be found within the protective shield of the Second Amendment, either as "ordinary military equipment, or that its use could contribute to the common defense" (Miller, 307 U.S. 178), or as "a lineal descendant of ... founding-era weapon(s)" (Parker, 478 F.3d at 398).

While the scope of inquiry into the Second Amendment's principles and purposes is wide-ranging, the application of those principles and purposes is limited to the designated D.C. Code provisions and the facts of this case. Further, the Court must guard against the natural inclination to allow the "tail" of "practical" considerations to "wag the dog" of principle as both the Petitioners and the Solicitor General have proposed. According to Petitioners, whatever the Second Amendment right to keep and bear arms may be, it must be subordinated to "reasonable regulations" justified by the "necessities" of "public safety." *See* Petitioners' Brief ("Pet. Br."), pp. 44-58. In essence, Petitioners would have this Court emasculate the Second Amendment so that it would read that "the right of the people to keep and bear arms shall not be infringed, unless the government has a reason to do so." Even the Solicitor General's proposed "heightened scrutiny" test does violence to the unconditional "no infringement" standard of the Second Amendment text, inviting this Court to "balance[] the impact of [a] challenged restriction[] on protected conduct and the strength of the government's interest in enforcement of [a] restriction" on the right to keep and bear arms. *See* U.S. Br., p. 27. In making this the standard of Second Amendment protection, the Solicitor General has "invite[d] the Supreme Court to uphold an individual right to bear arms in principle but would then allow politicians and judges to gut it in practice." Editorial, "Misfire at Justice," *Wall Street Journal*, Jan. 22, 2008, p. A18.

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[4] Indeed, Justice Thomas observed in Lopez that the court "agree[d] in principle [that] the Federal Government has nothing approaching a police power." *Id.* at 584-85 (Thomas, J., concurring). Former U.S. Attorney General Edwin Meese III, who chaired the American Bar Association's Task Force on the Federalization of Criminal Law (The Federalization of Criminal Law (1998)), points out, "The drafters of the Constitution clearly intended the states to bear responsibility for public safety. **The Constitution gave Congress jurisdiction over only three crimes: treason, counterfeiting, and piracy on the high seas and offenses against the law of nations."** Edwin Meese III and Rhett DeHart, "How Washington Subverts Your Local Sheriff," Hoover Institute Policy Review, Jan. and Feb. 1996, No. 75 (emphasis added).

In a similar political context, the Supreme Court of Oregon, before addressing a state constitutional protection of the right to keep and bear arms, rejected such pragmatic temptations with the astute and still relevant observation:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is **to respect the principles given the status of constitutional guarantees and limitations** by the drafters; it is not to abandon these principles when this fits the need of the moment. [State v. Kessler, 289 Ore. 359, 614 P.2d 94, 95 (1980) (emphasis added).]

Accordingly, the key to answering the question presented is to be found in the text of the Second Amendment, and in this Court's faithful search for its "authorial intent."[5] This search begins with the rule that "[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning, for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840). The "appropriate meaning" of the Second Amendment text cannot be discovered by isolating it from: (a) the political principle upon which it was based; (b) its sister articles in the Bill of Rights in which it was placed; and (c) the state constitutional precursors from which it was derived — as this Court is being invited to do by both Petitioners and the Solicitor General. Rather, the right protected by the Second Amendment, like all of the rights stated in the Bill of Rights, must be examined in its textual, contextual, and historic settings.

II. THE SECOND AMENDMENT SECURES THE INDIVIDUAL AND UNALIENABLE RIGHT OF THE AMERICAN PEOPLE TO KEEP AND BEAR ARMS.

There is no dispute that "[t]he first ten amendments to the Constitution were a product of the intense struggle over the ratification of the Constitution." *See* Sources of Our Liberties 418 (R. Perry and J. Cooper, eds., Am. Bar Fdn., Rev. ed. 1978) (hereinafter

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[5] *See generally* E.D. Hirsch, Jr., Validity in Interpretation, Yale University Press (1967), pp. 24-25, 124-126, 212-16.

"Sources"). While it sailed smoothly through the first six state ratification conventions, the Constitution narrowly escaped rejection in the remaining seven, primarily on the ground that it did not contain a bill of rights. *Id.*, p. 420. To ensure ratification, the Federalists promised to "support a bill of rights when the First Congress [was] assembled." *Id.*, p. 421. To that end, James Madison introduced proposed amendments to the Constitution, the major portion of which was "based largely on the declarations of rights in the state constitutions, particularly that of Virginia." *Id.*, p. 422.

A. The Bill of Rights, as a Whole, Rests upon the Governing Principle that the People Embody the Nation's Sovereignty.

Drawing on the 1776 Virginia Constitution, Madison's original draft reiterated the trifold foundational principles upon which the new American nation was founded: (1) that "all power originally vested in ... the **people**"; (2) "that government is instituted ... for the benefit of the **people**"; and (3) that the **people** have the indubitable, unalienable, and indefeasible right to reform or change their Government...." *See* D. Young, The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792, p. 654 (2d ed. 2001) (emphasis added). *See also* Virginia Constitution, Sections 2 and 3 (June 12, 1776), reprinted in Sources, p. 311. Thus, Madison reminded his House colleagues that the underlying political and legal foundations for the adoption of a national bill of rights were the same as those already expressed in earlier state constitutions that contained a declaration of rights.

See, e.g., 1776 Pennsylvania Constitution, Sections IV and V, Sources, p. 329; and 1780 Massachusetts Constitution, Articles V and VII, Sources, p. 375.

As was true of these previously-established state governments, the new national government was constituted by "We, the people of the United States," in accordance with the nation's Charter principles that: (a) governments are "instituted among Men, deriving their **just** powers from the consent of the governed"; (b) the purpose of civil governments is to "**secure**" the unalienable rights of the people; and (c) "whenever **any** Form of Government becomes destructive of these ends, it is the **right of the people to alter or to abolish it**, and to institute a new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." *See* Declaration of Independence, reprinted in 1 The Founders' Constitution, p. 10 (P. Kurland and R. Lerner, eds., U. of Chi. Press: 1987) (emphasis added).

As Madison explained in the Virginia ratifying convention:

> In the British government, the danger of encroachments on the rights of the people is ... confined to the executive magistrate:
>
> In the United States, the case is altogether different. **The people**, not the government, **possesses the absolute sovereignty**. The legislature, no less than the executive, is under the limitations of power.... Hence, in the

> United States, the great and essential rights of **the people** are secured against legislative, as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. [IV The Debates in the Several State Conventions, pp. 569-70 (Phila.: 1866), reprinted in Sources, p. 426 (emphasis added).]

As a member of the Virginia Commonwealth, Madison well knew that a first order of business of the people in constituting a new government was to secure to the people the right to reconstitute that government by whatever means necessary, lest they again fall under an absolute despotism.

B. The Individual Right of the People to Keep and Bear Arms Is Ultimately Necessary to Secure the Uniquely American Right of the Sovereign People to Reconstitute Their Government.

As needful as the bulwark of "the right of the people to keep and bear arms" is to "the security of a free state," that right is one among a panoply of "people's" rights, each of which plays a unique and integral part in "secur[ing] the Blessings of Liberty to ourselves and our Posterity," as proclaimed in the Constitution's Preamble.

1. The Rights of Americans Are Greater Than the Rights of Englishmen.

Like the First Amendment, the Second Amendment is not a simple reiteration of the common law rights of Englishmen. As Justice Black wrote in Bridges v. California, 314 U.S. 252 (1941), "[n]o purpose in ratifying the Bill of Rights was clearer than that of securing for the **people of the United States** much **greater freedom** of religion, expression, assembly and petition than the people of Great Britain had ever enjoyed."[6] *Id.*, 314 U.S. at 265 (emphasis added). What Justice Black observed about the First Amendment is equally applicable to the Second. *See* T. Cooley, The General Principles of Constitutional Law in the United States of America, p. 298 (Little Brown & Company, Boston: 1898) ("The [Second] amendment ... was adopted with some modification and enlargement from the English Bill of Rights of 168[9]....").

As St. George Tucker observed, the "right of bearing arms" in the English Bill of Rights was "confined to protestants, and the words suitable to their condition ... have been interpreted to authorize the prohibition of keeping a gun ... for the destruction of game ... to any person not qualified to kill game." St. George Tucker, View of the Constitution of the United States ("Tucker's View"), p. 239 (Liberty Fund: 1999). The American guarantee, however, like the First, Fourth, Ninth, and Tenth reaches all "persons who are part of [the] national community." United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). Additionally, the American right is unconditional, not to be "infringed," whereas the English guarantee was subject to exceptions "allowed by law." *See* 1689 English Bill of Rights, reprinted in Sources, p. 246. Thus, Tucker celebrated the Second Amendment to be "the true palladium of liberty," in contrast to its English predecessor which had allowed "the [English] people [to be] disarmed," there being "not one man in five hundred [who] can keep a gun in his house without being subject to a penalty." Tucker's View, pp. 238-39.

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[6] The brief of the Amici AJC, et al. (pp. 27-31) in support of Petitioners offers evidence for the meaning of the Second Amendment in the laws of other countries, but James Madison made it clear America was different, pointing to "the advantage of being armed, which the Americans possess over the people of almost every other nation, [where] the governments are afraid to trust the people with arms." Federalist No. 46, reprinted in The Federalist, p. 247 (G. Carey and J. McClellan, eds.: Liberty Fund, 2001).

2. An Examination of the Rights Secured in the First Amendment Is Necessary to Assess the Nature and Purpose of the Right Protected by the Second.

As important as the Second Amendment right is to the security of a free state, it was a right that the founders hoped the people would never be required to put to use. After all, the right of the people to secure their freedoms by force of arms was to be a **last resort,** to be exercised only "when a long train of abuses and usurpations ... evinc[ing] a design to reduce them under absolute Despotism." *See* Declaration of Independence, 1 The Founders' Constitution, p. 10. The first line of defense to maintain a "free state"is not the Second Amendment, but the five distinct freedoms set forth in the First — religion, speech, press, assembly, and petition.

a. Freedom of Religion

Patterned after the Virginia free exercise of religion guarantee embodied in the 1776 Virginia Constitution,[7] the First Amendment religion guarantees were designed to set the people free from a government-enforced system of orthodoxy of opinion which Madison claimed was the very foundation of tyranny:

> Religion ... can[not] be subject to ... the Legislative Body. The latter are but the creatures ... of the [Society at large]. Their jurisdiction is both derivative and limited: ... with regard to the constituents. The preservation of a **free** Government requires [its powers not] be suffered to overleap the great Barrier which defends the **rights of the people**. **The Rulers** who are guilty of such an **encroachment**, exceed the commission from which they derive their authority, and are **Tyrants**. [J. Madison, Memorial and Remonstrance Against Religious Assessments, ¶ 2, reprinted in 5 The Founders' Constitution, p. 82 (emphasis added).]

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[7] *See generally* Reynolds v. United States, 98 U.S. 145, 163 (1879).

b. The Freedoms of Speech and of the Press

The freedom of speech had been secured in the English Bill of Rights, but only to the members of Parliament assembled[8] and the freedom of the press only by statute and the inaction of Parliament. *See* IV W. Blackstone, Commentaries on the Laws of England 151-52 (U. of Chi. Facsimile ed.: 1979). Madison contended, however, that the two freedoms must be constitutionally extended to the people, not just to protect the people "from previous restraint of the executive, as in Great Britain, but [from] legislative restraint also; and this exemption to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws." IV The Debates in the Several State Conventions, p. 570, reprinted in Sources, p. 426. Thus, this Court in New York Times v. Sullivan, 376 U.S. 254 (1964), ruled that the freedom of speech protected the people from seditious libel actions for criticism of government officials, vindicating thereby the **sovereignty of the people** over their government, just as Madison had stated: "'[T]he nature of Republican Government [is] that the censorial power is in the people over the Government, and not in the Government over the people.'" *Id.*, 376 U.S. at 275.

c. Right to Assemble and Petition

The First Amendment also secures "the right of the **people** peaceably to assemble, and to petition the **Government** for redress of grievances." (Emphasis added.) In the English Bill of Rights, the right to petition was limited to appeals to "the King," and the right to assemble was omitted altogether, presumably on the ground that the people's rights were secured by the people's representatives in Parliament assembled. *See* Sources, p. 246. In the United States, however, "the very idea of a government, republican in form, implies the right on the part of the citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *See* United States v. Cruikshank, 92 U.S. 542, 552 (1875).

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[8] Sources, p. 247.

Indeed, prior to the Declaration of Independence, America's founders exercised the people's right to assemble and to petition the government for redress of grievances, producing the 1765 Resolutions of the Stamp Act Congress[9] and the 1774 Declaration and Resolves of the First Continental Congress.[10] In the 1774 Declaration and Resolves, however, the colonists claimed that their "assemblies have been frequently dissolved, contrary to the rights of the people" and their "reasonable petitions ... treated with contempt." Sources, p. 287.

Having exercised their freedoms of speech, press, assembly, and petition to no avail, the people resorted to their right to keep and bear arms to secure their right to a free state.

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[9] *See* Sources, pp. 261-71.

[10] *See* Sources, pp. 272-89.

d. Right to Keep and Bear Arms

In the Declaration of Independence, America's founders viewed armed resistance to tyranny as not only a "right," but a "duty." Having experienced the loss of their rights as Englishmen, the American people were not so sanguine to think that the new governments they were creating could not, themselves, devolve into despotism. Thus, the people of Virginia reaffirmed in their 1776 state constitution "that ... a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish" the very government created by such constitution "in such manner as shall be judged most conducive to the public weal." Sources, p. 311. *See also* 1776 Pennsylvania Constitution, Sources, p. 329. To that end, the Virginia Constitution guaranteed "a well-regulated militia, composed of the body of the people, trained to arms, [as] the proper, natural, and safe defence of a free State...." 1776 Virginia Constitution, Section 13, Sources, p. 312. To the same end, the Pennsylvania Constitution guaranteed to "the people [the] right to bear arms for the defence of themselves and the state...." 1776 Pennsylvania Constitution, Section XIII, Sources, p. 330.

C. The Right of the People to Keep and Bear Arms Is an Individual Right, Not a State's Right to Arm its Militia.

In the months and years prior to the ratification of the United States Constitution, the people of Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire adopted constitutions containing declarations of rights. With respect to the right to keep and bear arms, Delaware, Maryland, and New Hampshire followed the lead of Virginia, securing this right as one reposed in a well regulated militia. Sources, pp. 339, 348, and 385. North Carolina, Vermont, and Massachusetts followed the lead of Pennsylvania, securing the right as one of self-defense. Sources, pp. 356, 366, and 376.

Madison's initial proposal to Congress combined the two, stating: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country...." Sources, p. 422. The final wording reflected Congress's understanding that the two phrases, taken together, secured a right of the people to keep and bear arms to the end that the people would be free to organize themselves into a militia to safeguard their liberties.

Petitioners would have this Court read the Second Amendment text differently, contending that "free State" means one of the independent and sovereign states of the federal union and, therefore, the Second Amendment protects only the right of each of the 50 states to arm its respective militia. *See* Pet. Br., pp. 12-15. This contention rests upon the mistaken assumption that the Second Amendment phrase, "well regulated militia," is derived from the unmodified term "Militia" in Article I, Section 8, Clauses 15 and 16. *See id.*, p. 12. But the genesis of "well regulated militia" is found in the 1776 Virginia, Delaware, and Maryland declarations of right, each of which utilize that term to describe a limit on the power of their respective state governments, not a grant of power to those governments. Indeed, the Virginia description of a "well-regulated militia [is] composed of the body of the people, trained to arms..." (Sources, p. 312), fit the preexisting "self-embodying defensive military association" that had been voluntarily formed in Fairfax County in 1775 "composed of free men [who] elect[ed] their own officers, provid[ed] themselves with firearms, and train[ed] themselves for defense." *See* D. Young, The Founders' View of the Right to Bear Arms, pp. 45-46 (Golden Oak Books: 2007).

In stark contrast, the militia described in Article I, Section 8, Clauses 15 and 16 is one "organiz[ed], arm[ed], and disciplin[ed]" by the United States government, and staffed and trained by the States, ready to "be employed in the Service of the United States" "to execute the Laws of the Union, suppress insurrections and repel invasions." Sources, p. 411. To read the Second Amendment as a guarantee that such a government-organized and trained militia, as provided for in Article I, Section 8, would serve "as the primary protectors of the states,"[11] as Petitioners have argued, is to wrench the language not only from its historic context,[12] but, in effect, to rewrite it to read that the "right of a State to organize and arm its militia shall not be infringed."

Furthermore, Petitioners have failed to grasp the significance of the guarantee's right to "keep" arms, not just to "bear" them. According to Petitioners, the right to "keep" arms "refer[s] to the *requirement* that militiamen have arms so they could bring them to musters," as provided in "numerous state militia laws."[13] Thus, Petitioners conclude that the Second Amendment does not protect a right of private ownership or possession of a firearm for private use.[14] Such a reading of "keep" is contrary to its ordinary meaning — "[t]o hold, to retain in one's power or possession; not to lose or part with [or] [t]o have in custody for security or preservation." *See* N. Webster, American Dictionary of the English Language (1828).

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[11] Pet. Br., pp. 14-15.

[12] *See* Pet. Br., p. 15, n.3.

Moreover, Petitioners' restrictive reading of "keep" is inconsistent with the Second Amendment's broader constitutional context which, in relation to the First Amendment, is based upon the premise that the Second Amendment right is to be exercised as a last resort to guard against tyranny, presupposing thereby that such arms as might be taken up in resistance to such a tyranny would ordinarily be used for private purposes. Additionally, following the Second Amendment are the Third and the Fourth

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[13] Pet. Br., p. 17.

[14] According to Petitioners' view, such private rights as self-defense are protected only by the "common law or state constitutions." *See* Pet. Br., pp. 19-20. Neither the common law nor the state constitutions, however, protect a D.C. resident's right to defend himself, his family or his home. The D.C. Code has effectively repealed the common law right of self-defense, leaving a D.C. resident at the mercy of armed intruders. And, if the Second Amendment does not apply to the District of Columbia, as Petitioners have vigorously argued (Pet. Br., pp. 35-40), then the people of the District have no constitutional protection. Consequently, all that a law-abiding resident of the nation's capital has to defend himself from an illegally-armed intruder is access to a 911 telephone call, hoping that the police will arrive in time to preserve his life, liberty, and property.

Amendments, each of which is designed for the protection of private property from government intrusions and control. The "plain object of [the Third] is to secure the perfect enjoyment of that great right at common law, that a man's house shall be his own castle, privileged against all civil and military intrusion." 2 J. Story, Commentaries on the Constitution of the United States, Section 1900, p. 647 (5th ed. 1891). And the Fourth Amendment "grew out of the use by British officials of general warrants ... to search for seditious publications." Sources, p. 427. Thus, the Fourth Amendment secures "the sanctity of a man's home and the privacies of life," protecting from government "invasion ... his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence...." *See* Boyd v. United States, 116 U.S. 616, 630 (1886).

D. The American Revolution Was Precipitated by Threats to the Colonists' Right to Keep and Bear Arms.

The authorial intent of the Second Amendment is further informed by an examination of the degree to which the American Revolution was precipitated by a series of British efforts to deprive the colonists of arms and powder. While the Respondent's Brief (pp. 20-25) covers some of this important story, other important details are chronicled herein:

1. The Powder Alarm.

On September 1, 1774, a detachment of 300 British troops marched to Charlestown and Cambridge, and seized the gunpowder and cannons stored there. In response, hundreds of angry (and armed) locals gathered in Cambridge to protest the confiscation. Reports of the day's events, including some false reports of a British attack on civilians, led to an estimated 20,000-30,000 armed men marching on Boston.[15] This event ensured that no colony would side with the British empire.[16] After the "Powder Alarm," American Colonel Israel Putnam advised the citizens of Massachusetts to "keep a strict guard over the remainder of your powder; for that must be the great means, under God, of the salvation of our country."[17]

2. Powder Impoundment.

The following day, General Gage ordered that no powder be withdrawn from the Boston Magazine. This edict applied to stores belonging to the local militia, as well as that held by private persons. As much of the local powder had been stored in such a central location, it allowed Gage to effectively cut off the entire supply to the area.[18]

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[15] French, Alan, The Day of Concord and Lexington: The Nineteenth of April, 1775 (1937, reprinted by The Scholar's Bookshelf: 2006), p. 19.

[16] Richmond, Robert P., Powder Alarm: 1774 (Auerbach Publishers: 1971), p. 35.

[17] *Id.*, p. 44.

[18] Young, David E., The Founders' View of the Right to Keep and Bear Arms, p. 37.

3. Cessation of Arms Imports.

On October 19, 1774, an order from the British Crown prohibited the importation of arms and ammunition to the colonies from Britain. On the same day, the colonies' royal governors were sent letters from the Earl of Dartmouth instructing them to "take the most effectual measures for **arresting, detaining and securing any Gunpowder or any sort of arms or ammunition,** which may be attempted to be imported into the Province under your Government...,"[19] including that which already had arrived.[20]

4. Leslie's Retreat.

On February 26, 1775, British troops moved into the Massachusetts town of Salem to seize colonial cannons and other arms rumored stored there. The colonists, however, who had maintained a watchful eye on all troop movements after the Powder Alarm, responded quickly, scurrying to hide the cannons and pulling up the town drawbridge, halting the British advance. The British troops retreated shortly before the arrival of armed companies of men from the nearby towns responding to the alarm.[21]

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[19] Earl of Dartmouth, letter to the governors of the colonies, as quoted in James, James Alton, Oliver Pollock; The Life and Times of an Unknown Patriot (Ayer Company Publishers: 1970), p. 61. (Emphasis added.)

[20] Young, The Founders' View, pp. 39, 56.

[21] *See* Coakley, Robert W. and Conn, Stetson, The War of the American Revolution: Narrative, Chronology, and Bibliography

5. Lexington and Concord.

On the evening of April 18, 1775, approximately 700 grenadiers and light infantry troops were secretly deployed by General Gage to hunt down colonial military provisions in Concord. Again, the locals were instantly aware of this and, by the next morning, a small group of 70 militiamen intercepted the British on Lexington Green, on the way to Concord.[22] Though the exact chain of events remain in question, the British were under orders from their commander to "**disarm**" the "rebels" but "on no account to fire, nor even attempt it without Orders."[23] Nevertheless, a shot was fired,[24] and at least one volley ripped through the militia ranks which, though determined not to be disarmed, "intended not to be the aggressors ..., [with the] intention, no matter what the circumstances, to wait to be attacked."[25] This beginning of hostilities, **precipitated by the confiscation of firearms**, the same as the previous September in Charlestown, had caused the entire countryside quite literally to be up in arms.

(Center of Military History, United States Army, 1975), p. 88.

[22] Young, The Founders' View, p. 51.

[23] French, The Day of Concord and Lexington, p. 105.

[24] If the firing on Lexington Green was started by the colonists, the colloquial saying would be true — that "the shot heard around the world was fired from an unregistered gun," one which would be illegal under D.C. law.

[25] French, The Day of Concord and Lexington, p. 49.

6. Williamsburg Magazine.

The events at Lexington and Concord were still unknown in Virginia when, in the middle of the night of April 20, 1775, a small force of Royal Marines, dispatched by Dunmore, the British colonial governor of Virginia, quietly emptied the Williamsburg arsenal and put the powder aboard an armed schooner. In the days that followed, Patrick Henry led the Hanover volunteers toward Williamsburg. Eventually, Governor Dunmore paid token restitution for the stolen powder without bloodshed.[26]

7. Boston Disarmament.

As the colonies readied for war, General Gage tried to solidify his hold over Boston through further confiscation of firearms on April 27, 1775. "Trapped within the town by the fortifications and British army after the Battles of Lexington and Concord, the people of Boston were blackmailed into giving up their personally owned firearms in exchange for the ability to leave the town...."[27] Upon receipt of the thousands of weapons, "reneged on his promise."[28] By June 1775, anyone in Boston "found in possession of arms" was "deemed an enemy of the King's Government" and imprisoned.[29]

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[26] Young, The Founders' View, p. 53.

[27] *Id.*, p. 52.

[28] *Id.*

[29] *Id.*, p. 57.

It was this pattern of British efforts to disarm the colonists, so as to prevent them from resisting an increasingly oppressive government, which coalesced colonists, leading directly to the American Revolution. The colonists may have been willing to continue to suffer "a long train of abuses and usurpations," but once those abuses "evince[d] **a design** to reduce them under **absolute Despotism** ... all having in **direct object** the establishment of an **absolute Tyranny**," it was **then** that our forefathers resolved "to throw off such Government...."[30] Patrick Henry reacted to Governor Dunmore's seizure of the Williamsburg Magazine in a way that reveals that British "gun control" was the one intolerable abuse leading to war: "You may in vain mention to them the duties upon tea, etc. These things, they will say, do not affect them. But tell them of the robbery of the magazine, and that the next step will be to disarm them, and they will be ready to fly to arms to defend themselves.'"[31]

As was then, so it is now, that the American people seek to discern the intentions of an increasingly powerful central government, watching their servants on this Court to see if they will honor and uphold, or dilute or negate, the written words of the nation's founders guaranteeing the right of a sovereign American people to "keep and bear arms."

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[30] Declaration of Independence, 1 The Founders' Constitution, p. 10 (emphasis added).

[31] Henry, William Wirt, I Patrick Henry: Life, Correspondence, and Speeches (Sprinkle Publications, Harrisonburg, Va. 1993), p. 279.

III. THE CHALLENGED D.C. CODE PROVISIONS IMPERMISSIBLY INFRINGE ON RESPONDENT'S PROTECTED SECOND AMENDMENT RIGHT TO THE PRIVATE OWNERSHIP AND USE OF A HANDGUN IN HIS HOME.

In 1840, Joseph Story forewarned that:

> One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by **disarming the people**, and **making it an offense to keep arms**, and by **substituting a regular army in the stead of a resort to the militia**. The friends of free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice ... [the Second Amendment's] powerful check upon **the designs of ambitious men**." [J. Story, A Familiar Exposition of the Constitution of the United States, § 450, p. 264 (Boston: 1840) (emphasis added).[32]]

Ignoring Story's warning, in the so-called interest of "public safety"[33] the D.C. government has enacted laws which effectively (1) disarm the people, (2) make it an offense to keep arms, and then, in justification, (3) claims that a militia created by the very government that disarmed the people is the only safeguard of the liberty of the very people that it has disarmed.

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[32] History has demonstrated the legitimacy of the framers' concern that a government can turn against its own people. It is estimated that, in the 20th century, a person was much more likely to be killed by his own government as by war. R. Rummel, Death by Government, Transaction Publishers, 1994, p. 15.

[33] Petitioners believe that the D.C. gun restrictions address "the serious dangers created by ownership of guns" in an effort to "reduce crime, suicide, domestic violence, and accidental

Just as the colonial governors and British military justified their barrier to the importation and possession of arms and powder, the D.C. Council has its reasons to ban handguns.[34] Despite their purported "good" reasons, however, the D.C. gun laws

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shootings," asserting that "**[p]reventing those harms** is not just a legitimate goal; it is a governmental duty of the highest order." Pet. Br., p. 11 (emphasis added). However, Petitioners operate on a faulty understanding of the role of government, which should be focused instead on the punishment of evil, not its anticipation and prevention. "[G]overnors ... are sent by [God] for the punishment **of evildoers**, and for the praise of them that do well." 1 Peter 2:14 (emphasis added). *See also* Romans 13:4. Any government that assumes the burden of preventing crime inexorably creates a surveillance society with totalitarian powers, for only that type of government can know what people may do, and deny them of the means in advance.

[34] Petitioners unilaterally have asserted that the D.C. Council has unlimited power over firearms, because "[r]egulating dangerous weapons is at the heart of any government's traditional police power." *See* Pet. Br., p. 47. But the provisions at issue in this case — forbidding the keeping of a hand-gun and requiring the "unload[ing,]" "disassembl[ing]," or "trigger-locking" of allowable firearms in a persons' private home — are **not** the exercise of the legislative power delegated by Article I, Section 8, Clause 17. Rather, such "rule and regulations" are akin to those authorized by Article IV, Section 3 with respect to property owned by the government (*see* Ashwander v. TVA, 297 U.S. 288, 330 (1936)), not to private property owned by D.C. residents.

unconstitutionally infringe on the right of the people to keep and bear arms.

A. The Amendment's Preamble Establishes the Standard of Review

According to Petitioners and the Solicitor General, the standard by which a Second Amendment claim is to be measured is whether the government can show that a firearm regulation is reasonably related to the government's concern for community safety. *See* Pet. Br., p. 44; U.S. Br., pp. 20-21. While the Solicitor General adds to this test a weighing process purportedly to ensure that firearm regulations not go too far, neither he nor Petitioners anchor their tests to the Second Amendment text. Thus, neither standard takes into consideration the purpose of the right to keep and bear arms, even though the Amendment's preamble states both its purpose and the necessary means to achieve it, and in so doing, furnishes the key to the appropriate standard to guide the Amendment's application in particular cases. *See generally* New York Times v. Sullivan, 376 U.S. at 269-80.

As noted above, the ultimate purpose of the guarantee of the right of the people to keep and bear arms is to "secur[e] a free state." The very nature of a "free state" is that it is constituted by the people, that is, by the governed, not by the governors. As also noted above, the "necessary" means by which such a state is to remain free is a "well regulated militia," that is, a self-embodying, self-governing, armed populace trained to arms, not by the state but by the people themselves. Whether the right to keep and bear arms is violated, then, must turn on whether a particular firearm regulations "infringes" either the class of persons who, by nature, constitute the "people" or the class of "arms" appropriate to a "well regulated militia."

By these two standards, both anchored in the constitutional text, the D.C. Code provisions unconstitutionally "infringe" on the Respondent's right to keep and bear arms.

B. D.C. Code Provisions Impermissibly Classify Persons Eligible to Possess a Firearm.

D.C. Code § 7-2502.02(a)(4) prohibits a D.C. resident from owning or possessing a "pistol" — with three notable exceptions: (1) persons who were in possession of a "validly registered" pistol prior to September 24, 1976; (2) "any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours;" and (3) a "police officer who has retired from the Metropolitan Police Department." A resident of the District, Respondent fit none of these categories; he was denied a permit to keep a handgun in his home.

Failing even to mention the question whether the D.C. Code exceptions unconstitutionally discriminate against Respondent, Petitioners argue that handguns, as contrasted with rifles and shotguns, pose sufficiently serious dangers to the public safety so as to ban them. *See* Pet. Br., pp. 49-55. Notably, Petitioners make no attempt whatsoever to explain why, if the danger posed by handguns is so great, there should be **any** exceptions to the ban. Indeed, Petitioners maintain that the Second Amendment inquiry requires no more than an inventory of the allegedly special dangers created by handguns, leaving it to the absolute discretion of the D.C. government to make whatever exceptions that it chooses.

But the Second Amendment protects the right of the **people** to keep and bear arms, not the right of any **special class** — such as retired D.C. police officers. As this Court has ruled in Verdugo-Urquidez, the "people" protected by the Second Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265. On their face, the three exceptions carved out by the D.C. Code are not based upon a consideration that only those who fit within them "are part" of the D.C. "community." To the contrary, the three exceptions appear to single out for special privilege certain members of the D.C. community either on the basis of longevity of residence or of their association with a particular kind of employment.

This is the very kind of discriminatory policy that the Second Amendment was designed to end. Indeed, the distinctions made by the D.C. Code exceptions are reminiscent of the discriminatory practices in England where the right to keep and bear arms depended solely upon the discretion of those who happened to be in power. *See* Sources, p. 231. Instead, if any class of persons is to be denied such right, it must be based upon a classification demonstrating that the excluded class is not within the meaning of "the people," such as an "[e]xcludable alien" who has attempted "to enter [the United States] forbidden by law." *See* Verdugo-Urquidez, 494 U.S. at 265, quoting from United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904).

The Solicitor General, however, maintains that the Second Amendment would be governed by a different standard, one that would permit a "ban [on] the private possession of firearms by persons whom Congress deems **unfit** to keep such weapons." *See* U.S. Br., p. 25 (emphasis added). For this reason, the Solicitor General has argued, Congress may prohibit such persons as idiots, imbeciles, felons, and children from possessing any firearm whatsoever. *Id.* at 25-26. While the Second Amendment would not absolutely preclude exclusions, it does prohibit them if they rest upon the constitutionally impermissible ground of unfitness. Exclusions may only be based upon the foundation that the class of persons excluded are not part of the constituent "people" — *i.e.*, those persons who have authority to constitute and reconstitute the government — being either incapable of giving the requisite consent to be governed, such as children, or having forfeited their civil rights, such as a convicted violent felon. According to the republican political philosophy underpinning the Second Amendment, whether a person is "trained" in the use of a firearm, and thus fit to possess it, is a matter of self-government, not subject to any fitness regulation of the government.

In the past, blacks have been ignominiously denied their right to keep and bear arms because of the perceived danger to community safety or general unfitness. Initially, blacks were not U.S. citizens entitled to the right to keep and bear arms. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417 (1857). Following the Civil War, a number of states enacted "black codes," limiting firearms ownership by blacks that mimicked in many ways the restrictions that a number of states in the antebellum south had imposed on both slaves and black freedmen. *See* Cottrol, R. and R. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration," 80 Geo. L.J. 309, 344-46 (Dec. 1991). Later gun control legislation was more subtle. Instead of overtly prohibiting blacks from having firearms, many laws passed between the end of the Civil War through well into the 20th century imposed high taxes on firearm sales, or banned inexpensive firearms, or gave authorities discretion in issuing licenses. Even some modern gun control was motivated in part by fear of black radicals and urban violence. *See* Robert Sherill (then Washington correspondent for *The Nation*), The Saturday Night Special, Penguin Books (1973) ("The Gun Control Act of 1968 was passed not to control guns but to control blacks...." p. 280.). Many facially neutral laws were aimed by many legislators at keeping certain segments of "the people" — including blacks and poor whites — out of the gun market. *See* Tahmassebi, S., "Gun Control and Racism," 2 G.M.U.C.R. L.J. 67, 75 (1991).

C. D.C. Code Provisions Impermissibly Classify Weaponry.

Petitioners have argued that the Second Amendment standard by a firearms ban or regulation is to be measured is whether the ban or regulation is reasonably related to public safety. *See, e.g.*, Pet. Br., p. 42. Although Petitioners purport to assure the

Court that its reasonableness standard could not be applied in such a way as to "effect[] functional disarmament," nevertheless Petitioners' "reasonableness" standard places the right to keep and bear arms in the discretionary bosom of the D.C. Council, leaving it up to the governors how far they can go before the people are functionally disarmed. *Id.*, pp. 43-44.

Petitioners' standard ignores the text which states — without exception reasonable or otherwise — that the specified right shall not be "infringed." According to its ordinary meaning, "infringe" means to "break, as contracts":

> to violate, either positively by contravention, or negatively by non-fulfillment or neglect of performance. A prince ... *infringes* [a] covenant by neglecting to perform its conditions, as well as by doing what is stipulated not to be done. [N. Webster, American Dictionary of the English Language (1828).]

In short, the argument that "the right of the people" is subject to reasonable regulation and restriction tramples on the very words of the Second Amendment, reading the phrase — "shall not be infringed" — as if it read "shall be subject only to reasonable regulation to achieve public safety."

The proposed reasonableness standard also disregards pertinent constitutional history. In the 1689 Bill of Rights, the English "subjects" were deemed to "have arms for their defence **suitable to**

their conditions and as allowed by law." (Emphasis added). According to Petitioners' standard of reasonableness, the right to keep and bear arms has been diminished by "practical realities," such as "guns hav[ing] become cheaper and more lethal." Pet. Br., p. 43. While such an analysis — that the Second Amendment guarantee changes with changing times — might be suitable if the 1791 American Bill of Rights read like its 1689 English counterpart, Petitioners' reasonableness standard has no place in a Constitution designed to secure the blessings of liberty not just to the generation which ratified the document but to their "posterity" — all succeeding generations.

Finally, Petitioners' reasonableness standard is inconsistent with this Court's ruling in United States v. Miller, in which the Court applied the standard whether the weapon at issue "has some reasonable relationship to the preservation or efficiency of a well regulated militia...." *Id.*, 307 U.S. at 178. Petitioners' Brief not only rejects this test, but belittles it. *See* Pet. Br., p. 46. Judged by the Miller standard, there is no question that a handgun is reasonably related to the preservation or efficiency of a well regulated militia, being a firearm well-suited to individual ownership and private use and training, a prerequisite for the kind of readiness, discipline, and skill should the people find it necessary to take up arms against a tyrant.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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Supreme Court of the United States

DISTRICT OF COLUMBIA and ADRIAN M. FENTY,
Mayor of the District of Columbia,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE HEARTLAND INSTITUTE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

The Heartland Institute is a national nonprofit research and education organization which promotes individual liberty. Founded in Chicago in 1984, Heartland is not affiliated with any political party, business, or foundation.

SUMMARY OF ARGUMENT

This Brief focuses on the last element in the Question Presented to this Court, whether the D.C. Code provisions at issue "violate the Second Amendment Rights of Individuals . . . who wish to keep handguns and other firearms for private use in their homes." These provisions do violate those Second Amendment protections because they unreasonably interfere with the rights of law-abiding individuals to possess, in their homes, arms commonly used for self-defense. This is the Second Amendment test we propound based on the strong historical and interpretive evidence that a basic right of self-defense underlies the Second Amendment's guarantee that the "right to keep and bear arms shall not be infringed."

The Second Amendment's protections descended from the primary right of self-defense and the long history behind it. This history is one of unwavering respect for the right of self-defense from Seventeenth Century England right up through ratification of the United States Constitution and adoption of the Bill of Rights. The right to possess firearms for self-defense in the home gives effect to this basic right of self-defense.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The amicus has given the parties at least seven days notice of its intention to file this brief.

Taking its cues from this history, *amicus* in this Brief offers a workable constitutional standard: firearm restrictions violate the Second Amendment if they unreasonably interfere with possession, in the home, of arms commonly used for self defense. This approach provides an interpretation of the Second Amendment that is both faithful to its history and compatible with reasonable regulation.

Based on this test, the District of Columbia's gun control laws at issue in this case are unconstitutional, as handguns are commonly used for self defense and the District's handgun ban unreasonably interferes with the rights of law-abiding citizens to possess such arms, in the home, for self-defense. By completely banning home possession of handguns, rather than merely regulating them, the District has violated the Second Amendment per se. Thus remand would serve no purpose in this case, other than to needlessly delay restoring the Respondent's constitutional rights.

ARGUMENT

I. THE SECOND AMENDMENT MANIFESTS THE RIGHT OF SELF-DEFENSE THAT AMERICAN LAW HAS ALWAYS EMBRACED

A. English Antecedents

The ideals of English law heavily influenced early American thought and culture. This Court has recognized that "the language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex Parte Grossman*, 267 U.S. 87, 108 (1925). Observing English culture's influence on early America, de Tocqueville wrote that there was "not an opinion, custom, or law . . . which the point of departure [from England] will not easily explain." Alexis de Tocqueville, *Democracy in America* 32, (George Lawrence trans., 1969) (1835).

The individual right of self-defense was central to the English Declaration of Rights. Proclaimed in 1689, the Declaration begins by admonishing James II for violating "the laws and liberties of th[e] kingdom" by, among other things, "causing good subjects, being Protestants, to be disarmed, at the same time that papists were both armed and employed, contrary to law." 1 W. & M., Sess. 2, c. 2 (1689). The Declaration restored such "ancient rights and liberties" by allowing Protestants "to have arms for their defence suitable to their Conditions and as allowed by law." *Id.* Although the law was initially used to restrict a Catholic's right to bear arms, the same parliament would later enact a law protecting his right to "have or keep . . . necessary weapons . . . for the defense of his house or person." 1 W. & M., Sess. 1, c. 15, § 4 (1689). Thus, the right of self-defense in England transcended even the most sharply felt social distinctions.

English law extolled the right of self-defense through gun ownership. In 1706, Parliament amended the old Game Acts, which had restricted firearms to the upper classes, noting that the individual must be allowed to keep arms "for the defence of his house and family." 5 Ann., c. 14 § 3 (1706). Seventeenth and Eighteenth Century English common law cases frequently expressed the fundamental importance of self-defense, particularly in the home. *See, e.g. Semayne's Case*, 77 Eng. Rep. 194, 195 (K. B. 1603); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 239-240 n.151, 154 (1983) (collecting English common law cases).

William Blackstone's *Commentaries on the Laws of England* recognized both the "primary" right of self-defense and the individual liberty to keep and bear arms that effectuates it. His *Commentaries* held great weight in the American Colonies and Blackstone was "the most cited English author" by American political writers in the years leading up to the revolution. Joyce Malcolm, *To Keep and Bear Arms: Origins of the Anglo-American Tradition* 142 (1994). According to Blackstone, the "principal or primary . . . rights of the people of England" included "the right of *personal security*, the right of personal liberty, and the right of private property." William Blackstone, 1 *Commentaries on the Laws of England* at 121 (1765) (emphasis supplied).

The right to bear arms gives practical effect to this primary right of self-defense. Blackstone listed five "auxiliary rights" that served "to protect and maintain inviolate the[se] three great and primary rights." Blackstone, *Commentaries*, *supra*, at 136. Included therein was the "right of the subject . . . of having arms for their defence suitable to their condition and degree, and such as are allowed by law." *Id.* at 141.

To Blackstone, the people were at liberty to arm themselves in self-defense against criminals. The right to private arms was "a public allowance, under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at 144. English subjects were thus at liberty to "hav[e] and us[e] arms for self-preservation and defense," and firearm ownership was the traditional means by which individuals protected themselves in the absence of immediate government assistance. *See id.* at 140.

B. Philosophical Underpinnings

English liberal philosophers, who espoused a basic right of armed self-defense, heavily influenced the Framers' thinking. Thomas Hobbes and John Locke set out principles of enlightened government to which the U.S. Constitution was written to adhere. To Hobbes, "[t]he right of nature . . . is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own life . . ." Thomas Hobbes, *Leviathan* 91 (Richard Tuck ed., 1996). Applying this general principle, Hobbes wrote, "[a] covenant not to defend my selfe from force, by force, is alwayes voyd." *Id.* at 117. While Hobbes generally embraced government power, this right of self-defense was a right of nature that one did not give up upon joining a society ruled by government because self-protection is necessary to fill the security vacuum that arises when the law fails to achieve complete security for all.

For Locke, the right of self-defense was paramount. "[I]f any law of nature would seem to be established among all as sacred in the highest degree . . . surely this is self-preservation, and therefore some lay this down as the chief and fundamental law of nature." John Locke, 5 *Essays on the Law of Nature*, in Political Essays 106, 112 (Mark Goldie ed., 1997). As Blackstone noted, individuals have a private right to possess arms for self-defense to secure this "chief and fundamental law of nature." *See* Blackstone, *Commentaries, supra*, at 141.

C. The Federalist Debates

Both sides of the federalist debates endorsed the right to have and use guns for self-defense. "The unanimity with which Federalists and Anti-Federalists supported an individual right to arms is a reflection of their shared philosophical and historical heritage." Kates, *supra*, 82 Mich. L. Rev. at 225-26. Alexander Hamilton wrote of the "original right of self-defense which is paramount to all positive forms of government . . ." The Federalist No. 28. To James Madison, this right expressed the framers' faith in the judgments of individuals, whereas he described governments that do not protect such rights as being "afraid to trust the people with arms." The Federalist No. 46. Madison proposed that the right to bear arms be placed among the various individual rights protections in Article I, following the habeas corpus protection and bills of attainder prohibition. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 169-70 (N. Corgan ed. 1997). John Adams also recognized the importance of the right to armed self-defense. While Adams was generally opposed to the use of armed military power outside government-controlled channels, even he acknowledged the legitimacy of "arms in the hands of citizens, to be used . . . in private self-defence." John Adams, *A Defence of the Constitutions of Government of the United States* 475 (1787).

The Pennsylvania minority, a vocal group of Anti-Federalist state delegates who opposed Pennsylvania's ratification of the Constitution without a bill of rights proposed an amendment stating that "the people have a right to bear arms for the defense of themselves and their own State or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless crimes committed, or real danger of public injury from individuals . . ." Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971). Because of its members' prominence and the force of their argument, "[t]he amendments proposed by the Pennsylvania minority bear a direct relation to those ultimately adopted as the federal Bill of Rights." Schwartz, *supra*, at 628.

D. Early Interpretations of the Second Amendment

Prominent early interpreters of the Second Amendment found that it protects an individual right of self-defense. In 1803, Professor and Judge St. George Tucker edited Blackstone's *Commentaries* with notes on parallel provisions in American law. In his annotations to Blackstone's discussion of the right to possess arms for "self preservation," Tucker observed that "in America this right had been constitutionalized by the enactment of the Second Amendment." 1 St. G. Tucker, *Blackstone's Commentaries with Notes of Reference to the Constitution and Law of the Federal Government* at 143 (1803). Thus, the Framers directly incorporated Blackstone's interpretation of the English rights to bear arms, cited above, into the Constitution of the United States. Tucker wrote that the Second Amendment's protections "may be considered as the true palladium of liberty . . . The right of self-defence is the first law of nature." *Id.* at 300. In his authoritative *Commentaries on the Constitution of the United States,* Justice Story used Tucker's language in referring to the "right of the citizens to keep and bear arms" as the "palladium of the liberties of a republic." 3 J. Story, *Commentaries on the Constitution of the United States* 746 (1833).

E. Early State Constitutional Provisions

Many early state constitutions defined the right to bear arms in terms of individual self-defense. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms,* 11 Tex. Rev. L. & P. 191 (2006) (listing state constitutional provisions for the right to keep and bear arms). Eighteenth Century state constitutions commonly used language such as "[t]hat the people have a right to bear arms for defence of themselves and the State." *See, e.g.* Pa. Const. Declaration of Rights, art. XIII (1776); Vt. Const. ch. 1, § 15 (1777); OH Const. art. VIII, § 20 (1802). Some state constitutional provisions used even stronger language to protect the natural right of armed self-defense, such as "the right of the citizens to bear arms in defence of themselves and the State shall not be questioned." *See, e.g.* Pa. Const. art. IX, § 21 (1790); Ky. Const. art. XII, § 23 (1792).[2]

These state constitutional provisions provide crucial insight into the meaning of the Second Amendment to the federal Constitution, reflecting the widely held understanding that it protects a private right of armed self-defense. Even scholars opposed to the individual rights interpretation admit that "the Second Amendment was copied from right to arms provisions in state constitutions, and the debates at the time reveal no suggestion that the scope of the right changed when adopted into the federal Bill of Rights." David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551, 590 (1991).

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[2] In such provisions, the term "themselves" referred to private individuals, rather than the collective citizenry, just as "themselves" referred to individuals in the nearby search-and-seizure provisions of those same state constitutions, such as that of the 1776 Pennsylvania Declaration of Rights, which stated that "the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure." *See* Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237, 259 (2004).

F. Early state case law

During the Nineteenth Century, state courts used the right of self-defense to define the scope of the Second Amendment's protections. In *State v. Reid,* 1 Ala. 612, 1840 WL 229 (1840), the Alabama Supreme Court applied both the Second Amendment and the State's constitutional declaration that "every citizen has a right to bear arms, in defence of himself and the State" to a law that banned possession of concealed guns and knives in public. After analyzing the history behind the right to bear arms, the court held that firearms restrictions were constitutional as long as they still allowed individuals to have and use their arms for self-defense. "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at *3. Thus, regulations prohibiting the possession of guns for self-defense and those that would render them "useless" for that purpose contravene the constitutional right to keep and bear arms.

In *Nunn v. State,* 1 Kelly 243, 1846 WL 1167 at *7 (1846), the Georgia Supreme Court relied on the *Reid's* self-defense rationale to reverse a defendant's conviction for openly carrying a pistol. After examining its history and roots, the *Nunn* court determined that the Second Amendment's right to keep and bear arms and the rights more generally protected by the State's constitution both secured individual rights of armed self-defense. *Id.*

However, the court made clear that those rights were subject to reasonable regulation. "The Constitution, in declaring that every citizen has the right to bear arms, in defence of himself and the State, has neither expressly nor by implication denied to the Legislature the right to enact laws in regard to *the manner* in which arms shall be borne." *Id.* at *8 (emphasis supplied). Thus, arms commonly used for self-defense are subject to reasonable regulation, but not outright prohibition, just as the time, place, and manner of speech are subject to regulation, but the content itself is not subject to outright prohibited under the First Amendment. *See Ward v. Rock of Racism*, 491 U.S. 781 (1989). Other early Second Amendment cases similarly held that the private right to bear arms in self-defense can be regulated but such arms cannot be prohibition. *See, e.g., Bliss v. Commonwealth*, 12 Ken. (2 Litt.) 90, 92 (1822) (striking down a ban on carrying concealed arms), overruled on grounds other than the individual nature of the right by Ky. Const. art. XIII, § 25 (1850) (expressly providing that "the general assembly may pass laws to prevent persons from carrying concealed arms," thus allowing regulation of gun possession but not prohibition).

II. THE SECOND AMENDMENT PROHIBITS UNREASONABLE INTERFERENCE WITH THE RIGHT OF INDIVIDUALS TO POSSESS, IN THEIR HOMES, ARMS COMMONLY USED FOR SELF DEFENSE

The Second Amendment's historical self-defense purpose should be used to define the scope of its protections. In our view, the Second Amendment protects the right to own firearms of a kind that are commonly used for self-defense by law-abiding individuals. We do not doubt that the government can outlaw private ownership of unusually destructive or exotic weapons. But private ownership of all handguns cannot be prohibited because handguns are the kind of weapon best suited for and most commonly owned for the purpose of self-defense.

A. The *Miller* Framework Provides The Starting Point For Modern Second Amendment Jurisprudence

This Court's most recent holding on the Second Amendment defined the scope of its protections in light of one of its historical purposes, but it erred in focusing exclusively on the militia purpose. In *United States v. Miller*, 307 U.S. 174, 179 (1939), the Court held that because it was not within judicial notice that short-barrel shotguns have a reasonable relationship to preserving a well regulated militia, the Second Amendment does not protect a right to keep and bear them. *See id.* at 178. *Miller* characterized the militia as "civilians primarily, soldiers on occasion," who were "expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179.

The Second Amendment did protect the militia's ability to arm itself, and may still do so today, but its purpose is also to protect the right of armed self-defense. The *Miller* Court's approach, which focused only on the relationship between the regulated arms at issue and the Second Amendment's militia purpose was flawed because that approach would *only* allow individuals to possess arms suited for military use. Such an approach is obviously troublesome if it would allow private ownership of modern military arms. Moreover, if, as the District argues, the militia to which the Constitution refers no longer exists today, then limiting the Second Amendment's application to the militia reduces the Amendment to a dead letter.

The flaw in *Miller* can be corrected, and *Miller*'s basic approach can still be employed by instead employing the Second Amendment's self-defense purpose to define the scope of its protections.

B. The Self-Defense Test

Applying this purpose-based approach to the Second Amendment's historical self-defense rationale yields a moderate and sensible interpretation of the right to keep and bear arms: the Second Amendment prohibits unreasonable government interference with the rights of competent, law-abiding individuals to possess, in their homes, arms commonly used for self-defense. As a necessary corollary, individuals must be allowed to possess such arms in a reasonably effective condition to carry out the purpose of self defense. Gun control laws that undermine this constitutionally protected self-defense function are tantamount to back door prohibitions, rather than mere regulations. *See State v. Reid*, *supra*, 1840 WL 229 at *3.

The self-defense test's common use requirement allows the Second Amendment to keep pace with the development and use of new technology, without altering the underlying rights that it protects. As new generations of weapons become commonly used for self-defense, they gain the potential for protection under the Second Amendment.

The reasonableness of non-prohibitory regulations of arms commonly used for self defense can be analyzed in the same way that courts determine the reasonableness of government burdens on other individual constitutional protections. A reasonableness review here would balance factors such as the degree to which the law impinges on the exercise of self-defense, the strength of the asserted government interest and whether the restriction is properly tailored to meet the government's need without unnecessarily burdening the right of self-defense. *Cf. Tashjan v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986) (applying this approach in the context of voting rights under the First and Fourteenth Amendments).

C. The Self-Defense Test Permits Reasonable Regulation

The test we propose allows for reasonable regulation that does not prohibit the home possession of arms commonly used for self-defense by competent, law-abiding adults. It allows for complete prohibition of dangerous weapons which are not commonly used for self-defense, such as anti-aircraft missiles, hand grenades, or machine guns. Likewise, armor piercing bullets are more commonly used for criminals to defend themselves against police, rather than by law-abiding individuals to defend themselves against criminals. *See* Kates, *supra*, 82 Mich. L. Rev. at 261-62. Criminals do not usually wear body armor and thus it is not reasonably necessary for law-abiding citizens to own armor-piercing bullets to protect themselves from crime.

By its very terms, the test also allows for restrictions that exclude children and felons from gun ownership. The right to bear arms does not – as it should not – extend to many whom the common law has traditionally deemed incompetent, such as children. By further limiting the protection to "law-abiding" individuals, the test naturally excludes various types of criminal convicts from gun ownership. This limit addresses the imbalance created by arms prohibitions like the laws at issue in the present case, which disarms the law-abiding, leaving criminals with a monopoly on force in the absence of complete public protection.

The self-defense test also allows for reasonable waiting periods. Brief waiting periods, such as those necessary to fully check the applicant's criminal record, are proper because they help ensure that the arms will be used for constitutionally protected self-defense purposes, without unduly interfering with those purposes. Waiting periods are reasonable if they allow otherwise legally qualified individuals to exercise their Second Amendment rights in a timely manner.

This test permits other regulations aimed at reducing the dangers of firearms, such as the risk of accidents, provided that such regulations are not tantamount to prohibitions of home possession for self-defense purposes, and are reasonable in light of the government interests involved. Outright bans or disassembly requirements that render guns useless for self-defense in the home would not be constitutional under the test, particularly as applied to homes without any children, as such laws would be tantamount to a prohibition and inadequately tailored to meet the government's purposes in those cases.

III. THE CHALLENGED LAWS VIOLATE THE SECOND AMENDMENT AS UNREASONABLE INTERFERENCES WITH THE INDIVIDUAL RIGHT TO POSSESS ARMS COMMONLY USED FOR SELF-DEFENSE

A. The District's gun control laws effectively outlaw private handgun ownership.

The challenged D.C. Code provisions effectively ban ownership and use of handguns in the District of Columbia. Under the challenged provisions, only those individuals permitted to own handguns prior to September 24, 1976 can be licensed to purchase additional handguns. *See* D.C. Code § 7-2502.02. This restriction denies the availability of handgun ownership and use for self-defense to everyone who did not have a permit prior to that time which ultimately effects a complete ban on handguns. *See id.*

B. Handguns Are the Epitome of Arms Commonly Used For Self-Defense

Handguns are in common use for self-defense. The vast majority of American gun owners prefer handguns to other firearms for self-defense. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. Crim. L. & Criminology 150, 164 (1995). Self-defense is the leading reason for handgun purchases and handguns are the leading firearms used in self-defense. *Id.* at 175. In its 2005 annual report, the FBI found that handguns accounted for over 83 percent of all firearms used in legally justified defensive homicides by private citizens, while shotguns and rifles together accounted for less than 7.5 percent of such. *See* U.S. Department of Justice, *Crime in the United States*, Expanded Homicide Data Table 14 (2007).

Handguns are well-suited for self-defense. Because of their utility in situations in which every second counts, "handguns are particularly effective for self-defense." Calvin Massey, *Guns, Extremists, and the Constitution*, 57 Wash. & Lee L. Rev. 1095, 1127 (2000); *see also* Kleck and Gertz, *supra*, at 164. Handguns are more maneuverable because of their size and can quickly be readied for defensive use. The successes of local self-defense initiatives reflect the effectiveness of handgun ownership and training. *See* Gary Kleck & David Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 L. & Pol'y Q. 271, 284 (1983) (citing an 88% drop in rapes committed in Orlando after the city implemented a handgun training program for women, while the overall rate of rapes increased by 5% in Florida and 7% nationwide during the same period).

C. The District's Limited Allowance For Shotguns And Rifles Cannot Shield Its Handgun Ban from Constitutional Challenge

While it bans handguns, the D.C. Code does permit individuals to possess shotguns or rifles, in their homes, provided that such "long guns" remain disassembled or trigger-locked at all times. *See* D.C. Code § 7-2507.02. This meager allowance for defensive firearms cannot save the District's handgun ban from constitutional attack for several reasons.

First, if the handgun ban violates the Constitution as a threshold matter, then that should end the inquiry. Other laws permitting the possession of other kinds of arms are not constitutionally relevant precisely because they pertain to other kinds of arms. Just as the First Amendment does not allow government to ban one book just because it permits the reading of another, the Second Amendment does not allow the District to ban one constitutionally protected type of firearm just because it permits limited ownership of another.

Second, the District requires that rifles and shotguns be kept in a condition unsuitable for self-defense. *See* D.C. Code § 7-2507.02.[3] "A gun stored for personal protection must be available for immediate use," which is why the vast majority of those who own guns primarily for self-defense prefer to keep them loaded and unlocked.[4] Gary Kleck & Don B. Kates, *Armed: New Perspectives on Gun Control* 300-301 (2001).

Third, limiting private gun ownership to shotguns and rifles results in more frequent and lethal accidents, perversely offsetting the handgun ban's purported safety benefits. A shotgun or rifle is "much more likely to suffer accidental discharge than is a handgun [and] . . . [a] long gun is also much more difficult than a handgun to lock or hide away from inquisitive children." Kates, *supra*, 82 Mich. L. Rev. at 263. "[B]ecause handguns are innately far safer than long guns, if a handgun ban caused defensive gun owners to keep loaded long guns instead . . . thousands more might die in fatal gun accidents annually." Don B. Kates, et. al, *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda*, 62 Tenn. L. Rev. 513, 578 (1995). Thus, the D.C. law at issue does not provide clear alternatives for protecting the right of self-defense that sufficiently offset the impact of its complete ban on handguns.

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[3] Though the handgun ban should be struck down outright, this provision might be a suitable candidate for remand under the standards set forth in the Justice Department's Brief, to determine whether it unreasonably interferes with the self-defense function of protected arms. *See* Brief for the United States as Amicus Curiae at 27-31.

[4] Because many gun owners perceive that handguns are more effective than rifles or shotguns for self-defense, 80% of defensive firearm uses are with handguns. *See* Kleck & Gertz, *supra*, at 175. Long guns such as rifles and shotguns are heavier, less maneuverable, and require considerably more strength to use than handguns because of their recoil.

D. The Link Between Handguns And Crime IsA Constitutional Red Herring

The link between handgun legality and aggregate crime levels has little constitutional significance. The purpose of the Second Amendment's right to keep and bear arms is to allow individuals to privately protect themselves, not to reduce overall crime rates or curb gun-related accidents. *See* Lund, *supra*, 39 Ala. L. Rev. at 112 n.24. The Framers knew that an individual right to keep and bear arms would carry with it the risks of crime and accidents, just as an individual right to speak freely carries with it the risk of libel. Faced with these trade-offs, the Framers deliberately chose a form of government that can accept such risks as the price for protecting individual liberties. "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." *An Historic Review of the Constitution and Government of Pennsylvania* at 1 (1759) (commonly attributed to Benjamin Franklin). Just as studies showing the dangers of prejudice and error in jury trials should not undermine a criminal defendant's Sixth Amendment rights, neither should studies purporting to show the dangers of private gun ownership undermine law-abiding individuals' Second Amendment rights.

The District and its supporters also err in extolling the supposed virtues of a world without guns, and condemning the vices of a world without gun regulations. In doing so, they set up a false set of choices. A world without guns is not an option, because hundreds of millions of guns are already in private hands and readily available across either the Virginia or Maryland borders; and even if all handguns in America magically vanished, criminals could still illegally saw off shotguns and rifles to produce concealable weapons that would be more lethal than most handguns. Thus, the District can only hope to dry up the supply of handguns for the law abiding, while criminal access to handguns remains virtually unlimited. It is against this real-world backdrop, and not against that of a utopian gun-free world, that the District's position must be assessed.

By the same token, the standard we advocate still allows for reasonable regulations designed to address many of the District's legitimate safety concerns, provided that such restrictions not unreasonably interfere with the self-defense rights of law-abiding adults. In sum, the handgun ban District's laws cannot provide the results that the District's arguments assume, and a reasonably understood right to possess guns for self-defense will not lead to the outcomes that the District's arguments would lead us to fear.

Even if the link between guns and crime is constitutionally significant, the mere potential for an armed citizenry deters violent crime in several related ways. First, knowledge that prospective victims may have handguns deters some perpetrators from committing crimes in the first place. *See* Don B. Kates, *The Value of Civilian Arms Possession as Deterrent to Crime or Defense Against Crime*, 18 Am. J. Crim. L. 113 (1991). Second, awareness that potential victims may have handguns leads criminals to forego violent confrontational crimes. *Id.* Third, if the victim has a handgun, the perpetrator is far less likely to successfully complete the crime. *Id.*; *See also* James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* 237 (1986) (citing a prison study in which approximately 40% of the inmates interviewed reported that they chose not to commit a particular crime because they feared that their victim would be armed).

The legal availability of handguns reduces the frequency and severity of violent crime. When the citizenry is potentially armed with handguns, criminals are more likely to choose non-violent, non-confrontational alternatives, which "radically decrease the likelihood of victim death or injury." Kates, *supra*, 18 Am. J. Crim. L. at 113. The risk of confronting armed victims is a stronger deterrent to would-be criminals than the risk of harsh legal consequences. T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. Crim. L. & Criminology 764, 789 (1995). When violent confrontations do take place, victims armed with handguns are thirty percent more likely to leave the conflict uninjured than victims who are unarmed. Michael Rand, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, Bureau of Justice Statistics Report Number NCJ-147003 (1994) (revised through 2002).

E. The District's Handgun Ban Should Be Struck Down In This Proceeding; Remand Is Not Necessary Here

Because handguns are the most commonly used and effective type of firearm for self-defense, an outright ban on handguns is unconstitutional per se, just as a complete ban on all firearms would be unconstitutional per se. *See* Section IIB. No balancing test is needed, because the Second Amendment has done the balancing required in this area: While regulations that reasonably interfere with handgun ownership should be upheld, bans categorically fail any suitable Second Amendment test.

Moreover, remand would offer no benefits to the development of Second Amendment jurisprudence. While the Justice Department's Brief lists general reasons why remanding a case can be useful, none of those reasons apply in the case of a complete prohibition. *See* Brief for the United State as Amicus Curiae at 27-31. The Court's choice to decide this case on the merits in the first instance will not affect the development or percolation of Second Amendment issues in the lower courts because the law at issue here – a total ban – will already be easily distinguished from other regulations where the reasonableness of interference with the right of self-defense will be contestable. Here, where the

District has not just regulated but completely banned the most common and well-suited firearm for self-defense, nothing will be gained by forestalling the inevitable conclusion that its laws violate the Second Amendment.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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INTEREST OF AMICI CURIAE[1]

Amicus **Dr. Suzanna Gratia Hupp, D.C.**, is a former Texas state representative. She is also, of more consequence, the mother of two children and survivor of the second deadliest mass shooting in U.S. history, second only to the recent killing spree at Virginia Tech. She desires only the right to protect her children both from the unthinkable fate that befell her parents that day in Killeen, Texas, and the scars their grisly deaths wrought on her own life.

In 1991, Dr. Hupp and her parents were enjoying lunch at a cafeteria in Killeen, Texas. Without warning, a deranged man crashed his truck through the window of the cafeteria and opened fire on the entire crowd. Dr. Hupp's first thought was her .38 caliber revolver which she had been forced to leave in her car due to the restrictive gun laws then in effect. As Dr. Hupp and her father overturned their table to provide themselves and her mother some protection, the killer continued to shoot and kill cafeteria patrons at will. When it became evident that the man would continue his killing spree unless stopped, Dr. Hupp's father rose and charged at the man. He had gone only a few steps before the killer shot him in the chest at point blank range. Seeing an opportunity to escape out the rear of the restaurant, Dr. Hupp grabbed her mother and rushed toward an open window, arriving safely in the parking lot. Her mother, however, did not. Instead of escaping with Dr. Hupp, her mother turned back and cradled her dying husband in her lap. The killer approached Dr. Hupp's mother, raised his gun and shot her point blank in the head.

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[1] All counsel of record received notice of amici's intention to file this brief at least ten days before this brief was due. Amici state that no portion of this brief was authored by counsel for a party and that no person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

That deranged man would kill over 20 people in the restaurant before finally killing himself. Not a day goes by that Dr. Hupp does not wonder how differently that day would have turned out had she, or any number of other patrons, not been prevented by law from carrying their private firearms, and how many lives might have been spared because of it.

Amicus **Liberty Legal Institute** ("LLI") is a non-profit civil rights law firm dedicated to the preservation of freedoms enumerated in the Bill of Rights. LLI focuses most of its civil rights practice on the preservation of First Amendment liberties, including the vigorous protection of free speech. Whether LLI agrees with the specific speech or religious practice in question, LLI and its attorneys have consistently argued for the broadest possible protection for speech and religious practice afforded by the First Amendment. *See, e.g., Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (LLI represented Respondent seeking to preserve the right of candidates to public debate forums); *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (LLI filed an amicus brief seeking to preserve student speech protections); *Gonzales v.*

O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006) (LLI filed a brief seeking to strengthen strict scrutiny analysis under the Religious Freedom Restoration Act).

In the present case, LLI is concerned that the erosion of the right to bear arms, a specifically enumerated right under the Second Amendment, through the introduction of a sweeping intermediate scrutiny test poses a significant danger both to that right and other enumerated rights, as well. Thus, LLI seeks to respond to the amicus brief filed by the United States in this case and introduce a workable framework for analyzing restrictions on Second Amendment activities that has served this nation so well in the First Amendment arena.

◆

SUMMARY OF ARGUMENT

The Second Amendment right at issue in this case should receive the same judicial treatment as other enumerated individual rights within the Bill of Rights. Amicus United States posits an intermediate scrutiny test as an all-encompassing test for analyzing *any* restriction on the Second Amendment right. The United States cites the need to prohibit "machineguns" and the maintenance of other tertiary regulations of gun ownership and gun commerce for its advocacy of the intermediate scrutiny test. This is the equivalent of advocating that, because of the proliferation of adult book stores or out of control commercial speech, the intermediate scrutiny tests employed for such expressive activity should be transposed to regulations of core political and religious speech or even outright bans on First Amendment activities altogether. Fortunately, this Court has distinguished the exercise of First Amendment freedoms and the context of the expression of those freedoms.

It is unnecessary for a lesser level of scrutiny to cast a long shadow across core protected Second Amendment activity. Instead, the scope of Second Amendment protection is determined by the type of firearm and the activity for which the firearm is used. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (Stevens, J., concurring in judgment) ("The scope of the First Amendment is determined by the content of expressive activity. . . ."). First, categorical bans on all gun ownership are per se unconstitutional. Second, regulations of core protected firearms, such as those descendent from the firearms regularly carried and employed by citizens in the founding era, should receive strict scrutiny analysis. Finally, there are categories of speech that this Court has deemed unprotected speech. Petitioners and Amicus United States attempt to seize upon a perceived aversion to machine guns and other weapons beyond this case in order to justify applying a lesser level of judicial scrutiny to all gun bans. That is the equivalent of arguing that because there are words such as fighting words or obscenity, all speech regulations should be analyzed using diluted scrutiny. This is not the law.

There is no need for the Court to reinvent the wheel when analyzing the Second Amendment with decades of established individual rights analysis at its disposal. Adopting a 'one size fits all' approach instead of implementing the precision analytical tools already established by and available to the Court would lead to unartful analysis and an unnecessary loss of freedom.

I. Introduction

This brief presupposes the Second Amendment secures the fundamental individual right to the ownership and use of firearms independent of service in or affiliation with any militia. The Court of Appeals for the District of Columbia Circuit (the "DC Circuit"), Respondent and various amici, perhaps most notably Amicus in Support of Petitioner The United States (the "United States"), have exhaustively established this both in law and in fact by text, history, practicality and reason.

As a supplement to that establishment, this brief provides a comprehensive analytical framework for determining the parameters of this individual right, in answer both to the D.C. Circuit's accurate albeit necessarily incomplete analysis and the important questions and concerns raised by the United States. If adopted, this framework would allow the Court both to secure the individual rights guaranteed by the Second Amendment and guard against the threat to public safety the unregulated ownership and use of firearms may present, and do so without the regulation of the right unnecessarily hindering its exercise.

II. An outright ban on traditional firearms is the equivalent of an unconstitutional ban on all First Amendment activity.

At issue in the case at bar is a series of gun laws which, though couched as mere *regulation* of firearms, in the aggregate affect an outright *ban* on the private ownership and use of the pistol (or handgun) within the District of Columbia (the "District"). Such a categorical ban on this traditional class of firearms is completely inconsistent with the enumerated fundamental right secured by the Second Amendment.

Under the First Amendment, the government may not ban all First Amendment activity. *See Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). In fact, just as the LAX airport sought to create a "First Amendment Free Zone," it is conceivable that certain governmental jurisdictions, most notably municipalities, would seek to convert the entire city into a gun free zone. Under the Second Amendment, any such government attempt to ban all firearms within its jurisdiction should be met with the same short shrift afforded LAX and its broad ban on First Amendment activity. *See id.* at 575 ("We think it obvious that such a ban cannot be justified . . . because no conceivable governmental interest would justify such an absolute prohibition of speech").

Traditional firearms consist of three classifications of arms that are the modern day equivalents of individual "founding-era weapon[s:]" the rifle, the shotgun and the pistol. *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007). The "pistol is the most preferred firearm in the nation to 'keep' and use for the protection of one's home and family." *Id.* at 400. The government's total ban on all such traditional firearms is the equivalent of the "First Amendment Free Zone."

Beyond such categorical bans is the multitude of regulations that impose restrictions on First or Second Amendment activity that fall short of a total ban, but nevertheless are substantial in their effect on the rights being exercised. Strict scrutiny applies to such regulations that target core First Amendment activity such as political and religious speech just as it applies to core Second Amendment activity such as the use of traditional firearms protected under the Second Amendment.

III. The regulation of core Second Amendment rights demands the same exacting scrutiny, strict scrutiny, as the regulation of core political or religious speech.

While the government retains some ability to regulate the ownership and use of traditional firearms under strict scrutiny, the United States has recommended this Court apply no more than intermediate scrutiny to any law affecting a regulation or restriction of the Second Amendment. This recommendation appears based primarily on concerns regarding, the ownership of machine guns. The United States raises important questions that require careful consideration. Its proffered solution, however, casts too long a shadow over the rights secured by the Second Amendment, a right the United States recognized as "central to the preservation of liberty." *Brief for the United States as Amicus Curiae* 17 (hereinafter "*U.S. Brief*"). Indeed, regulations governing the ownership of traditional firearms are very different from regulations governing the ownership of hand grenades and rocket launchers, just as there is a deep chasm between the regulation of core political speech and nude dancing. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) ("[S]ociety's interest in protecting [sexually explicit films] is of a wholly different, and lesser, magnitude than [its] interest in untrammeled political debate.").

First Amendment protection is "at its zenith" when government regulates core political speech. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Thus, strict scrutiny is applied to regulations of core political speech. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (restrictions on political speech "must be subjected to the most exacting scrutiny"). Likewise, the possession of traditional firearms is at the center of the core of Second Amendment protection. Strict scrutiny should apply to regulations of gun ownership in the same manner as it applies to regulations of core political and religious speech.

The Court routinely applies strict scrutiny when striking down regulations of entire categories of speech. *See, e.g.*, *R.A.V.*, 505 U.S. at 392-95 (applying strict scrutiny to a regulation banning "fighting words"); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760-61 (1995) (plurality) (applying strict scrutiny to a restriction on religious advocacy); *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (applying strict scrutiny to a law barring flag desecration).

Such sweeping categorical bans on speech are the equivalent of sweeping bans on categories of traditional firearms. Thus, a sweeping ban on the possession of pistols must be analyzed under strict scrutiny. This alleviates any concerns the United States raised concerning misunderstandings regarding the meaning of traditional firearms because the United States or any other governmental authority is not without recourse if a machine gun is classified as a traditional firearm. Even in such an extreme case, possession of a machine gun could be regulated if the government identified a compelling governmental interest and provided the necessary nexus to the regulation while identifying the chosen regulation as the least restrictive means of achieving the interest.

There is one caveat to the strict scrutiny analysis – time, place and manner regulations. It is conceivable that the government would like to prohibit even traditional firearms from certain locations such as visitor areas in jails, public libraries, public schools and courthouses. These government facilities typically

have government police protection to a greater degree than private places of commerce or private dwellings. Such place regulations are certainly of concern to governments. In addition, some local governments may desire their citizens to carry their firearms in a concealed manner. Finally, there may be times firearms are restricted, such as no hunting at night for deer or no hunting at night within so many feet of a residential community. These time, place and manner regulations are the equivalent of time, place and manner regulations the D.C. Circuit alluded to when it cited *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *Parker*, 478 F.3d at 399.

However, the District attempts to make a logical leap to conclude that the total ban of pistols is a time, place and manner restriction. *Brief for Petitioners* 48. That is the equivalent of stating that a ban on all political speech on a public sidewalk is a valid time, place and manner restriction because it denies a speaker any time, any place and any manner for political speech. The District's reliance on the urban nature of its district is an important point, but it is not a fog to cloud all logic. The District may have regulations that prohibit the discharge of a pistol unless in self-defense, provide that all training be conducted in gun clubs, or require citizens to conceal the weapons they carry on their person. Such regulations are legitimate time, place and manner regulations. However, a mere citation to "time, place and manner regulations" is not a panacea for entire bans, which should be subject to strict scrutiny.

IV. Weapons beyond the scope of this case should not serve as a basis for lowering the standard of scrutiny for all bans on firearms.

The D.C. Circuit correctly limited the scope of its opinion to the category of firearms at issue in this case – traditional firearms. *See Parker*, 478 F.3d at 397-99. This categorical approach to reviewing the firearms restrictions at issue in this case, and not extending the analysis beyond, is consistent with this Court's long-standing practice in reviewing restrictions on the fundamental freedom of speech. *See Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.").

Some forms of speech are routinely categorized as falling outside of the protections of the First Amendment. As this Court so held, "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinksy v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *see also Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *Schenk v. United States*, 249 U.S. 47 (1919). Words that are "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are unprotected. *Chaplinsky*, 315 U.S. at 572.

Likewise, there may be categories of firearms that are not protected. This is not the case to draw those distinctions and diluting the level of scrutiny in anticipation of future cases does nothing more than wash the starch out of the protection that is so vital to the preservation of freedom. Amicus United States raises questions for future cases regarding the application of the rule in this case to those categories of arms, such as machine guns, which are not at issue in this case. This Court should not entertain an invitation to reduce the level of scrutiny applied to a fundamental right because there may be categories of expression of that right in the future that are justifiably excluded from protection. Any abandonment of the fundamental right analysis is unnecessary and as dangerous as concluding that all speech regulations are governed by intermediate scrutiny because of the threat of obscenity.

CONCLUSION

The D.C. Circuit, in keeping with the limited issues presented in *Parker*, provided a precedent-rich analysis helpful for determining both the nature of the "arms" covered by the Second Amendment and the proper response to an outright ban on any of these arms. Amici encourage the Court to draw upon its vast experience in First Amendment jurisprudence to inform its analysis and formulation of the legal framework for resolving this case.

The Court should affirm that the Second Amendment secures the individual right to own and use firearms and affirm the court below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-290

In The

Supreme Court of the United States

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between the individual right to bear arms – one of the fundamental rights essential to the protection of all other forms of liberty and security – and a theory of government power that renders such fundamental individual rights subservient to the whims of government authority. The case thus touches the very core of IJ's mission and ideals.

STATEMENT

Petitioners challenge the decision below on the various grounds that: (1) the Second Amendment only protects a collective right to keep and bear arms in connection with militia service; (2) the Second Amendment does not apply to the District of Columbia because the District should be treated as the States are treated, and the States supposedly are not subject to the Second Amendment, but rather are protected by it; and (3) the District's restrictions on arms should be viewed as permissible and reasonable regulations even under an individual-rights view of the Second Amendment. Pet. Br. at 8-11 (summarizing arguments). And several of petitioners' *amici* seek to bolster such arguments by contending that the Second Amendment does not apply to the States, and thus should not apply to the District. Br. of *Amici Curiae* New York, *et al.*, in Support of Petitioners, at 1-2 (Second Amendment claimed to be a federalism provision n favor of the States); Br. of *Amici Curiae* Major American Cities, *et al.*, in Support of Petitioners, at 12-20 (same); Br. of *Amici Curiae* City of Chicago and Chicago Bd. Of Educ. in Support of Petitioners at 2, 5-31 (disputing incorporation of Second into Fourteenth Amendment).

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[1] This brief is filed pursuant to the written blanket consents on file with this Court. Per the terms of such consents, written notice was provided to the parties more than seven days prior to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

In making such arguments, petitioners and their *amici* rely primarily on historical sources from and preceding the adoption of the Second Amendment to define the scope and meaning of the right to keep and bear arms. *See* Pet. Br. at 11-35 (looking to views of original Framers); Br. of *Amici Curiae* New York, *et al.*, at 2-4 (denying Fourteenth Amendment incorporation without any discussion of the views of the Framers of that Amendment); Br. of *Amici Curiae* Major American Cities, *et al.*, at 20-22 & n. 4 (denying incorporation with only a footnote misdescribing history of the Fourteenth Amendment); Br. of *Amici*

Curiae City of Chicago and Chicago Bd. of Educ., at 14-16 (denying incorporation with only a brief and misleading discussion of views of the Framers of the Fourteenth Amendment).

Largely overlooked in the briefs, however, is the understanding and intent of the Framers of the Fourteenth Amendment and the nature of the right to keep and bear arms as they understood it and addressed it in connection with their efforts to prevent freedmen from being disarmed and victimized by state governments and militias. The individual-rights view of the Second Amendment held by those subsequent Framers was incorporated into the Constitution as a whole via the Fourteenth Amendment, defines the rights secured to citizens as against the States, and adopts a construction of the privileges or immunities of national citizens that reflects back on the Second Amendment itself to either confirm or, if need be, expand, the construction of that earlier Amendment.

This brief will focus primarily on the history and relevance of the Fourteenth Amendment as it relates to the constitutional right to keep and bear arms. The earlier history and construction of the Second Amendment will be left to the capable arguments of respondent and its other *amici*.

SUMMARY OF ARGUMENT

1. Interpretation of the Constitution, as with interpretation of any instrument, requires this Court to consider the document as a whole. Subsequent amendments to the Constitution can have particular force even for interpreting earlier provisions, not only

because they may reflect an operational understanding of the meaning the pre-existing provisions, but because they can incorporate such understanding onto the existing provisions through the force and authority of the amendment itself. In such fashion, amendments can confirm or alter a particular construction of pre-existing provisions, and require that such provisions be read for their meaning as of the time of amendment, not merely from the time of original adoption.

2. The history and adoption of the Fourteenth Amendment demonstrates the Framer's specific and repeated concern that freedmen were being disarmed by state and local governments and militias, in violation of what those Framers understood to be an individual constitutional right to bear arms. In response to this Court's previous refusal to enforce parts of the Bill of Rights directly against the States, and its holding that blacks were not citizens of the United States entitled to the rights of such citizens, the Framers set out to remedy the inability to enforce numerous constitutional rights against the States by incorporating them into the Fourteenth Amendment.

Identification of the evils the 39th Congress sought to remedy – including the disarming of freedmen – the parallel legislative responses to that problem, and the specific explanations by the Framers of the purpose and function of the Fourteenth Amendment, all demonstrate that they viewed the existing constitutional right to bear arms as an individual right of personal security. And they understood and intended the language of the Fourteenth Amendment to secure such a right *against* the States and various militias, not merely in the service of the very entities seeking to disarm and abuse the freedmen. And by accomplishing that goal through the identification and extension of the rights of national citizens, the Framers of the Fourteenth Amendment also clarified and defined the underlying rights in the Second Amendment as well.

Such clarification through incorporation demonstrates that the right to bear arms is an individual right, not merely a federalism provision. It also rebuts the notion that the phrase "to bear arms" was an exclusively military reference and confirms that personal security even, and especially, as against state actors is a primary function and purpose of the right to bear arms. Whatever level of scrutiny this Court applies in evaluating the infringement of the right to bear arms in this case must be protective of that central purpose of allowing for self-defense and personal security, and cannot allow government to, *ipse dixit*, declare such purposes unlawful or insignificant.

3. The history of the right to bear arms and the Fourteenth Amendment also reflects upon an error in this Court's incorporation doctrine that ought to be corrected. The Framers of the Fourteenth Amendment viewed the right to bear arms as a privilege or immunity of national citizenship. This Court, starting with the *Slaughter-House Cases*, has essentially abandoned the Privileges or Immunities Clause as a source of substantive restrictions on the States, contrary to the views of the Framers of that Clause. That decision should be overruled. While this Court subsequently shifted the work of incorporation to the

Due Process Clause, a proper textual and historical basis for incorporation would be far more legitimate.

Whatever the basis for incorporation, however, the history of the Fourteenth Amendment shows that the right to bear arms was intended to be incorporated, and thus should be read as it was understood at the time of such incorporation. This Court's decisions on the reach of the Second Amendment standing alone do not negate, and in fact support, incorporation of the right to bear arms as against the States.

ARGUMENT

I. The History and Adoption of the Fourteenth Amendment Is a Valuable and Proper Source for Construing the Right To Keep and Bear Arms Protected by the Second Amendment.

As everyone recognizes, constitutional provisions must be construed in context. *United States* v. *Balsys*, 524 U.S. 666, 673 (1998). The amendments to that document are, of course, part of the essential intrinsic context of such a document. The Constitution following an amendment is, in many ways, a substantially different document than it was just prior to amendment, and the internal context even for provisions not expressly altered by the amendment nonetheless changes, and changes the interpretation of such provisions. *Cf. United States* v. *La Franca*, 282 U.S. 568, 576 (1931) (Statutes after amendment "are to be read, as to all subsequent occurrences, as if they had originally been in the amended form"). And insofar as an amendment was made with reference to earlier provisions, the amendment will control over such earlier provisions. *Cf. Rogers* v. *Palmer*, 102 U.S. (12 Otto) 263, 266 (1880) (amendment to statute controls original act to extent of conflict).

To understand the meaning of the Second Amendment today, one therefore must also understand the meaning of the Fourteenth Amendment and the ways in which it was understood and intended to incorporate the Second Amendment. An individual right to bear arms was a key component of what the Framers of the Fourteenth Amendment understood to be the privileges or immunities of citizens of the United States. By incorporating such an understanding into the Fourteenth Amendment, they necessarily have shaped the context of any present construction of the Second Amendment as well.

II. The History and Adoption of the Fourteenth Amendment Confirms and Establishes that the Right To Keep and Bear Arms Is an Individual Right.

During reconstruction following the Civil War, there was considerable discussion in Congress and throughout the Nation of the right to bear arms, and of the deprivation of that right by Southern States and militias seeking to oppress freedmen. In seeking to protect the right to bear arms and other rights from state infringement – first through interim legislation and then through the constitutional amendment – the Framers of the Fourteenth Amendment both defined the nature and scope of the right to bear arms in general, and then ensured that the right could be enforced against state abridgement.

In a comprehensive study of the relationship between the right to bear arms and the Fourteenth Amendment, Stephen P. Halbrook has reviewed the extensive history and discussion of the right to bear arms during reconstruction and concluded that the Framers of the Fourteenth Amendment understood the Second Amendment to protect against federal invasion an *individual* right of a citizen to keep and bear arms, and that protection for that underlying right was incorporated into the Fourteenth Amendment to protect it from abridgement by the States. Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) (hereinafter "FREEDMEN"). The history recounted in that study amply supports the individual-rights view of the Second Amendment and, to the extent any uncertainty remained, cemented such view into the Constitution through the act of incorporating it into the Fourteenth Amendment.

Understanding how such view was incorporated into the Fourteenth Amendment, like most other constitutional analysis, requires looking to the state of the law and the evils perceived by the Framers, the remedy chosen for such evils, and other evidence of contemporaneous understanding by the Congress that framed the Amendment. *See Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) (In construing Constitution, court looks to the history of the time and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy).

A. *State Violation of Freedmen's Right To Keep and Bear Arms Was a Central Evil To Be Remedied by the Fourteenth Amendment.*

A critical step in interpreting the Fourteenth Amendment's protection of the privileges and immunities of national citizens and of life, liberty, and property is to understand the evils its Framers sought to remedy. Among the many evils those Framers sought to cure, the systematic violation of the freedmen's constitutional right to keep and bear arms was prominent.

The evidence of such concern is extensive. While Congress was drafting and considering the proposed Fourteenth Amendment and two pieces of interim legislation – the Freedmen's Bureau Bill and the Civil Rights Bill – it received considerable testimony and evidence regarding the disarming of freedmen by state and local governments and militias.

For example, numerous witnesses testified before the Joint Committee on Reconstruction – which drafted the Fourteenth Amendment – and before other committees that many still-recalcitrant Southern States sought to disarm freed blacks and others, and then prey upon such newly vulnerable populations. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 78-79 (Dec. 19, 1865) (discussing report denouncing southern abuses, including local ordinances providing that that "no freedman who is not in the military service shall be allowed to carry firearms, or any kind of weapon" without special permission); House Ex. Doc. No. 70, 39th Cong., 1st Sess., at 236-39 (1866) (report that in Kentucky town the "marshall takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs"; outlaws in Kentucky "make brutal attacks and raids upon freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders"); Report of the Joint Comm. on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 3, at 32 (1866) (hereinafter "Report of the Joint Comm.") (testimony from military officer that local militia in Mississippi "were ordered by the adjutant general of the State to disarm the negroes and turn their arms into the arsenals."); *id.* at 39 (report from the Freedmen's Bureau that the "Militia Organizations in * * * South Carolina (Edgefield) were engaged in disarming the negroes. This created great discontent among the latter, and in some instances they had offered resistance. [¶] In southwestern Georgia, I learned that the militia had done the same, sometimes pretending to act under orders from United States authorities."); *id.*, pt. 2, at 21 (testimony that Alexandria, Virginia sought "to enforce the old law against [negroes] in respect to whipping and carrying firearms, nearly or quite up to the time of the establishment of the Freedmen's Bureau in that city."); *id.*, pt. 4, at 49-50 (testimony that armed patrols in Texas, acting under supposed authority of the Governor, "passed about through the settlements where negroes were living, disarmed them – took everything in the shape of arms from them – and frequently robbed them" of other valuables); *id.*, pt. 2, at 272 (testimony that "[s]ome of the local police [in North Carolina] have been guilty of great abuses by pretending to have authority to disarm the colored people.").

Such testimony did not go unnoticed. Indeed, numerous members of Congress – and many of the key architects of the Fourteenth Amendment and related reconstruction-era legislation – specifically cited such mischief as needing a federal remedy. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 914 (Feb. 19, 1866) (Sen. Wilson) (quoting reports that Southern Militias "were engaged in disarming the negroes" as reasons to disband such militias); *id.* at 915 (Sen. Wilson) (noting that ex-Confederates went "up and down the country searching houses, disarming people, committing outrages of every kind and description"); *id.* at 941 (Feb. 20, 1866) (Sen. Trumbull) (discussing reports of oppression of freedmen and the "abusive conduct of [a Mississippi] militia" which would "hang some freedman or search negro houses for arms"); *see also id.* at 39, 40 (Dec. 13, 1865) (Sen. Wilson) (citing, as justification for a proposed bill, reports that in Mississippi "rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are done in other sections of the country").

And beyond merely *noticing* the oppressive conduct of the Southern States, federal officers and Congressmen alike considered it a violation of the freedmen's *constitutional right to bear arms* that demanded a federal remedy. *See* House Exec. Doc. No. 70, at 233, 236 (Report of the Commissioner of the Freedmen's Bureau) ("the civil law [in Kentucky] prohibits the colored man from bearing arms" and "their arms are taken from them by the civil authorities. * * * Thus, the right of the people to keep and bear arms as provided in the Constitution is infringed."); *id.* at 236-39 (report that in Kentucky, colored people's "arms are taken from them by the civil authorities, and confiscated for the benefit of the commonwealth. * * * Thus, the right of the people to keep and bear arms as provided in the Constitution is infringed."); CONG. GLOBE, 39th Cong., 1st Sess. 908-09 (Feb. 17, 1866) (Rep. Lawrence) (during testimony regarding the proposed Fourteenth Amendment, discussing the need to protect freedmen, and quoting General Order No. 1 issued by the military providing, *inter alia*, that "'[t]o the end that civil rights and immunities may be enjoyed, * * * [t]he constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed * * *.'"); REPORT OF THE JOINT COMM., pt. 2, at 229 (discussing circular issued by General Saxton noting that "[i]t is reported that in some parts of [South Carolina], armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen. Such conduct is in clear and direct violation of their *personal rights as guaranteed by the Constitution* of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.'") (emphasis added); *id.*, pt. 3, at 140 (testimony that militias in Alabama "were ordered to disarm the freedmen," causing assistant commissioner of the Freedmen's Bureau to make "public [his] determination to maintain the right of the negro to keep and bear arms").

The view that States were violating the freedmen's right to bear arms, and the response to such violations, were widely reported. FREEDMEN at 7, 19, 31, 37 (discussing press coverage of state efforts to disarm freedmen and the military and congressional response to same). Such reporting confirmed a broader public understanding of an individual right to bear arms, and of the intention of the federal government to enforce that right against the States. *See, e.g.*, *Harper's Weekly*, Jan. 13, 1866, at 3 col. 2 (reporting that the "militia [in Mississippi] have seized every gun and pistol found in the hands of the (so called) freedmen," that the State refused to recognize "the negro as having any right to carry arms," and that it thus insists upon "infringing upon their liberties"); Editorial, *The Loyal Georgian (Augusta)*, Feb. 3, 1866, at 3, col. 4 (commenting that General Order No. 1 gave colored citizens "the same right to own and carry arms that other citizens have. You are not only free but citizens of the United States and as such entitled to the same privileges granted to other citizens by the Constitution. * * * All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.").

As the above evidence and congressional discussion reflects, the disarming of freedmen by state and local governments and militias was considered a significant evil requiring a remedy and a violation of the individual rights of freedmen to keep and bear arms. In order to remedy such evils, the 39th Congress adopted a number of measures culminating in the Fourteenth Amendment.

B. Legislative Responses to Southern Recalcitrance and Violations of the Right To Keep and Bear Arms.

Two key pieces of legislation considered in parallel with the proposed Fourteenth Amendment, and that inform its meaning, were the Freedmen's Bureau Bill and the Civil Rights Bill.

1. The Freedmen's Bureau Bill.

The Freedmen's Bureau Bill, S. 60, enhanced and extended the authorization of the Freedmen's Bureau so that the federal military could protect the rights of freedmen in States still lacking a reconstructed or functioning civil government. The Bill was introduced by Sen. Lyman Trumbull, Chairman of the Senate Judiciary Committee, on January 5, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866). The bill as introduced protected, *inter alia*, the "full and equal benefit of all laws and proceedings for the security of person and estate." *Id.* at 209 (Jan. 12, 1866). Between January and July 1866 the bill was debated, amended to include express protection for the "constitutional right to bear arms," passed, successfully vetoed, reintroduced, passed again, unsuccessfully vetoed, and ultimately became law on July 16, 1866.[2]

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[2] *See* CONG. GLOBE, 39th Cong., 1st Sess., at 421 (Jan. 24, 1866) (Senate passage); *id.* at 688 (Feb. 6, 1866) (House passage, with an amendment adding protection for the "constitutional right to bear arms"); *id.* at 748 (Feb. 8, 1866) (Senate concurrence with House amendments); *id.* at 775 (Feb. 9, 1866) (House concurrence with Senate amendments); *id.* at 916-17 (Feb. 19, 1866) (reporting President's veto message); *id.* at 943 (Feb. 20, 1866) (Senate override falling 2 votes short of the necessary two-thirds); *id.* at 1238 (Mar. 7, 1866) (reintroduction of bill as H.R. 613 by Rep. Eliot); *id.* at 2878 (May 29, 1866) (House passage);

As finally enacted, the Freedmen's Bureau Act continued and expanded federal military protection of the rights of persons in areas where ordinary judicial proceedings were not yet restored and in unreconstructed States. Section 14 of the Act (the former § 7 of the bill) provided, in relevant part, that:

> [T]he right * * * to have full and equal benefit of all laws and proceedings concerning *personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate*, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all citizens * * * without respect to race or color or any previous condition of slavery. * * * [T]he President shall * * * extend military protection and have military jurisdiction over all cases and questions concerning the *free enjoyment of such immunities and rights* * * *.

14 STAT. 173, 176 (1866) (emphasis added).

Congressional consideration and adoption of the Freedmen's Bureau Bill, overlapping Congress' consideration and approval of the Fourteenth Amendment, sheds considerable light on the then-contemporary understanding of essential concepts and language incorporated into the Fourteenth Amendment. Most obviously, the references to "personal liberty, personal security, and the acquisition,

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id. at 3412 (June 26, 1866) (Senate passage); *id*. at 3524 (July 2, 1866) (Senate concurrence in conference committee report); *id*. at 3562 (July 3, 1866) (House concurrence in same); *id*. at 3849 (July 16, 1866) (reporting President's veto message); *id*. at 3850 (House override); *id*. at 3842 (Senate override).

enjoyment, and disposition of estate," and to "such immunities and rights" plainly echo the "life, liberty, or property" and "privileges or immunities" language of the Fourteenth Amendment. Thus, it is highly instructive that the Act expressly includes "the constitutional right to bear arms" as encompassed by such language.

In fact, such language was added to the earlier language regarding the "security of person and estate," to emphasize the importance of the right to bear arms to the Framers of that era and one of the specific evils that were seeking to remedy. CONG. GLOBE, 39th Cong., 1st Sess. 654 (Feb. 5, 1866) (Rep. Eliot) (describing Committee substitute adding such language). Such right, however, was understood to be included within the broader general references in the act, even without such emphasis. *See, e.g.*, *id.* at 743 (Feb. 8, 1866) (Sen. Trumbull) (explaining that in "the section which declares that negroes and mulattoes shall have the same civil rights as white persons, and the same security of person and estate," the House has "inserted these words, 'including the constitutional right of bearing arms.' I think that does not alter their meaning.").

Congressional discussion of the bill also reflects upon the *nature* of the right to bear arms as being an individual right that would be made enforceable against the States and would trump state law. CONG. GLOBE, 39th Cong., 1st Sess. 512, 517 (Jan. 29, 1866) (Rep. Eliot) (bill would nullify the black codes in places like Louisiana barring freedmen from carrying weapons); *id.* at 657 (Feb. 5, 1866) (Rep. Eliot) (describing some of the evils to which the bill was directed, citing report regarding Kentucky law prohibiting blacks from owning guns and disarming blacks). Even the bill's opponents did not dispute the *nature* of the rights at issue, only whether Congress could properly enforce them or should extend them to freedmen. *Id.* at 371 (Jan. 23, 1866) (Sen. Davis) (opposing bill but acknowledging that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense"). Such discussion shows the right to bear arms, as then understood, was an individual right based in large part on personal security and defense, not merely collective service.

2. The Civil Rights Bill.

A further remedy adopted by Congress, and reflecting upon the right to bear arms, was the Civil Rights Bill also introduced by Sen. Trumbull on the same day as the Freedmen's Bureau Bill. CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866). As introduced, the bill provided complementary protection for the "full and equal benefit of all laws and proceedings *for the security of person and property*." *Id.* at 211 (Jan. 12, 1866) (emphasis added). That bill was to apply in all States, even after reconstruction had restored civil authority in the Southern States. Between January and April 1866, the bill was debated, passed, unsuccessfully vetoed, and thus became law.[3]

As enacted into law, Section 1 of the Civil Rights Act of 1866 provided, in relevant part:

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[3] CONG. GLOBE, 39th Cong., 1st Sess. 606 (Feb. 2, 1866) (Senate passage); *id.* at 1367 (Mar. 13, 1866) (House passage); *id.* at 1679 (Mar. 27, 1866) (reporting veto); *id.* at 1809 (Apr. 6, 1866) (Senate override); *id.* at 1861 (Apr. 9, 1866) (House override).

> *Citizens, of every race and color,* without regard to any previous condition of slavery or involuntary servitude, * * * *shall have the same right, in every State and Territory in the United States,* to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and *to full and equal benefit of all laws and proceedings for the security of person and property,* as is enjoyed by white citizens.

14 STAT. 27 (1866) (emphasis added).

As with the Freedmen's Bureau Bill, the terms and discussion of the Civil Rights Bill reflect upon both the Fourteenth and the Second Amendments. As an initial matter, the protection for the "security of person and property" again echoes the Fourteenth Amendment's protections, and such language was again understood to encompass the Second Amendment's right to bear arms. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1291 (Mar. 9, 1866) (Rep. Bingham) (explaining that bill would "enforce in its letter and its spirit the bill of rights as embodied in that Constitution"); *id.* at 1291-92 (Rep. Bingham) (explaining that the relevant "sections of the Freedmen's Bureau bill enumerate the same rights and all the rights and privileges that are enumerated in the first section of this [the Civil Rights] bill"); *id.* at 1292 (Rep. Bingham) (quoting section of Freedmen's Bureau Bill providing for the "'full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms,'" and explaining purpose to "arm Congress with the power to * * * punish all violations by State Officers of the bill of rights"). [4]

Congressional discussion of the bill also confirmed the personal nature of the right to bear arms and Congress' intent to make that right enforceable against the States. *See, e.g., id.* at 474 (Jan. 29, 1866) (Sen. Trumbull) (bill needed to override "badges of slavery" such as the black codes in Mississippi and other states that "prohibit[ed] any negro or mulatto from having firearms," and noting the "intention of this bill to secure those rights" against state deprivation); *id.* at 1838 (Apr. 7, 1866) (Rep. Clark) (discussing veto override vote, criticizing seizure of arms from blacks in Alabama and Mississippi, and noting: "I find in the Constitution of the United States an article which declares that 'the right of the people to keep and bear arms shall not be infringed.' For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws.").

Also of interest in the discussion of the Civil Rights Bill was a proposal by Rep. Raymond of New York, also a member of the Joint Committee considering the Fourteenth Amendment, to add a clause declaring that all persons born in the United States are "citizens of the United States, and entitled to all rights and privileges as such." CONG. GLOBE, 39th

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[4] Opponents similarly understood the bill to have the same scope as the Freedmen's Bureau Bill, which was explicit in its protection of the right to bear arms. CONG. GLOBE, 39th Cong., 1st Sess. 1121 (Mar. 1, 1866) (Rep. Rogers) (Civil Rights Bill "is nothing but a relic of the Freedman's Bureau bill"); *cf. id.* at 1122 ("the rights of nature" included "the right of self-defense, the right to protect our lives from invasion by others").

Cong., 1st Sess. 1266 (Mar. 8, 1866). That language, of course, would eventually find its way into the Fourteenth Amendment itself. Explaining his proposed amendment to the Civil Rights Bill, Rep. Raymond explained:

> make the colored man a citizen of the United States and he has *every right which you or I have as citizens of the United States* under the laws and constitution of the United States. * * * He has defined status; he has a country and a home; a right to defend himself and his wife and children; *a right to bear arms*.

Id. (emphasis added). While such language did not make it into the Civil Rights Bill, it was added to the Fourteenth Amendment and Rep. Raymond's analysis again reflects on both the nature of the right to bear arms and its incorporation.

As with the Freedmen's Bureau Bill, Congress understood and intended that its protection for the "security of person and property" would encompass protection of an individual constitutional right to bear arms as a remedy for the abuses committed by the Southern States in disarming the freedmen. And that understanding would carry through to the Fourteenth Amendment.

C. The Fourteenth Amendment and Enforcement of the Second Amendment Against the States.

The Fourteenth Amendment was originally proposed via a House Resolution by Rep. Bingham on Dec. 6, 1865. CONG. GLOBE, 39th Cong., 1st Sess. 14 (Dec. 6, 1865) (calling for an amendment to the constitution "to empower Congress to pass all necessary and proper laws to secure to all persons in their rights, life, liberty, and property"). Between December 1865 and July 1868, the proposed Fourteenth Amendment was referred to a Joint Committee of Congress and reported out therefrom, approved by Congress, and ultimately ratified by the States.[5]

Throughout the discussion and debate over the proposed amendment, there were repeated and undisputed statements of the intent of the Amendment to enhance protection for rights set out in the Constitution and Bill of Rights, and to make such rights enforceable against the States. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 566 (Feb. 1, 1866) (Senate resolution to consider an amendment to the Constitution "so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation all the guarantees contained in that instrument"); *id.* at 586 (Rep. Donnelly) (proposed Amendment "provides in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution"); *id.* at 1088 (Feb. 28, 1866) (Rep. Bingham) (proposed amendment would "arm the Congress * * * with the power to enforce this bill of rights as it stands in the Constitution today"); *id.* (Rep. Woodbridge) (amendment would empower Congress to protect "the natural rights which necessarily pertain to citizenship"); *id.* at 2465 (May 8, 1866) (Rep. Thayer) (amendment "is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law").

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[5] *See* CONG. GLOBE, 39th Cong., 1st Sess. 566 (Feb. 1, 1866) (Senate resolution referring matter of potential amendment to Joint Committee); *id.* at 806, 813 (Feb. 13, 1866) (Joint Committee reporting draft language for Fourteenth Amendment); *id.* at 2286 (Apr. 30, 1866) (report to House of proposed amendment from Joint Committee); id. at 2545 (May 10, 1866) (House passage); *id.* at 3042 (June 8, 1866) (Senate passage with amendments); *id.* at 3149 (June 13, 1866) (House passage as amended by Senate); 15 STAT. 708, 709-11 (1868) (ratification by three-fourths of the States officially proclaimed on July 28, 1868).

Beyond such a general intent to incorporate, however, the discussions reflect a more particular intent to incorporate the right to bear arms, as might be expected given the simultaneous consideration by Congress of abuses by the Southern States in disarming freedmen, and the passage of legislation directed at that and other abuses. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1182 (Mar. 5, 1866) (Sen. Pomeroy) (describing the "safeguards of liberty * * * under our Constitution" as being that every man should have "the right to acquire and hold [a homestead], and the right to be safe and protected in that citadel of his love[,] * * * the right to bear arms for the defense of himself and family and his homestead[, and] * * *[h]e should have the ballot."); *id.* at 1072 (Feb. 28, 1866) (Rep. Nye of Nevada) (opposing Amendment as unnecessary because of view that "[a]s citizens of the United States they [blacks] have equal right to protection, and to keep and bear arms for self-defense."); *id.* at 2765-66 (May 23, 1866) (Sen. Howard) (describing "personal rights" secured by earlier amendments, including the right to keep and bear arms, and explaining the object of the Fourteenth Amendment as being "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees).[6]

Indeed, among the express justifications for the Amendment was the desire to remedy the gap in protection created by this Court's decision in *Barron* v. *Baltimore,* 32 U.S. (7 Pet.) 243 (1833), holding that the bill of rights did not apply of its own force to the States, and this Court's decision in *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857), holding that even freed blacks could not be citizens and hence were not entitled to the rights of citizens. CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (Feb. 26, 1866) (Rep. Bingham) (explaining problem as being that currently "this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States"); *id.* at 2459 (May 8, 1866) (Rep. Stevens) (provisions of the amendment "are all asserted, in some form or another, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect * * *."); FREEDMEN at 37-38 (discussing citizenship language designed to reverse effect of *Dred Scott* case).

Interestingly enough, this Court in *Dred Scott* had no difficulty identifying the privileges and immunities of citizens as including the right to bear arms, it simply refused to extend those rights to blacks. 60 U.S. (19 How.) at 416-17. The Fourteenth Amendment was intended to fill those gaps, and ensure federal authority and jurisdiction to protect such rights as against state deprivations. And an individual right to bear arms was front and center among the rights the Framers sought to protect.

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[6] *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. 1182 (Mar. 5, 1866) (Sen. Pomeroy) (discussing legislation "appropriate" for "securing the freedom of all men" under the Thirteenth Amendment: "It can be nothing less than throwing about all men the essential safeguards of the Constitution. The 'right to bear arms' is not plainer taught or more efficient than the right to carry ballots. And if appropriate legislation will secure the one so can it also the other.").

D. Lessons from the Background, History, and Adoption of the Fourteenth Amendment.

Although the present case deals with the District of Columbia, an instrument of the federal government subject to the Second Amendment directly, rather than by incorporation, the significance of the above history is several-fold: First, by discussing the right to bear arms as one that must be protected against infringement by state and local governments and militias, the history of the Fourteenth Amendment confirms that it was viewed by the Framers of that era as an individual right, not merely a collective right of the States themselves in support of approved militias. Indeed, the fact that militias were among the primary culprits the Framers identified as *violating* the right to bear arms renders any continued suggestion of a purely collective right belonging to state governments impossible to square with the adoption of the Fourteenth Amendment.

Second, the repeated contextual uses of the phrase "to bear arms" in the context of carrying arms for personal security rebuts the claim that such phrase had an exclusively military meaning. Pet. Br. 18-19. Rather, it had the broader and general meaning of carrying arms for any purpose, including both military and non-military uses. Indeed, that even soldiers serving the Freedmen's Bureau employed the phrase in plainly a non-military context shows that the language "to bear arms" has a broader meaning than suggested by petitioners.

Third, the history establishes a definition of the privileges or immunities of United States citizens which operates not only via the Fourteenth Amendment against the States, but also provides constructive guidance as to the underlying rights themselves even as they operate against the federal government. Although such guidance comes after the adoption of the original Second Amendment, because it was incorporated into the Fourteenth Amendment, it is also part of the Constitution as a whole and offers intrinsic evidence of how the earlier amendments must be construed in the context of the binding later amendments. Thus, even though the right to bear arms applies directly to the district via the Second Amendment itself, the subsequent constitutional construction of that right as among the privileges of national citizenship necessarily serves to define the underlying right in a more meaningful and authoritative manner than any mere after-the-fact opinion of a later Congress. Such a construction is no mere *post-hoc* opinion, it is part of the binding law incorporated into the document as a whole via the Fourteenth Amendment.

Fourth, the nature of the right as understood and incorporated by the Framers of the Fourteenth Amendment also affects the type of protection implied by that right. Being an individual right against all levels of government, the degree of scrutiny should be heightened and governmental justifications viewed with skepticism. Furthermore, given the self-defense justifications of the right, any competing claim that seeks to deny the right of or need for self defense would be inconsistent with the embedded purpose and assumptions of the right to bear arms and hence invalid on its face. Finally, while there certainly are some restrictions on arms that even the Framers understood to be permissible – use only for lawful purpose, for example – any restrictions supposedly advancing permissible interests cannot be allowed to prevent ordinary citizens from exercising the core of the right and owning a weapon capable of protecting themselves, their families, and their communities if necessary, in the very circumstances where such protection would be necessary.

III. Incorporation and the Second Amendment in the Supreme Court.

The above material demonstrates that the Framers of the Fourteenth Amendment intended to incorporate the Bill of Rights generally, and the Second Amendment specifically, into the new amendment to make such rights enforceable against the States. The primary vehicle by which they understood themselves to accomplish that purpose was the Privileges or Immunities Clause, the content of which was so obvious to the Framers that it occasioned little, if any, dispute. This Court's Privileges or Immunities Clause jurisprudence, however, has largely neutered that provision and stripped it of its original intent and purpose. *See, e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). This Court has instead shifted much of the work that naturally would have been done by that clause instead to the Due Process Clause, creating the somewhat contradictory category of substantive due process, and struggling with what tests to apply to such an invented category.

At this point, however, the overwhelming weight of evidence and scholarly opinion makes clear that this Court should revisit its Privileges or Immunities Clause jurisprudence and ground the protection of individual rights as against the States in its historically and textually accurate source. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994) ("'everyone' agrees the Court [has] incorrectly interpreted the Privileges or Immunities Clause"); Thomas B. McAffee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986) ("this is one of the few important constitutional issues about which virtually every modern commentator is in agreement."); *see also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1121, 1297 n. 247 (1995) ("[T]he *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause"); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1258-59 (1992) (noting that the *Slaughter-House* majority had "rendered the privileges or immunities clause unnecessary" and "strangl[ed] the privileges or immunities clause in its crib).

A more historically accurate approach to incorporation would plainly include the Second Amendment right to bear arms as among the rights incorporated for protection against state infringement. As the previous discussion of the history of the Fourteenth Amendment demonstrated, the right to bear arms was among the essential protections the Framers sought to provide to freedmen threatened by their States, state militias, and others.

Any discussion of incorporation, of course, would be remiss in not at least briefly addressing this Court's key decisions regarding incorporation generally and the Second Amendment in particular. This Court's decisions in the *Slaughter-House Cases*, *Cruikshank*, *Presser*, and *Miller*, however, do not undermine the incorporation of an individual right to bear arms consistent with the intent of the Framers of the Fourteenth Amendment.

In the *Slaughter-House Cases*, this Court recognized that a "pervading purpose" among the reconstruction-era amendments was the "security and firm establishment of [the freedom of the slave race], and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." 83 U.S. (16 Wall.) at 71. Recognizing that understanding those amendments required looking to the "evil which they were designed to remedy, and the process of continued addition to the Constitution," this Court recounted the problem created by the *Dred Scott* and the solution adopted by the Fourteenth Amendment's citizenship clause, essentially overruling the *Dred Scott* decision. *Id.* at 73.

From there, however, the Court went astray, and opined that the Privileges or Immunities Clause only protected rights that were unique to national citizenship, and did not cover rights that were also rights of *state* citizenship, including essentially all fundamental rights previously understood as the duty of *all* governments to protect. *Id.* at 74-80. The Court thus seemingly excluded all of the usual individual rights from the scope of the privileges or immunities of national citizenship, as distinct from the privileges or immunities of state citizenship or just citizenship in general. *Id.* at 78-79. While conceding that at least some rights protected by the Constitution would be encompassed within the Fourteenth Amendment's privileges and immunities clause, the Court found such rights not to be implicated by the case at hand and thus went no further in defining what rights would be included. *Id.* at 80-81.

The conventional reading of the *Slaughter-House Cases* understands the decision to render the Privileges or Immunities Clause largely meaningless in terms of incorporating the Bill of Rights as against the States. Although recognizing the general purpose of the Framers to protect the freedmen, the decision failed to acknowledge that the Fourteenth Amendment sought to remedy precisely the problem that the Bill of Rights did not apply directly to the States and hence the States were abusing the rights set forth therein.

The history of the Fourteenth Amendment with respect to the right to bear arms demonstrates that such a constricted reading of the Fourteenth Amendment's Privileges or Immunities Clause is simply wrong. It was the express intent of the Framers to protect constitutional rights which, while *previ-*

ously the responsibility of the States to secure for their citizens, were being ignored and abused by those very States. And, as for the right to bear arms in particular, there is ample evidence that it was among the very central privileges or immunities of national citizenship that the Framers sought to protect. Insofar as the *Slaughter-House Cases* is understood to reach a contrary conclusion, the decision should be overruled. *Cf. Saenz* v. *Roe*, 526 U.S. 489, 522-28 (1999) (Thomas, J., dissenting) (raising possibility of reviving the Privileges or Immunities Clause).

In any event, whether incorporation is based on the Privileges or Immunities Clause, or by having substantive due process pick up the work intended to be done by the earlier clause, this Court already has incorporated much of the Bill of Rights into the Fourteenth Amendment. Whatever theory of incorporation this Court selects, it should be mindful of the specific history and intent to incorporate the right to bear arms as an individual right necessary to protect freedmen against state and local governments and militias. That history and intent necessarily trump the theoretical speculation regarding whether any original federalism aspect of the Second Amendment should preclude subsequent incorporation. The views of the Framers of the Fourteenth Amendment were to the contrary and those views are of greater significance in this context.

While it would be better and more coherent to reclaim a proper understanding of the privileges and immunities clause as the basis for incorporation, any path respectful of the history of the Fourteenth

Amendment would incorporate the right to bear arms.[7]

Turning to this Court's cases directly mentioning the Second Amendment, those cases stand for far less than petitioners and their *amici* suggest.

This Court's decision in *United States* v. *Cruikshank*, 92 U.S. (2 Otto) 542 (1876), for example, does not conflict with incorporation, and in fact seems to support it. In *Cruikshank*, the question confronting this Court was whether private conduct by one group of citizens against another violated, *inter alia*, the First Amendment right to assemble and petition, the Second Amendment right to bear arms, and the Fourteenth Amendment rights to life and liberty and to the exercise of their rights, privileges, and immunities as citizens of the United States and the State of Louisianna. 92 U.S. (2 Otto) at 544-45.

Rather than disputing the existence of such individual rights, the Court affirmatively endorsed the view that such rights in fact pre-existed the Constitution and considered only the question whether the *federal government* was empowered by the Constitution to protect such rights as against *private* infringement.

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[7] Even were incorporation based upon the Privileges or Immunities Clause, as suggested by the Framers of the Fourteenth Amendment, the debate over selective versus total incorporation would still remain. While the Fourteenth Amendment Framers frequently referred to providing protection for the bill of rights, their view of what *individual* rights were encompassed therein was somewhat uncertain. The evidence is quite strong as to the rights to speak, to assemble, and to petition the government and, as we have seen, is both strong and specific regarding the right to bear arms. However, incorporation of provisions such as the Establishment Clause, which some view as a prohibition of a national church and protection for potential state churches, rather than a protection for individuals, got little mention from the Framers, has little contemporaneous history bearing on the Fourteenth Amendment, and thus would pose different questions than incorporation of the Second Amendment.

In discussing the right of "bearing arms for a lawful purpose," this Court viewed that right, like the First Amendment right to assemble, as pre-existing the Constitution, neither "granted" by it nor "in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress[,] * * * leaving the people to look for their protection against any *violation by their fellow-citizens* of the rights it recognizes, to" the States. *Id.* at 553 (emphasis added). It was in that context of describing the limited jurisdiction of the First and Second Amendments standing alone that this Court commented that the Bill of Rights "was not intended to limit the powers of the State governments in respect of their own citizens, but to operate upon the national government alone." *Id.* at 552.

Far from undermining incorporation, such a judicial view of the Bill of Rights was recognized by the Framers of the Fourteenth Amendment and was the very reason for *adding* an amendment that would protect such rights against state infringement. Indeed, this Court seemed to recognize as much when it later distinguished the case before it as involving the conduct of *private parties*, not state actors, and thus observed that the Fourteenth Amendment "adds nothing to *the rights of one citizen as against another.*

It simply furnishes an additional *guarantee against any encroachment by the States* upon the fundamental rights which belong to every citizen as a member of society." *Id.* at 554 (emphasis added).

This Court's discussion thus seems to *endorse* such incorporation, treating the Fourteenth Amendment as a guarantee against *state* deprivation of the fundamental rights of citizens, which it had already described as including the pre-existing right to bear arms; a right not "dependent" upon the Constitution "for its existence," *id.* at 553, in precisely the same manner as the right to assemble was not dependent upon the Constitution, but rather inhered in the very notion of "citizenship under a free government," *id.* at 552.

Presser v. *Illinois*, 116 U.S. 252 (1886), likewise follows the same path as *Cruikshank*. Considering whether state restrictions on the claimed right of "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns" violated the right to keep and bear arms or the right to assemble, this Court found no violation. *Id.* at 264-65. Repeating *Cruikshank*'s analysis of the Second Amendment itself as being only a limit on the national government, *id.* at 265, this Court then turned to the Fourteenth Amendment. But instead of holding that First and Second Amendment rights were not attributes of national citizenship or otherwise excluded from the Fourteenth Amendment's protection, this Court held that the claimed right to military *association* and *drilling* with arms did not implicate the right to bear arms at all, only potentially the right to assemble. *Id.* at 266-67. As to the right to assemble, this Court cited *Cruikshank* for the proposition that the First Amendment right to assemble and petition the government *was* indeed "an attribute of national citizenship," but then held that the claimed right to associate and drill as a military company lacked the expressive purpose of petitioning the government and hence was not within the scope of the protected right. *Id.* at 267.

In the end, therefore, the case simply decides that the particular right claimed – one of military organization and assembly – fell within neither the right to bear arms nor the right to assemble and petition the government. In the course of doing so, however, this Court actually confirmed that, within their proper scope, the rights protected by the First and Second Amendments are indeed attributes of national citizenship and part of the privileges or immunities of such citizenship, protected by the Fourteenth Amendment against state infringement. While the facts of the case did not involve any actual abridgement of those rights according to this Court, the reasoning in *Presser*, as in *Cruikshank*, supports incorporation of the Second Amendment.

Finally, in *Miller* v. *Texas*, 153 U.S. 535 (1894), this Court merely reiterated its earlier holdings that the Second Amendment did not operate *directly* upon the States, and disposed of a Fourteenth Amendment incorporation claim by noting the "fatal" failure to raise the issue in the trial court. *Id.* at 538.

In the end, regardless *how* the right to bear arms is incorporated into the Fourteenth Amendment, the history of that Amendment demonstrates that the Framers intended such incorporation, viewed the right as a personal one, and thereby defined or redefined the right to bear arms even as against the federal government. Nothing in this Court's cases on the operation of the Second Amendment alone conflicts with the notion of incorporation via the Fourteenth Amendment, and this Court's reasoning in fact supports incorporation. Such incorporation, in turn, supports the decision below.

CONCLUSION

For the reasons above, this Court should affirm the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF *AMICI CURIAE*

Amici Curiae are members of the 110th Congress.[1] *Amici* have several important interests in this case.

First, as members of Congress bound by oath or affirmation "to support th[e] Constitution," U.S. Const. art. VI, cl. 3, *Amici* have an interest in assisting the Court to arrive at an appropriate construction of the Second Amendment and resolution of this case.

Second, the Constitution specifically allocates to Congress certain powers and responsibilities related to the militia. *See* U.S. Const. art. I, § 8, cls. 15 & 16. The responsibility of *Amici* for exercising this constitutionally assigned role give *Amici* a particular interest in assisting the Court to arrive at an appropriate construction of the Second Amendment and resolution of this case.

Third, Congress has, for decades, exercised the power assigned to it by the Constitution to regulate, and in some cases ban, the use or possession of certain weapons.[2] In so doing, Congress has regularly considered, interpreted and applied the Second Amendment in light of its obligation "to support th[e] Constitution." U.S. Const. art. VI, cl. 3. While it is well established that the judiciary has the power to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), this Court frequently has noted its respect for Congress as a coordinate and coequal branch of government, and generally assumes Congress "legislates in light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). *Amici* have an interest in ensuring that when resolving this case the Court considers Congress's experience interpreting and applying the Second Amendment – particularly during the 68 years since the Court last directly addressed the substantive nature of any rights conferred by that provision of the Constitution.

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[1] A list of the members of Congress is provided in the Appendix of this brief. This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Amici submit this brief in their individual capacities, not on behalf of Congress itself, but their views are informed and animated by their experiences as members of Congress, and their interest in Congress's standing as an institution.

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[2] In 1927, Congress prohibited the mailing of concealable weapons. *See* Act of Feb. 8, 1927, ch. 75, § 1, 44 Stat. 1059. Regulation of firearms in the District of Columbia dates back considerably further. *See* Pet. Br. at 3.

SUMMARY OF ARGUMENT

The decision below reads the Second Amendment as creating an individual right to possess firearms for purposes unrelated to the preservation or efficiency of a well regulated militia. In so doing, the decision rendered meaningless the Amendment's opening clause ("A well regulated Militia, being necessary to the security of a free state"), disregarded this Court's settled precedent limiting the application of the Amendment to those situations where the preservation or efficiency of a well regulated militia is potentially impaired, and failed to evaluate the statutes at issue using standards anything like those ordinarily applied when (unlike here) constitutional rights are implicated.

Under this Court's interpretation of the Second Amendment (*United States v. Miller*, 307 U.S. 174, 178 (1939); *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980)), that provision lends no support to Respondent's claims, since he does not assert that his desired use or possession of the firearms at issue relates to "the preservation or efficiency of a well regulated militia,"[3] and the decision below should be reversed.

Had the Court been presented with a colorable claim that the challenged conduct infringed the "right to keep and bear arms" in a manner inconsistent with the "preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178, this Court's precedents suggest that judgments about whether the regulation or prohibition of a *particular* weapon is consistent with the Second Amendment should be left to the political branches. The Constitution's express assignment of responsibility for the nation's militia to Congress (*see* U.S. Const. art. I, § 8, cls. 15 & 16), and the absence of "judicially discoverable and manageable standards" for resolving such controversies, militate in favor of such a result. This approach would be in accord with the state of affairs in the decades since *Miller* was decided. During that time, Congress has legislated actively to regulate or prohibit the use or possession of certain weapons – mindful of any limitations imposed by the Second Amendment, and guided by this Court's decision in *Miller*.[4]

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[3] *See infra* page 22 and note 10.

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[4] *Amici* take no position here regarding the application of the Second Amendment to the States, through the Fourteenth Amendment or otherwise. *Cf. Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876).

ARGUMENT

I. INTERPRETATION OF THE SECOND AMENDMENT TO RESOLVE THIS CASE SHOULD BE INFORMED BY CONGRESS'S LEGISLATIVE ACTIVITIES AND ROLE AS A CONSTITUTIONAL INTERPRETER

It has been nearly seven decades since this Court "consider[ed] the nature of the substantive right safeguarded by the Second Amendment." *Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., concurring). In the intervening period there has been considerable academic debate and public discourse about that question. It is also an issue that Congress has addressed, both expressly and implicitly, as part of the lawmaking process.

Indeed, since this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939), which itself addressed a challenge to the National Firearms Act of 1934, Congress has enacted numerous laws which required it to consider whether and how the Second Amendment constrains its authority. *See, e.g.*, Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-931); Armor Piercing Ammunition Ban, Pub. L. No. 99-408, 100 Stat. 920 (1986) (amending 18 U.S.C. §§ 921-923, and § 929 to prohibit the manufacture, importation, or sale of armor piercing ammunition and impose penalties for crimes involving armor piercing ammunition); Undetectable Firearms Act of 1988, Pub. L. No. 100-649, 102 Stat. 3816 (making it unlawful to manufacture, import, sell, or possess any firearm that is undetectable by a metal detector or an x-ray machine); Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (ruled unconstitutional on grounds unrelated to Second Amendment in *United States v. Lopez*, 514 U.S. 549 (1995)); Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (requiring waiting period and completion of background check before individual is able to purchase a handgun); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Federal Domestic Violence Gun Ban, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (1997) (banning persons convicted of misdemeanor crimes of domestic violence from possessing firearms); Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 119, 112 Stat. 2681, 2681-69 (1999) (requiring all licensed gun dealers to offer "gun storage or safety devices" for sale); *see generally* 18 U.S.C. §§ 921-931.

Congress has also enacted numerous laws under which criminal sentences are enhanced based on the possession or use of a firearm. *See, e.g.*, Act of Oct. 12, 1984, Pub. L. No. 98-473, §§ 1005-1006, 98 Stat. 1837, 2138-2139; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (amending 18 U.S.C. § 924 to include mandatory prison sentences for crimes of violence or drug trafficking involving handguns); *see also Harris v. United States*, 536 U.S. 545 (2002) (addressing "brandishing" and "discharging" a firearm as sentencing factors).

Article VI, Clause 3 of the Constitution requires that members of Congress be bound, by oath or affirmation, "to support th[e] Constitution." In view of that requirement, the courts do "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Indeed, it is "out of respect" for Congress's obligation "to support" the Constitution and its capacity as an interpreter of the Constitution that the Court generally assumes Congress "legislates in light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991); *see also Harris*, 536 U.S. at 556 (quoting *Rust*).

Congress's obligation to support the Constitution, and its interpretive role, are particularly germane to the issues in this case.

Article I vests Congress with the power to provide "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States." U.S. Const. art. I, § 8, cls. 15 & 16 (the "Militia Clauses"). Any assessment of the Second Amendment should be made in light of the Constitution's allocation of responsibility for the militia to Congress. *See McElroy v. United States*, 361 U.S. 234, 268 (1960) (Whittaker, J., concurring in part and dissenting in part) (noting a "protracted controversy in the Constitutional Convention" was resolved "by continuance of the militia 'according to the discipline prescribed by Congress.' Art. I, s 8, cls. 15 and 16, and Amend. II"); *see generally McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) (interpreting constitutional provisions in light of "construction of the whole instrument").

In other contexts, this Court has recognized the appropriateness of judicial deference to congressional judgments related to the exercise of powers specifically conferred by Article I. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58-59 (2006) (discussing the deference due to Congress under its Article I "Spending Clause" and "military affairs" powers); *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."); *see also Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998) ("Deference to the political branches dictates 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.'") (quoting *Mathews v. Diaz*, 426 U.S. 67, 82 (1976)); *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987) (discussing deference to Congress when exercising its "spending power" conferred by Article I); *Bowen v. Gilliard*, 483 U.S. 587, 598 (1987) (courts exercise deferential review over Congress's "decisions to spend money to improve the general public welfare" pursuant to Article I, Section 8) (quotation omitted); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964) ("How obstructions in commerce may be removed – what means are to be employed – is within the sound and exclusive discretion of the Congress" under its Commerce Clause power); *Graham v. Goodcell*, 282 U.S. 409, 431-432 (1931) (recognizing Congress's broad discretion when exercising its constitutional power over taxation).

As discussed above, Congress has a long history of regulating or prohibiting the possession or use of certain weapons. These congressional actions should be viewed as undertaken mindful of any limitations imposed by the Second Amendment, as well as this Court's decision in *Miller*. *See Rust*, 500 U.S. at 191; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73-74 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court."). *Amici* respectfully ask that the Court give appropriate weight in this case to the understanding of the Second Amendment that inheres in Congress's extensive experience regulating or prohibiting the use of certain "arms."

Consideration of, or deference to, Congress's experience as an interpreter of the Constitution, in appropriate circumstances, is entirely consistent with the Court's role, articulated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), to "say what the law is." *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (reconciling *Marbury* with the Court's view that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,'" and that "its conclusions are entitled to much deference") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

Such deference to congressional activity is particularly appropriate here, given that this Court has not addressed the substantive nature of the Second Amendment for nearly 70 years – leaving Congress to apply its own judgments and interpretations, guided by *Miller* and earlier decisions of this Court.

As explained in Section II of this brief, the Court of Appeals's decision erroneously departed from this Court's holding in *Miller*. In doing so, it arguably calls into question numerous statutes enacted by Congress over the years – and, in the view of some, possibly state and local laws as well. *See*, *e.g.*, Linda Greenhouse, *Supreme Court Agrees to Hear Gun Control Case*, N.Y. Times, Nov. 20, 2007, at A1 ("[L]awyers on both sides of the case agreed today that a victory for the plaintiff in this case would amount to the opening chapter in an examination of the constitutionality of gun control rather than anything close to the final word."); Robert A. Levy, *Unholster the 2nd Amendment*, L.A. Times, Nov. 14, 2007, at 21 ("[I]f the Supreme Court affirms the D.C. [C]ircuit's holding, state gun control laws across the nation could be vulnerable to constitutional attack.").

This Court has recognized the problems that can arise from abrupt changes to settled expectations about the meaning of statutes or the Constitution, and has considered them when analyzing cases before it. *See, e.g., Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (interpreting Sherman Act); *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (applying doctrine of *stare decisis* to sustain constitutional *Miranda* rule, and observing "the warnings have become part of our national culture"); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion) (applying doctrine of *stare decisis* to interpretation of the Constitution). While the preservation of congressional expectations and judgments upon which existing laws depend is not a value that trumps other considerations in all circumstances, *cf. INS v. Chadha*, 462 U.S. 919 (1983) (finding one-House veto unconstitutional), this is a case where that value should be afforded considerable weight.

When reexamining a prior holding, this Court's "judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Casey*, 505 U.S. at 854. Here, the Court's decision could affect numerous existing federal laws, as well as Congress's consideration of future legislation. While that is no doubt true of many decisions, the Court's decades-long silence during a period of consistent lawmaking by Congress is unusual. These special circumstances warrant particular attention to Congress's activity in the area of firearms regulation, and to the views of Congress as an institution that are implicit in its lawmaking activity in this area.[5]

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[5] Petitioner contends that the Second Amendment does not apply to the District of Columbia. *See* Pet. Br. at 35-40. Given the Question for which *certiorari* was granted, *Amici* have assumed for purposes of this appeal that the Amendment applies within the District of Columbia, and take no substantive position on the issue in this brief. However, even if the Second Amendment applies in the District, judgments of the District government are made pursuant to power delegated by Congress. *See* D.C. Code § 1-201.02 (Congress has "ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution"); D.C. Code § 1-206.01 ("[T]he Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject . . . including legislation to amend or repeal any law in force in the District . . . ."). The decisions to enact the statutes at issue here are therefore entitled to substantial deference given the responsibilities for the militia specifically assigned to Congress by Article I of the Constitution. The Court of Appeals failed to consider the significance of this constitutional assignment, or to assess the degree of deference owed to legislative judgments about the meaning and boundaries of the Second Amendment.

II. THE DECISION BELOW BREAKS WITH THIS COURT'S PRECEDENT AND FAILS TO ACCORD APPROPRIATE DEFERENCE TO LEGISLATIVE JUDGMENTS ABOUT THE NATURE AND BOUNDARIES OF ANY RIGHTS CONFERRED BY THE SECOND AMENDMENT

A. The Decision Below Is An Unwarranted Departure From This Court's Precedent

The decision below is a dramatic departure from this Court's prior interpretation of the Second Amendment.

This Court has *never* construed the Second Amendment as applicable when the desired possession or use of a weapon at issue is purely "private" – that is, when it has no "relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178; *see also id.* (considering whether the weapon at issue could "contribute to the common defense"); *Printz v. United States*, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring) ("In *Miller*, we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be 'ordinary military equipment' that could 'contribute to the common defense.'") (quoting *Miller*).

While the Court of Appeals acknowledged the *Miller* Court's exhortation that the Second Amendment "must be interpreted and applied" in light of the Amendment's purpose "to assure the continuation and render possible the effectiveness" of the militia, Pet. App. 42a, it erroneously construed the Amendment as "protect[ing] an individual right to keep and bear arms," even when such activity has no conceivable connection to a militia. Pet. App. 44a ("[T]he activities [the Second Amendment] protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia."). This departure from *Miller* is both unwarranted and unwise.[6]

The Court of Appeals sought to justify its decision on the ground that *Miller* related to a limited issue – whether a short-barreled shotgun was "within the scope of the term 'Arms'" – and supposedly did not address whether the Second Amendment protects the right to "keep and bear arms . . . for private purposes." Pet. App. 40a. Yet this Court's most recent reliance on *Miller* does not support the Court of Appeals's narrow reading of that decision. To the contrary, in *Lewis v. United States*, this Court explained that "legislative restrictions on the use of firearms" do not "trench upon any constitutionally protected liberties," and described *Miller* as having determined that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" 445 U.S. 55, 65 & n.8 (1980) (quoting *Miller*, 307 U.S. at 178). Thus, the Court described *Miller's* holding in precisely the terms the lower court seeks to sidestep. Only by ignoring the critical language in *Miller*, as well as this Court's explanation of *Miller's* holding in *Lewis* (and the citations in *Lewis* to lower court cases holding that certain firearms regulations "do not violate the Second Amendment," *id.* at 65 n.8) could the Court of Appeals have found a violation of the Second Amendment in this case.

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[6] Much commentary about the Second Amendment lapses into a debate about whether the Amendment confers an "individual" or "collective" right. *Miller* did not employ or embrace that simplistic dichotomy, nor should the Court do so now.

Lower courts have properly interpreted *Miller* as holding that a threshold requirement for application of the Second Amendment is that the possession or use of a firearm "bear a reasonable relationship to 'the preservation or efficiency of a well regulated militia.'" *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (quoting *Miller*, 307 U.S. at 178); *see id.* at 290 (Alito, J., dissenting on grounds related only to Congress's power under the Commerce Clause and observing "Congress may ban [machine guns] from the channels of interstate commerce altogether . . . ."); *see also United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992) ("[T]he claimant of Second Amendment protection must prove that his or her *possession* of the weapon was reasonably related to a well regulated militia."); *Lewis*, 445 U.S. at 65 n.8 (citing lower court decisions).

As this Court has observed, expansive language in the Constitution "must be interpreted according to its text, by considering history, tradition and precedent, and with due regard for its purpose and function in the constitutional design." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). None of these considerations supports the Court of Appeals's reading of the Second Amendment, which arguably calls into question much about the ways society has organized its law enforcement and public safety regimes in recent decades, and risks unleashing a flood of Second Amendment challenges to existing federal laws.[7]

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[7] Respondent's Brief in Response to the Petition for *Certiorari* advanced his interpretation of the Second Amendment in substantial part by pressing a "right" to self-defense. *See* Resp. Br. at 19-23, 29-32. For instance, Respondent asserts the "*need* for Second Amendment rights" in view of violent crime, *id.* at 30 (emphasis added), and contends the Amendment guarantees "to citizens . . . an effective means of preserving their lives." *Id.* at 32. Whether an armed citizenry actually improves public safety is a question best left for policymakers, not the courts. Moreover, the existence of violent crime does not establish that the Second Amendment has anything to do with combating it. If the Constitution places any constraints on laws that would attempt to criminalize or otherwise prohibit self-defense, those constraints need not be predicated on the Second Amendment (and there is no persuasive evidence that they are). Instead, if a "right" to self-defense is recognized in the Constitution, it is likely rooted elsewhere, such as the guarantees of the Fifth Amendment (and the Fourteenth Amendment under the incorporation doctrine), or among those rights "retained by the people" referred to in the Ninth Amendment.

B. Even If Second Amendment Rights Were Implicated, The Court Of Appeals Failed To Apply An Appropriate Level Of Scrutiny

Although the Court of Appeals acknowledged, as a general proposition, that "reasonable regulations" on the "use and ownership" of firearms might not run afoul of the Second Amendment, Pet. App. 51a-52a, it did not evaluate the constitutionality of the statutes at issue using standards anything like those ordinarily applied when constitutional rights are implicated. *Cf. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary.") (quotation omitted); *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 279 (1990) ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the person's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests'") (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976) ("Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment.").[8]

Instead, the court below concluded that "[o]nce it is determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." Pet. App. 53a. Thus, the decision below compounds the erroneous conclusion that the Second Amendment affords substantive rights to Respondent under the facts of this case with the misguided view that the statutes at issue *necessarily* are unconstitutional if the Amendment applies to the use or possession of firearms unrelated to "the preservation or efficiency of a well regulated militia."

There is simply no support for such reasoning – which is also plainly inconsistent with *Lewis*, where the Court applied "rational basis" scrutiny to a statute *prohibiting* certain people from possessing firearms. 445 U.S. at 65 ("We therefore hold that

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[8] The Court of Appeals seemed to believe such an analysis was unnecessary because it understood the statutes at issue to constitute a firearm "ban," as opposed to "reasonable regulation." Pet. App. 51a-53a. But such a reading of the laws would not obviate the need for further inquiry; even fundamental rights that traditionally receive the greatest protection – like the First Amendment right to speech free of prior restraints – are not absolute. *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) ("This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.").

§ 1202(a)(1) prohibits a felon from possessing a firearm").

C. Disputes Regarding Second Amendment Constraints On Federal Laws Relating To The Use Or Possession Of "Arms" Generally Should Be Deemed Nonjusticiable

This case provides the Court an opportunity to consider whether certain claims based on the Second Amendment should be deemed nonjusticiable. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968) (Justiciability is "'not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . .'") (quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961)); *cf. New York v. United States*, 505 U.S. 144, 183-86 (1992) (discussing cases finding Guarantee Clause claims nonjusticiable issues committed to Congress).

When evaluating whether a case presents a "political question" best left to the political departments, the Court considers whether there is:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for

> unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). These prudential considerations are instructive here.

Much or all of the original significance of the Amendment has dissipated with the passage of time and changes in society. *See* Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control 196 (2006) (Federal laws enacted in 1903 and 1916 "effectively nationalized the function and control of the militia. By wresting control of the militia from the states, these acts had the practical effect of draining the Second Amendment of much of its remaining force."); Akhil Reed Amar, America's Constitution: A Biography 325 (2005) ("The legal and social foundations on which the amendment was built have washed away over the years."); Don Higginbotham, "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," 55 Wm. & Mary Q. 39-58 (1998); *cf. Perpich v. Dept. of Defense*, 496 U.S. 334, 343 (1990) (discussing Militia Clauses of Article I and the decision by Congress in 1916 "to 'federalize' the National Guard"); *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973) (observing that the Militia referred to in Article I is "now the National Guard").

It is also self-evident that this Court has not developed extensive jurisprudence regarding the

Second Amendment, either before or since *Miller* was decided in 1939. *Cf.* Mark V. Tushnet, Out of Range: Why the Constitution Can't End the Battle Over Guns 63 (2007) ("Since *Miller* the Supreme Court has assiduously avoided taking up Second Amendment cases."). If Respondent and the court below were correct that individuals have a right to use or possess weapons under the Second Amendment unrelated to the "preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178, neither this Court nor the courts of appeals have articulated "judicially discoverable and manageable standards" for ascertaining the contours of such a right or how it might apply to contemporary society. *See Baker v. Carr*, 369 U.S. at 217. Nor is it evident the judiciary is well positioned to do so. *Cf. Gilligan*, 413 U.S. at 10 ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence" than "decisions as to the composition, training, equipping and control of a military force . . . .").[9]

As discussed above, *Miller* made clear that the Second Amendment "must be interpreted and applied" keeping in view the Amendment's purpose "to assure the continuation and render possible the effectiveness" of the militia. *Miller*, 307 U.S. at 178. Because Respondent does not assert that his desired use or possession of the firearms at issue relates to "the preservation or efficiency of a well regulated militia,"[10] the Amendment lends no support to his claims.

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[9] Under the approach employed by the Court of Appeals, the judiciary also would be tasked with determining whether particular modern weapons are "lineal descendant[s]" of "founding-era" weapons (Pet. App. 51a) – an exercise for which there are no existing or obvious "judicially discoverable and manageable standards." *Baker v. Carr*, 369 U.S. at 217.

Were a court presented, in another case, with a colorable claim that the challenged conduct infringed the "right to keep and bear arms" in a manner inconsistent with the "preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178, this Court's precedents suggest such a controversy should be left to the political branches, and deemed nonjusticiable.[11]

It is well established by the text of the Constitution, and from this Court's prior decisions, that Congress is vested with responsibility for the nation's militia. *See* U.S. Const. art. I, § 8, cls. 15 & 16; *Perpich*, 496 U.S. at 349-54 (discussing powers granted to Congress by Militia Clauses and federal authority over state militia); *see also* U.S. Const. art.

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[10] *See* Pet. App. 71a; *see also* J.A. 51a (Complaint ¶ 2: Heller "presently intends to possess a functional handgun and long gun for self-defense within his own home"). Moreover, given that Respondent was born in 1941 (Pet. App. 120a), he was a member of neither the United States nor District of Columbia militias at the time he filed suit, based on age limits for membership in each. *See* 10 U.S.C. § 311; D.C. Code § 49-401.

[11] At least one district court has found a Second Amendment claim barred by the political question doctrine. *See Gregoire v. Rumsfeld*, 463 F. Supp. 2d 1209, 1218-20 (W.D. Wash. 2006).

I, § 10 ("No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace"). The Court has acknowledged that Congress's power over the militia is "analogous" to its power over military affairs, in which Congress has "plenary constitutional authority." *Chappell v. Wallace*, 462 U.S. 296, 301-02 (1983). "[T]he insistence . . . with which the Constitution confers authority over the Army, Navy, and *militia* upon the political branches" is clear. *United States v. Stanley*, 483 U.S. 669, 682 (1987) (Scalia, J.) (emphasis added); *see also Gilligan*, 413 U.S. at 5-6 (finding claim seeking federal court oversight of "training, weaponry and orders of the Ohio National Guard" nonjusticiable because Article I is "explicit that the Congress shall have the responsibility for organizing, arming and disciplining the Militia").

Whether the regulation or prohibition of a *particular* weapon implicates the "preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178, over which Congress has responsibility, is precisely the kind of question best left for the political branches to resolve.[12] *See Gilligan*, 413

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[12] Although the Court need not identify all exceptions to a general determination that Second Amendment claims are nonjusticiable, *cf. Veith v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring) (agreeing case before the Court was nonjusticiable while noting "I would not foreclose all possibility of judicial relief . . . in some redistricting cases"), one category of exceptions might involve claims brought by States – an exception respectful of federalism considerations and consistent with the Amendment's purpose "to assure the continuation and

(continued . . .)

U.S. at 10 ("The complex, subtle, and professional decisions as to the composition, training, *equipping*, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system . . . .") (emphasis added).[13]

(continued . . .)

render possible the effectiveness" of the militia, *Miller*, 307 U.S. at 178, in which both the Congress and the States may play a role. *See* U.S. Const. art. I, § 8, cls. 15 & 16; *cf. Hickman v. Block*, 81 F.3d 98, 102 (9th Cir.) ("Because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed."), *cert. denied*, 519 U.S. 912 (1996).

[13] The Court's willingness to conclude in *Miller* that a "shotgun having a barrel of less than eighteen inches in length" was not within the scope of the term "arms," as used in the Second Amendment, 307 U.S. at 178, does not foreclose this Court from now concluding that such judgments, if necessary at all, are best left to the political branches. In fact, Appellees in *Miller* did not even participate in the appeal, and the Court explained its decision was based on "the absence of any evidence" that the weapon at issue bore a "reasonable relationship to the preservation or efficiency of a well regulated militia," and that it was not within "judicial notice" that the weapon "could contribute to the common defense." *Id.*; *cf. Gilligan*, 413 U.S. at 10 ("[I]t is difficult to conceive of an area

(continued . . .)

This approach would be in accord with the state of affairs since *Miller* was decided. During that time, Congress has legislated actively to regulate or prohibit the use or possession of certain weapons. *See supra* pp. 5-7. Consistent with its precedents, this Court should presume Congress has done so (and will continue to do so) mindful of the Second Amendment, *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (assuming Congress "legislates in light of constitutional limitations"), despite operating in a political environment where passions about these issues run high.[14]

Since *Miller* it has been well settled that the Second Amendment is implicated only when the desired possession or use of a weapon has a "relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. If the Second Amendment has any specific applications in Twenty-First Century America, it may be most appropriate for judgments about those applications to reside with the political branches, and

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(continued . . .)

of governmental activity in which the courts have less competence" than "decisions as to the composition, training, *equipping* and control of a military force") (emphasis added).

[14] Respecting interpretations and applications of the Second Amendment by the political branches of the federal government is also appropriate given this Court's view that the provision operates as a restraint only on the federal government. *See Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

particularly with Congress,[15] which is expressly vested with responsibilities over the militia by Article I.[16]

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[15] This would allow members of Congress who share the Court of Appeals's reading of the Second Amendment to legislate in light of that view. Even though *Amici* do not believe such a view is consistent with a proper interpretation of the Second Amendment or with *Miller*, Congress is permitted to legislate with the intent of protecting or advancing "rights" beyond those established by the Constitution, provided it is acting pursuant to authority granted by the Constitution. *Cf.* Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(a)(2) ("The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.").

[16] Congress's regulation of the use or possession of "arms" would remain subject to other constitutional restraints, and to review by the federal courts. *Cf. United States v. Lopez*, 514 U.S. 549 (1995) (finding statute exceeded Congress's power under the Commerce Clause).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

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DISTRICT OF COLUMBIA ET AL.,

Petitio

v.

DICK HELLER,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

◆

BRIEF OF THE INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION (ILEETA), THE INTERNATIONAL ASSOCIATION OF LAW ENFORCEMENT FIREARMS INSTRUCTORS (IALEFI), MARYLAND STATE LODGE, FRATERNAL ORDER OF POLICE, SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, 29 ELECTED CALIFORNIA DISTRICT ATTORNEYS, SAN FRANCISCO VETERAN POLICE OFFICERS ASSOCIATION, LONG BEACH POLICE OFFICERS ASSOCIATION, TEXAS POLICE CHIEFS ASSOCIATION, TEXAS MUNICIPAL POLICE ASSOCIATION, NEW YORK STATE ASSOCIATION OF AUXILIARY POLICE, MENDOCINO COUNTY, CALIF., SHERIFF THOMAS D. ALLMAN, OREGON STATE REP. ANDY OLSON, NATIONAL POLICE DEFENSE FOUNDATION, LAW ENFORCEMENT ALLIANCE OF AMERICA, AND THE INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF THE *AMICI CURIAE*

Amici are district attorneys, police organizations, and other persons concerned with protecting the public safety benefits of citizens possessing handguns for self-defense in the home.[1]

International Law Enforcement Educators and Trainers Association

The International Law Enforcement Educators and Trainers Association (ILEETA) is a professional association of 4,000 persons who provide training to law enforcement in the proper use of firearms, and on many other subjects.

ILEETA is participating because police recruits who already have personal civilian experience using handguns are better trainable to use handguns safely and proficiently as police officers.

29 California District Attorneys

The elected California District Attorneys in this brief represent populous counties such as Orange,

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received written notice in December of intent to file this brief. No counsel for a party authored the brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. The NRA Civil Rights Defense Fund has made contributions to the Independence Institute that have been used in part to fund the preparation of this brief.

Fresno, and San Bernardino, as well as mid-sized and rural counties.

Southern States Police Benevolent Association

The Southern States Police Benevolent Association (SSPBA) consists of more than 20,000 law enforcement employees in 12 southeastern states. SSPBA's polling shows that its members strongly support the Second Amendment.

The interests of additional *amici* are described in Appendix C.

SUMMARY OF ARGUMENT

Before the enactment of the handgun ban, fewer than ½ of 1% of guns seized by police in the District had been lawfully registered. Accordingly, the bans on ownership of registered handguns and on home self-defense by law-abiding people have virtually nothing to do with the legitimate government interest in crime control.

To the contrary, the handgun and self-defense bans are criminogenic.

Guns save lives. In the hands of law-abiding citizens, guns provide very substantial public safety benefits. In all 50 states—but not in the District—it is lawful to use firearms for defense against home invaders. The legal ownership of firearms for home defense is an important reason why the American rate of home invasion burglaries is far lower than in countries which prohibit or discourage home handgun defense.

By drastically reducing the rate of confrontational home invasions, the deterrent effect of U.S. home defensive gun ownership greatly reduces the assault rate (since there are many fewer confrontations) and thereby reduces the total U.S. violent crime rate by about 9%.

Numerous surveys show that firearms are used (usually without a shot needing to be fired) for self-defense at least 97,000 times a year, and probably several hundred thousand times a year.

The anti-crime effects of citizen handgun ownership provide enormous benefits to law enforcement, because there are fewer home invasion emergencies requiring an immediate police response, and because the substantial reductions in rates of burglary, assault, and other crimes allow the police and district attorneys to concentrate more resources on other cases and on deterrence.

Lawful civilian handgun ownership improves police training, by providing a larger body of recruits who are experienced in handgun safety and accuracy, as well as providing civilian experts whose ideas are adopted by police trainers.

Ordinary law-abiding citizens are not too hot-tempered or accident-prone to possess firearms safely for home defense.

Especially for home defense in an urban area, long guns are inadequate substitutes for handguns. Handguns are safer for victims, for families, and for the community as a whole.

This Court's precedents point to the unconstitutionality of the handgun ban.

ARGUMENT

In December 1976, the law-abiding citizens of Washington, D.C., were re-registering their handguns at police headquarters. Most police were appalled at the imminent ban:

> "We don't appreciate being heels," Clark[2] said, pointing out the pain it takes to tell an elderly widow who is living alone "that even though your husband bought the gun legally and registered it properly, you can't keep it. Why that makes an innocent citizen a crook."
>
> It was a theme heard often in D.C. today, and surprisingly, *it seems to gall policemen more than anybody else.*
>
> "You're not controlling guns, you're controlling people," said Sgt. Jimmy King, a veteran robbery squad investigator.

---

[2] Officer David Clark, one of two officers in charge of registration for the Gun Control Section of the D.C. police.

> *"Honest citizens, the little old lady who's not hurting anybody anyway is the real victim.* We're not stopping these bums killing each other, us, or committing armed robberies." ...
>
> Like most officers, King believes the court is the real answer.
>
> "The court is not enforcing the laws we already have on the books," he said, explaining:
>
> "There's a law on the books today which allows a five-year additional sentence for any crime committed while armed, but it's not enforced."
>
> *King's sentiments were echoed throughout police headquarters and by officers on the streets.*
>
> "I don't know why they bother to make new laws, they don't enforce the old ones," said Fourth District Officer Andrew Way as he wrote a parking ticket yesterday.

Earl Byrd, *D.C.'s Gun Registration,* WASH. STAR, Dec. 2, 1976 (emphasis added).

The notion that most police support handgun prohibition is false.[3] Police critics of the D.C. ban

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[3] *See, e.g.*, David Griffith, *Shooting Straight: The Majority of Cops Believe Citizens Should Have the Right to Own Handguns* POLICE, Mar. 2007, at 10, http://www.policemag.com/Articles/2007/03/Editorial.aspx; *Officers Emphatically Say "No"*

(Continued on following page)

have included D.C. Police Chief Maurice Turner (who was muzzled by Mayor Marion Barry), former Police Chief Charles Ramsey, and union leaders at the city jail who testified in favor of a repeal bill. Tom Sherwood, *Should the District Lift Its Freeze on Handguns?* WASH. POST, July 23, 1982; *Ramsey shifts stand on gun ban*, WASH. TIMES, Nov. 11, 2007. Inaccurate claims that "the police" support D.C.'s draconian laws alienate the public from the police.

Amici have no fears that upholding the rights of law-abiding citizens to possess handguns and other functional defensive firearms in their homes will endanger law enforcement officers.[4] Police in the District are killed at a rate about six times higher than the national rate, a statistic that hardly suggests that the

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to Gun Control, POLICE, Mar. 2007, at 14 (both articles reporting results of a survey conducted by the magazine); *Police Views on Gun Control,* AUSTIN AMERICAN-STATESMAN, Oct. 4, 1993, at A8 (1993 poll by the Southern States Police Benevolent Association shows that 90% of southern police feel that the Constitution protects the right of individuals to keep and bear arms); *Funny You Should Ask,* POLICE, Apr. 1993, at 56 (85% of police believe civilian gun ownership increases public safety); *The Law Enforcement Technology Gun Control Survey*, L.ENFORCEMENT TECH., July/Aug. 1991, at 14-15 ("75% do not favor gun control legislation ... with street officers opposing it by as much as 85%").

[4] *Cf.* David Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J.L. & ECON. 635 (2001) (allowing licensed, trained citizens to carry concealed handguns in public places does not increase police officer deaths, and may reduce police deaths).

District's ban on law-abiding citizens protecting their homes has helped protect the police.[5]

I. The Efficacy and Social Benefits of Armed Self-Defense

Police carry handguns on duty and keep those guns for home protection for an obvious reason: the guns are essential, life-saving tools for protecting themselves, their families, and their communities. *See* James Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow Up the Rule?* 49 L.& CONTEMP. PROBS. 6 (1986)(carefully analyzed, almost all the rationales for allowing police and security guards to possess handguns show that prohibition of handguns for other persons is illogical). Ample empirical evidence demonstrates that the home possession of firearms by law-abiding citizens also contributes substantially to public safety.

A. Burglary

The only national study of how frequently firearms are used against burglaries was conducted by the Centers for Disease Control and Prevention (CDC). In 1994, random digit dialing phone calls were made throughout the United States, resulting in 5,238 interviews. The interviewees were asked about use of a firearm in a burglary situation during the previous 12 months. Extrapolating the polling sample to the national population, the researchers estimated that in the previous 12 months, there were approximately 1,896,842 incidents in which a householder retrieved a firearm but did not see an intruder. There were an estimated 503,481 incidents in which the armed householder *did* see the burglar, and 497,646 incidents in which the burglar was scared away by the firearm. Robert Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997).

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[5] The District has approximately 0.2% of the national population (2000 census), but accounts for 1.2% of police officers murdered. *See* FBI, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2006, table 1, *available at* http://www.fbi.gov/ucr/killed/2006/table1.html (cumulative data for 1997-2006).

Only 13% of U.S. residential burglaries are attempted against occupied homes. U.S. Bureau of Justice Statistics, *Household Burglary*, BJS BULL. at 4 (1985). Criminologists attribute the prevalence of daytime burglary to burglars' fear of confronting an armed occupant; burglars report that they avoid late-night home invasions because, "That's the way you get yourself shot." GEORGE RENGERT & JOHN WASILCHICK, SUBURBAN BURGLARY: A TALE OF TWO SUBURBS 33 (2ded. 2000)(study of Delaware County, Penn., and Greenwich, Conn.); *see also* JOHN CONKLIN, ROBBERY AND THE CRIMINAL JUSTICE SYSTEM 85 (1972)(study of Massachusetts inmates, reporting that some gave up burglary because of "the risk of being trapped in the house by the police or an armed occupant.").

The most thorough study of burglary patterns was a St. Louis survey of 105 currently active burglars. The authors observed, "One of the most serious risks faced by residential burglars is the possibility of being injured or killed by occupants of a target. Many of the offenders we spoke to reported that this was far and away their greatest fear." As a result, most burglars tried to avoid entry when an occupant might be home. RICHARD WRIGHT & SCOTT DECKER, BURGLARS ON THE JOB: STREETLIFE AND RESIDENTIAL BREAK-INS 112-13 (1994).

Burglars in other nations behave differently.

A 1982 British survey found 59% of attempted burglaries involved an occupied home. Pat Mayhew, *Residential Burglary: A Comparison of the United States, Canada and England and Wales* (Nat'l Inst. of Just., 1987). The *Wall Street Journal* reported:

> Compared with London, New York is downright safe in one category: burglary. In London, where many homes have been burglarized half a dozen times, and where psychologists specialize in treating children traumatized by such thefts, the rate is nearly twice as high as in the Big Apple. And burglars here increasingly prefer striking when occupants are home, since alarms and locks

> tend to be disengaged and intruders have little to fear from unarmed residents.[6]

In the Netherlands, 48% of residential burglaries involved an occupied home. Richard Block, *The Impact of Victimization, Rates and Patterns: A Comparison of the Netherlands and the United States*, in VICTIMIZATION AND FEAR OF CRIME: WORLD PERSPECTIVES 26 tbl. 3-5 (Richard Block ed., 1984). In the Republic of Ireland (which, along with England, is one of the few European nations where handguns are banned), criminologists report that burglars have little reluctance about attacking an occupied residence. *See* Claire Nee & Maxwell Taylor, *Residential Burglary in the Republic of Ireland*, in WHOSE LAW AND ORDER? ASPECTS OF CRIME AND SOCIAL CONTROL IN IRISH SOCIETY 143 (Mike Tomlinson et al. eds., 1988). In Toronto, where handguns are legal but rare, 44% of home burglaries take place when the victim is home. *See* IRWIN WALLER & NORMAN OKHIRO, BURGLARY: THE VICTIM AND THE PUBLIC 31 (1978).

An American burglar's risk of being shot while invading an occupied home is greater than his risk of going to prison. Presuming that the risk of prison deters some potential burglars, the risk of armed defenders would deter even more.[7]

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[6] Kevin Heilliker, *Pistol-Whipped: As Gun Crimes Rise, Britain Is Considering Cutting Legal Arsenal*, WALL ST.J., Apr. 19, 1994, at A1.

Florida State University criminologist Gary Kleck's book *Point Blank: Guns and Violence in America* won the highest honor awarded by the American Society of Criminology: the Michael Hindelang Book Award "for the greatest contribution to criminology in a three-year period." In the book Kleck detailed an important secondary consequence of the deterrence of home invasion. Suppose that the percentage of "hot" (occupied residence) burglaries rose from current American levels (around 13%) to a level similar to other nations (around 45%). Knowing how often a hot burglary turns into an assault, we can predict that an increase in hot burglaries to the levels of other nations would result in 545,713 more assaults every year. This by itself would raise the American violent crime rate 9.4%. GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 140 (1991).

Put another way, the American violent crime rate is significantly lower than it would otherwise be, because American burglars are so much less likely to enter an occupied home. Given that the average cost of an assault, in 2006 dollars, is $12,032,[8] the annual cost savings from reduced assault amounts to more than six billion dollars ($6,566,018,816).

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[7] JAMES WRIGHT, PETER ROSSI, & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 139-40 (1983) (Nat'l Inst. of Just. study); *see also* Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBS. 1, 12, 15-16 (1988).

Interestingly, because burglars do not know *which* homes have a gun, people who do not own guns enjoy substantial free-rider benefits because of the deterrent effect from the homes that do keep arms.[9]

B. Deterrence

Intending to build the case for comprehensive federal gun restrictions, the Carter administration awarded a major National Institute of Justice (NIJ) research grant in 1978 to University of Massachusetts sociology professor James Wright and his colleagues Peter Rossi and Kathleen Daly. Wright had already editorialized in favor of much stricter controls. Rossi would later become president of the American Sociology Association. Daly would later win her own Hindelang Award, for her feminist perspectives on criminology.

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[8] *See* Ted Miller et al., *Victims Costs and Consequences* 9 (Nat'l Inst. of Just., NCJ 155282, 1996), http://www.ncjrs.gov/pdffiles/victcost.pdf (the 1996 figures were multiplied by 1.28, to account for 1996-2006 increases in the Consumer Price Index).

[9] David Kopel, *Lawyers, Guns, and Burglars,* 43 ARIZ. L.REV. 345, 363-66 (2001). For more, *see* Philip Cook & Jens Ludwig, *Guns & Burglary* and David Kopel, *Comment*, both in EVALUATING GUN POLICY (Jens Ludwig & Philip Cook eds., 2003)(pro/con analysis of guns/burglary relationship).

When the NIJ authors rigorously examined the data, they found no persuasive evidence in favor of banning handguns or self-defense. Notably, the D.C. bans had not reduced crime. JAMES WRIGHT, PETER ROSSI & KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 294-96 (1983)(critiquing two previous studies, one of them by the U.S. Conference of Mayors; presumably the critiques were persuasive, since neither the USCM brief nor any other of Petitioners' *amici* cite the studies).

Wright and Rossi produced another study for the National Institute of Justice. Interviewing felony prisoners in 11 prisons in 10 states, Wright and Rossi discovered that:

- 34% of the felons reported personally having been "scared off, shot at, wounded or captured by an armed victim."
- 8% said the experience had occurred "many times."
- 69% reported that the experience had happened to another criminal whom they knew personally.
- 39% had personally decided not to commit a crime because they thought the victim might have a gun.
- 56% said that a criminal would not attack a potential victim who was known to be armed.
- 74% agreed with the statement that "One reason burglars avoid houses

> where people are at home is that they fear being shot."

JAMES WRIGHT & PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 146, 155 (expanded ed. 1994).

Notably, "the highest concern about confronting an armed victim was registered by felons from states with the greatest relative number of privately owned firearms." *Id.* at 151. The authors concluded "the major effects of partial or total handgun bans would fall more on the shoulders of the ordinary gun-owning public than on the felonious gun abuser of the sort studied here....[I]t is therefore also possible that one side consequence of such measures would be some loss of the crime-thwarting effects of civilian firearms ownership." *Id.* at 237.

C. The Frequency of Defensive Gun Use

There have been 13 major surveys regarding the frequency of defensive gun use (DGU) in the modern United States. The surveys range from a low of 760,000 annually to a high of three million. The more recent studies are much more methodologically sophisticated. *See* App. 1-3.

In contrast, much lower annual estimates come from the National Crime Victimization Survey (NCVS), a poll using in-person home interviews conducted by the Census Bureau in conjunction with the Department of Justice. The NCVS for 1992-2005 would suggest about 97,000 DGUs annually, with 75,000 DGUs in 2005, the last year for which data are available. *See* App. 4-6.

A criticism of the NCVS figure is that it is too low because the NCVS never directly asks about DGUs, but instead asks open-ended questions about how the victim responded. Because the NCVS first asks if the respondent has been a victim of a crime, the NCVS results exclude people who answer "no" because, thanks to successful armed self-defense, they do not consider themselves "victims." Further, the NCVS only asks about some crimes, and not the full scope of crimes from which a DGU might ensue. *See, e.g.*, GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 152-54 (1997).

Gary Kleck and Mark Gertz conducted an especially thorough survey in 1993, with stringent safeguards to weed out respondents who might misdescribe a DGU story. Kleck and Gertz found a midpoint estimate of 2.5 million DGUs annually. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun,* 86 J.CRIM.L. & CRIMINOLOGY 150 (1995).

The Kleck/Gertz survey found that 80% of defensive uses involved handguns, and that 76% of defensive uses do not involve firing the weapon, but merely brandishing it to scare away an attacker. *Id.* at 175.

Marvin Wolfgang, "the most influential criminologist"[10] in the English-speaking world, and an ardent supporter of gun prohibition, reviewed Kleck's findings. Wolfgang wrote that he could find no methodological flaw, nor any other reason to doubt the correctness of Kleck's figure:

> I am as strong a gun-control advocate as can be found among the criminologists in this country....I would eliminate all guns from the civilian population and maybe even from the police. I hate guns....Nonetheless, the methodological soundness of the current Kleck and Gertz study is clear....
>
> ....
>
> The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.

Marvin Wolfgang, *A Tribute to a View I Have Opposed,* 86 J.CRIM.L. & CRIMINOLOGY 188, 191-92 (1995).

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[10] Ellen Cohn & David Farrington, *Who Are the Most Influential Criminologists in the English-Speaking World?* 34 BRIT.J. CRIMINOLOGY 204 (1994) (based on citations in top journals). Dr. Wolfgang was also President of the American Society of Criminology, and President of the American Academy of Political and Social Science. His research was cited in *Furman v. Georgia*, 408 U.S. 238, 250 n.15 (1972)(Douglas, J., concurring).

Philip Cook of Duke and Jens Ludwig of Georgetown were skeptical of Kleck's results, and so they conducted their own survey for the Police Foundation. That survey produced an estimate of 1.46 million DGUs.[11]

The National Opinion Research Center (NORC) argues that the figures from Kleck are probably too high, and from the NCVS too low; NORC estimates the actual annual DGU figure to be somewhere in the range of 256,500 to 1,210,000. Tom Smith, *A Call for a Truce in the DGU War*, 87 J.CRIM.L. & CRIMINOLOGY 1462 (1997).

This Court need not resolve the particulars of the debate among the social scientists. All social science research shows that defensive gun use is frequent in the United States.

D. Natural Experiments

In October 1966, the Orlando Police Department began conducting highly-publicized firearms safety training for women, after observing that many women were arming themselves in response to a dramatic increase in sexual assaults in the area. Orlando rapes fell by 88% from 1966 to 1967. Burglary fell by 25%. Not one of the 2,500 trained women actually ended up firing her weapon; the deterrent effect of the publicity sufficed. As Gary Kleck and David Bordua note: "It cannot be claimed that this was merely part of a general downward trend in rape, since the national rate was increasing at the time. No other U.S. city with a population over 100,000 experienced so large a percentage decrease in the number of rapes from 1966 to 1967...."[12] That same year, rape increased by 5% in Florida and by 7% nationally.[13]

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[11] PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 62-63 (1996). Cook and Ludwig argue that their own study produced implausibly high numbers, and they prefer the NCVS estimate. *Id.* at 68-75. For a response, *see* Gary Kleck, *Has the gun deterrence hypothesis been discredited?* 10 J.FIREARMS & PUB. POL'Y 65 (1998), http://saf.org/kleck1998.pdf.

In March 1982, the Atlanta exurb of Kennesaw passed an ordinance requiring all residents (with exceptions, including conscientious objectors) to keep firearms in their homes.[14] House burglaries fell from 65 per year to 26, and to 11 the following year.[15]

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[12] Gary Kleck & David Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 L. & POL'Y Q. 271, 284 (1983); Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 J.L. & CONTEMP. PROBS. 35, 47 (1986).

[13] *See* Don Kates, *The Value of Civilian Handgun Possession As a Deterrent to Crime or Defense Against Crime*, 18 AM.J.CRIM.L. 113, 153 (1991).

One article argued that the drop in Orlando rapes was statistically insignificant, being within the range of possibly normal fluctuations. David McDowall et al., *General Deterrence through Civilian Gun Ownership*, 29 CRIMINOLOGY 541 (1991). However, the authors' statistical model was such that even if gun-based deterrence had entirely eliminated rape in Orlando, the model would have declared the result to be statistically insignificant. KLECK, TARGETING GUNS, at 181.

E. 911 Is Insufficient

America's police officers work very hard to rescue crime victims as rapidly as possible. But it is simply impossible for the police to arrive quickly enough to prevent all victims from being injured by violent predators. For example:

- In Washington, D.C., in 2003, the average police response time for highest-priority emergency calls was 8 minutes and 25 seconds.[16]
- In Salt Lake City, 911 callers are frequently put on hold.[17]
- The average response time for Priority One calls (defined as life-threatening emergencies)

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[14] *Town to Celebrate Mandatory Arms*, N.Y. TIMES, Apr. 11, 1987, at 6.

[15] Kleck, 35 SOC. PROBS. at 13-15. The McDowall article (*supra* n.13) reports that there was no statistically significant change in the Kennesaw burglary rate. But the article improperly combined household burglaries (which did decline substantially) with other forms of burglary, such as unoccupied businesses. KLECK, POINT BLANK, at 136-38.

[16] *Ramsey defends 911 response*, WASH. TIMES, May 11, 2004, at A1.

[17] Debbie Dujanovic, *911 Nightmare Uncovered in Investigative Report*, KSL.com, Nov. 1, 2007, http://www.ksl.com/?nid=148&sid=2077061.

in Atlanta and its three surrounding counties is 11.1 minutes.[18]

- In Los Angeles, the average emergency response time is 10.5 minutes.[19]
- In New York City it is 7.2 minutes for crimes in progress.[20]
- The *New York Times* reported that in Nassau County in 2003, 11% of 911 callers got a prerecorded message and soothing music, rather than a human operator.[21]
- The average response time for crime in progress calls in Rochester, New York, was 14 minutes, 31 seconds.[22]
- In Philadelphia the time for Priority One calls is just under 7 minutes.[23]

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[18] *911 Response Times: An I-Team Investigation*, FOX 5 ATLANTA, http://www.fox5atlanta.com/iteam/911.html.

[19] *LA police average over 10 minutes in responding to 911 calls*, A.P. wire, July 1, 2003; *see also Cop Response Slows*, L.A. DAILY NEWS, July 22, 2001 (median of 8 minutes, 30 seconds; average of 12.1 minutes).

[20] *Mayor Bloomberg Releases Fiscal 2005 Mayor's Management Report*, US STATES NEWS, Sept. 12, 2005.

[21] *Nassau 911 Callers Are Being Put on Hold*, N.Y. TIMES, Sept. 14, 2003.

[22] Tim Macaluso, *POLICE: East side response times too slow?* CITY NEWSPAPER, June 20, 2007, http://www.rochestercitynewspaper.com/news/blog/POLICE%3A+East+side+response+times+too+slow+/.

[23] Howard Goodman, *A System Geared To Preventing 'Another Polec'*, PHIL. INQUIRER, Aug. 3, 1998, at A1.

- The average in St. Petersburg, Florida, for Priority One (again, defined as "life-threatening") is 7 minutes, 5 seconds.[24]

Note that the above times are how long it takes the police to arrive after being dispatched. The times do *not* include the time that the caller waits for the 911 operator to pick up, and then talks with the operator.

Petitioners' law requiring crime victims to depend entirely on 911 ignores the fact that any criminal in control of a crime scene will not permit his victim to call the police, and that the neighbors may be unaware of the crime in progress. In contrast, when the victim of a home invasion has a handgun, the victim can prevent the criminal from gaining control of the scene, and the victim can use her free hand to dial 911.

F. Self-Defense Does Not Make Victims Worse Off

It is sometimes claimed that a victim resists with a gun will have the weapon taken away, or that resistance will enrage the criminal into a fatal attack. Yet data from the National Crime Victimization Survey show that a victim's weapon is taken by the attacker in, at most, one percent of cases in which the victim uses a weapon. *See* KLECK, TARGETING GUNS, at

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[24] Leanora Minai, *Is that enough?* ST. PETERSBURG TIMES, Apr. 7, 2002, at 1B.

168-69. Data from the National Crime Victimization Survey and other sources also show that "There is no sound empirical evidence that resistance does provoke fatal attacks."[25] Nor does resistance with a firearm increase the chance of victim injury.[26] Instead, "The use of a gun by the victim significantly reduces her chance of being injured...."[27]

G. Law Enforcement Benefits of Citizen Self-Defense

A very important reason why most police officers join a public safety department, or why lawyers join a prosecutor's office, is that they care deeply about public safety. Accordingly, when armed citizens deter or thwart crime, citizens are helping to create the safe society to which the police and prosecutors have dedicated their careers.

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[25] Gary Kleck & Jongyeon Tark, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes,* 42 CRIMINOLOGY 861, 903 (2005).

[26] Kleck, 35 SOC. PROBS. at 7-9; Gary Kleck & Miriam DeLone, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 J.QUANTITATIVE CRIMINOLOGY 55, 73-77 (1993)(study of all NCVS robbery data from 1979-85; most effective form of resistance, both for thwarting the crime, and for reducing the chance of victim injury, is resistance with a gun); Kleck & Gertz, 86 J.CRIM.L. & CRIMINOLOGY at 174-75; William Wells, *The Nature and Circumstances of Defense Gun Use: A Content Analysis of Interpersonal Conflict Situations Involving Criminal Offenders,* 19 JUST.Q. 127, 152 (2002).

[27] Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J.CRIM. JUST. 351, 362, 367 (2000)(NCVS robbery data, pertaining to situations where the robber has a non-gun weapon; if the robber has a gun, or has no weapon, victim gun possession did not seem to affect injury rates. If 10% more victims had guns, serious victim injury would fall 3-5%).

The important deterrent effect of armed citizens—particularly in reducing hot burglaries and the assaults and rapes that often result from hot burglaries—substantially reduces the number of emergencies to which police must respond. Consequently, the police have more resources available for other emergencies, and for investigative and preventive work. District Attorneys benefit from having fewer crimes to prosecute, so that they can devote greater attention to other cases.

Further, the lawful availability of handguns for citizens provides the police with a much larger pool of recruits who have experience with handgun safety, and who have learned some basics (or developed proficiency) in handgun accuracy.

Significantly, many police firearms instructors are civilians. Many innovations in police firearms training have been created by civilian trainers, who themselves train police officers and police instructors. Civilian experts have more time to dedicate to the subject than do almost all police instructors—because many police instructors do not train full-time, and those that do must teach a variety of subjects. Civilian Jeff Cooper's "The Modern Technique" is the foundation for defensive handgun instruction for an enormous number of departments. *See* JEFF COOPER, PRINCIPLES OF PERSONAL DEFENSE (rev.ed. 2007); *see* *also* JOHN FARNAM, THE FARNAM METHOD OF DEFENSIVE HANDGUNNING (2ded. 2005).

In short, law-abiding armed citizens play a substantial role in the core governmental function of protecting public safety. Their role is a modern example of how the main clause of the Second Amendment (protecting negative liberty, by prohibiting citizen disarmament) reinforces the introductory clause (affirming the active liberty of citizen participation in public security). *Cf.* STEPHEN BREYER, ACTIVE LIBERTY (2005); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 137 n.13 (1997)("police officers being necessary to law and order, the right of the people to carry handguns shall not be infringed").

II. The Invidious Conflation of Law-Abiding Gun Owners with Incipient Murderers

Petitioners' prohibitions are now and always have been based on invidious prejudice that the law-abiding citizens of the District are incipient murderers.

For example, Petitioners darkly warn that the possession of handguns will lead to homicides even by people who are "generally law-abiding and responsible." Pet. Br. 51. Likewise, the enactment of the bans was supported by "findings" claiming that "firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities. Most murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion, or intoxication, and where the killer and victims are acquainted. Twenty-five percent of these murders are within families." David A. Clarke, Chairperson of the Committee on the Judiciary and Criminal Law, *Bill No. 1-164, the "Firearms Control act of 1975"*, Apr. 21, 1976, at 5.

To see the error of Petitioners' aspersions on the law-abiding citizens of the District, one need only look at District's own data. Pursuant to a local law that took effect in 1969, all lawfully-owned firearms in the District had to be registered.

Before the bans, fewer than 0.5% of D.C. crime guns were registered to D.C. residents. Paul Valentine, *Mayor Signs Stringent Gun Control Measure*, WASH. POST, July 24, 1976, at E1, E3 (Police Chief Maurice "Cullinane acknowledged at the Mayor's press conference that less than 0.5 per cent of the guns seized by police last year were registered. There are about 60,000 registered weapons in the city.").

Regulatory excess aimed at the last 10% of a problem has been described as "tunnel vision" which "imposes high costs without achieving additional safety benefits." STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 11 (1992). The D.C. prohibition is even worse, for it targets only 0.5% of the problem, at a great cost in reduced public safety.

The law-abiding gun owners of the District were not the cause of the District's crime problems. That an infinitesimal number of registered gun owners did misuse their guns does not justify barring all law-abiding persons from owning functional firearms, just as the fact that an infinitesimal number of police misuse their guns does not justify disarming all of the police. *Cf. Romer v. Evans*, 517 U.S. 620, 632 (1996)(law "seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."); *Cleburne v. Cleburne Living Center*, 472 U.S. 432 (1985)(law based on irrational prejudice).

Likewise, the fact that law-abiding citizens and police officers are sometimes the victims of gun thefts does not justify banning either group from possessing functional guns. The problem of gun theft could be addressed by a narrowly tailored law, such as a requirement that guns be locked up when no one is home. The law review article (co-authored by the counsel of record of this brief) that Petitioners cite to dispute the efficacy of gun lock laws actually says that gun owners resist locking laws *if* the laws interfere with self-defense. Pet. Br. 54, citing Cynthia Leonardatos, David Kopel, & Paul Blackman, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 CONN. L.REV. 157 (2001).

Petitioners implicitly claim that a typical citizen of the District who can pass a criminal records and mental records background check (such as the National Instant Check System) is at serious risk of committing murder. It is hard to imagine how such a population could be considered fit for home rule.

Amici (which include many Maryland and Virginia police officers) reject Petitioners' dire and suspicious attitude toward the law-abiding citizens of the District of Columbia.

The large majority of murderers have prior criminal records; thus, Petitioners' premise for the bans—the "finding" that "Most murders are committed by previously law-abiding citizens"—is indisputably false, and therefore irrational. The truth is that "Homicide offenders are likely to commit their murders in the course of long criminal careers consisting primarily of nonviolent crimes but including larger than normal proportions of violent crimes." David Kennedy & Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUD. 263, 276 (1998).[28] For example:

- A *New York Times* study of the murders in that city in 2003-05 found "More than 90 percent of the killers had criminal records...."[29]
- In 1989, the *New York Times* reported that in Washington, D.C., almost all the murderers

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[28] The article's analysis of 1988 national data on homicide in 33 large cities showed that 54% of killers had a prior adult criminal record, 2% had a juvenile record only; no information was available on 25% and 20% did not have criminal records; so 74% of killers for whom records were available had a prior criminal record.

[29] Jo McGinty, *New York Killers, and those Killed, by the Numbers*, N.Y. TIMES, Apr. 28, 2006.

and victims were "involved in the drug trade."[30]

- In Lowell, Massachusetts, "Some 95% of homicide offenders" had been "arraigned at least once in Massachusetts courts" before they killed. "On average ... homicide offenders had been arraigned for 9 prior offenses...."[31]
- Of Illinois murderers in 2001, 43% had, within the last 10 years, an Illinois felony conviction and 72% had an Illinois arrest.[32]
- Baltimore police records show that 92% of 2006 murder suspects had criminal records.[33]
- A study of Minneapolis homicide offenders found that 73% had been arrested at least once by the Minneapolis Police Department, with an average number of 7.4 arrests.[34]

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[30] Richard Berke, *Capital Offers a Ripe Market to Drug Dealers*, N.Y. TIMES, Mar. 28, 1989, at 1, 6.

[31] Anthony Braga et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, Massachusetts*, 9 POLICE Q. 20, 29-31 (2006).

[32] Philip Cook et al., *Criminal Records of Homicide Offenders*, 294 JAMA 538 (2005).

[33] Gus Sentementes, *Patterns persist in city killings: Victims, suspects usually black men with long criminal histories*, BALT. SUN, Jan. 1, 2007.

[34] Kennedy & Braga, 2 HOMICIDE STUD. at 276, 283 (studying homicides perpetrated from Jan. 1, 1994 to May 24, 1997, and examining suspects' MPD arrest records from 1990 onward;

(Continued on following page)

- "The vast majority of persons involved in life threatening violence have a long criminal record with many prior contacts with the justice system." Delbert Elliott, *Life Threatening Violence is* Primarily *a Crime Problem*, 69 COLO. L.REV. 1081, 1093 (1998)(summarizing studies); *see also* Kennedy & Braga, 2 HOMICIDE STUD. at 267 (among the well-established "criminological axioms" of homicide is that a "relatively high proportion of victims and offenders have a prior criminal record (about two-thirds of offenders and half of victims)")(parenthetical in original).

A. Domestic Violence

The D.C. bans' false findings that "Most murders are committed by previously law-abiding citizens" were supported by the claim that there are many murders involving "arguments" or "where the killer and victims are acquainted" and that a quarter of such murders are "within families." Clarke, *supra* p. 25, at 5. The Council did not seem to realize that criminals too have acquaintances, relatives, homes, and arguments. In fact, the perpetrators of "argument" or "domestic" homicide are, like other homicide perpetrators, overwhelmingly persons with extensive criminal records (and who are therefore barred by federal law from possessing any firearm):

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the study did not examine records of arrests by other law enforcement).

- About 18% of homicides involve boyfriends/ girlfriends, friends, or family members. It is misleading to combine these homicides with "acquaintance" homicides (which are about 28% of homicides), because the most common way that the "acquaintances" met was through "prior illegal transactions," such as drug dealing.[35]
- A Police Foundation study of Kansas City revealed that in 90% of homicides among family members, the police had been called to the home within the past two years. The median number of previous calls was five.[36]
- Another study found that 72% of domestic murderers had prior criminal history; 40% had been under restraining orders.[37]
- "A history of domestic violence was present in 95.8%" of the intra-family homicides studied.[38]

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[35] KLECK, TARGETING GUNS, at 236, analyzing data from US DOJ, *Murder Cases in 33 Large Urban Counties in the United States 1988*, http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09907.xml, and FBI, *Supplementary Homicide Reports* (1995).

[36] MARIE WILT ET AL., DOMESTIC VIOLENCE AND THE POLICE 23 (1977).

[37] Linda Langford et al., *Criminal and Restraining Order Histories of Intimate Partner-Related Homicide Offenders in Massachusetts, 1991-95* in THE VARIETIES OF HOMICIDE AND ITS RESEARCH (FBI Academy, 2000), http://www.icpsr.umich.edu/HRWG/PDF/hrwg99.pdf.

[38] Paige Hall-Smith et al., *Partner Homicide in Context*, 2 HOMICIDE STUD. 400, 410 (1998).

Thus, "Homicides are likely to be part of a pattern of continuing violence—especially, but not exclusively, for domestic homicide."[39]

Significantly, many domestic shootings involve lawful self-defense. Data from Detroit, Houston, and Miami, showed very large majorities of wives who killed their husbands were not convicted, or even indicted, because they were "act[ing] in self-defense against husbands who are abusive to themselves, their children, or both." MARGO DALY & MARTIN WILSON, HOMICIDE 15, 199-200 (1988); *see also* Angela Browne, *Assault and Homicide at Home: When Battered Women Kill*, in 3 ADVANCES IN APPLIED SOCIAL PSYCHOLOGY 61 (Michael Saks & Leonard Saxe eds., 1986)(FBI data show that 4.8% of U.S. homicides are women killing a mate in self-defense). In a study of domestic violence victims in West Virginia shelters, "26.5% reported that they believed they would have to use a gun to protect themselves." MARGARET PHIPPS BROWN ET AL., THE ROLE OF FIREARMS IN DOMESTIC VIOLENCE 31 (2000).

There is no doubt that an abused woman is at much greater risk if her abuser has a gun. However, research shows *no* heightened risk to an abuse victim who lives apart from the abuser and who has her own gun. An abuser's being armed creates a 7.59 odds ratio for increased risk of femicide. Living alone and having a gun yields an odds ratio of 0.22, far below the 2.0 level necessary for statistical significance. Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM.J.PUB. HEALTH 1089, 1090-92 (2003). Petitioners and their *amici* relentlessly cite variants of the first figure, but ignore the second figure.

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[39] Kennedy & Braga, 2 HOMICIDE STUD. at 267.

Federal law bans the possession of any firearm by a person subject to a domestic violence restraining order, by any person convicted of a domestic violence misdemeanor, or of a felony, including non-violent felonies such as drug possession. 18 U.S.C. §922(g). The bans for domestic abusers are not overbroad, and therefore do not violate the right to arms. *See Oregon v. Hirsch*, 338 Or. 622, 114 P.3d 1104 (2005)(felon-in-possession law not overbroad); *Wisconsin v. Thomas*, 274 Wis.2d 513, 683 N.W.2d 497 (Wis.App. 2004)(same). Petitioners' law disarming abuse victims is overbroad. *See West Virginia* ex rel. *Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988)(gun restrictions may not be "overbroad" or "sweep unnecessarily broadly"); *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980)(ban on home possession of a protected arm is *per se* unconstitutional); *Junction City v. Mevis*, 226 Kan. 516, 601 P.2d 1145 (1979)(ban on weapons transport was "constitutionally overbroad," even though "city maintains that the courts should read additional exceptions into the act which are not specifically contained therein"); *Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972)("overbroad" restrictions on firearms possession and transport; a "legitimate and substantial" government "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

B. Juveniles

The instant case involves firearms ownership by law-abiding adults. Yet Petitioners and their *amici* cite statistics about gun misuse by juveniles.

The citations miss Justice Frankfurter's point that it is unconstitutional to infantilize the entire nation by restricting adults to possessing only items suitable for children. *Butler v. Michigan*, 352 U.S. 380 (1957)(rejecting the notion that literature for adults should be censored to protect children from seeing inappropriate materials). Besides, ordinary American teenagers are, like ordinary American adults, not incipient murderers. The vast majority of young murderers are, like their older counterparts, established criminals:

- A Los Angeles study showed that gangs had a role in 80% of all adolescent homicides.[40]

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[40] Off. of Juv. Just. & Delinq. Prev., *Report to Congress on Juvenile Violence Research* 14 (July 1999), www.ojjdp.ncjrs.org/pubs/jvr/contents.html.

- 57% of homicides perpetrated by male youths are committed in the course of another crime, such as robbery or rape.[41]
- A study of young murderers found that 89% had psychotic symptoms.[42]

C. Body Count Statistics

Petitioners and their *amici* cite various articles comparing the number of criminals killed by armed citizens with the number of deaths from gun misuse, and claim that since the former number is smaller than the latter, guns must be too dangerous for home defense.

Again, the comparison falsely combines two separate groups: law-abiding gun owners (who are disarmed by Petitioners' law) and illegal criminal gun owners (who are not, and who perpetrate the vast majority of murders).

More fundamentally, counting the number of criminal deaths is a very inappropriate measure of anticrime utility. *Amici* would strongly oppose making the number of justifiable homicides into a positive metric for the performance of particular police forces or individual officers.

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[41] Ann Loper & Dewey Cornell, *Homicide by Juvenile Girls*, 5 J.CHILD & FAM. STUD. 323, 326, 330 (1996)(also noting that males constitute 94% of juvenile homicide perpetrators).

[42] Wade Myers & Kerrilyn Scott, *Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*, 2 HOMICIDE STUD. 160 (1998)(also noting prior studies showing young murderers to be distinguished by "neurological abnormalities," "criminally violent family members" and "gang membership").

Besides, the survey evidence of defensive gun use (detailed in Part I) is unanimous that the large majority of DGUs consist only of brandishing a gun, rather than firing a shot, let alone a fatal one.

D. Accidents

One reason that the per capita death rate from firearms accidents has declined by 86% since 1948, while the per capita firearms supply has risen by 158% (*see* App. 12-13) is that handguns have replaced many long guns as the firearm kept in the home.[43] The gun accidental death rate for children has fallen even more sharply, by 91%. *See* App. 7-10. Handguns are more difficult for a small child to accidentally discharge than are long guns. The trigger on a rifle or shotgun is easier to pull than is the heavier trigger on a revolver or the slide on a self-loading pistol. Handguns can be hidden from inquisitive children more easily than long guns can.

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[43] An additional reason for the 86% reduction in accidents may be expert-led safety programs, principally Project ChildSafe (created by the National Shooting Sports Foundation, funded in part by the DOJ, partnered with the National Lieutenant Governors Association, and promoted by local law enforcement)(www.projectchildsafe.org), and Eddie Eagle Gun Safety (created by the NRA, winner of two awards from the National Safety Council, and taught by police and sheriffs departments all over America)(www.nrahq.org/safety/eddie/awards.asp).

For all ages, the fatal gun accident rate is at an all-time low, even as the per capita gun supply is at an all-time high. The annual risk level for a fatal gun accident is 0.22 per 100,000 population—about the risk level for taking two airplane trips a year, or for a whooping cough vaccination. *See* App. 15 (2004 gun data); BREYER, BREAKING THE VICIOUS CIRCLE, at 5, 7 (AIRPLANE AND VACCINE DATA).

Swimming pools are involved in many more accidental child fatalities than are firearms. NATIONAL SAFETY COUNCIL, INJURY FACTS 2007, at 133, 144 (in 2003, there were 7 accidental firearms deaths for children aged under 5, and 49 for ages 5-14; for the combined age groups in that same year, there were 86 bathtub deaths, and 285 in swimming pools); STEVEN LEVITT & STEPHEN DUBNER, FREAKONOMICS 135-36 (rev.ed. 2006)(swimming pool accidents cause more deaths of children under 10 years than all forms of death by firearm combined. "The likelihood of death by pool (1 in 11,000) versus death by gun (1 in 1 million-plus) isn't even close.")(parentheticals in original).

To ban airplanes, swimming pools, or whooping cough vaccine based on a microscopic rate of fatal accidents would be absurd; the District's assertion of accidents as a reason for banning handguns or functional firearms cannot pass rational basis review.

The people who cause gun accidents tend to have high rates of "arrests, violence, alcohol abuse, highway crashes, and citations for moving traffic violations." Julian Waller & Elbert Whorton, *Unintentional Shootings, Highway Crashes, and Acts of Violence*, 5 ACCIDENT ANALYSIS & PREVENTION 351, 353 (1973). Unlike in 1973, many such people are now prevented from buying a gun by the National Instant Check System.

It is true, and trivial, that homes with guns have more gun accidents, just as homes with lawnmowers have more lawnmower accidents.

III. Long Guns Are Inadequate Substitutes

Mayor Fenty claims that "It is plainly relevant that the District allows residents to possess other perfectly effective firearms...."[44] To the contrary, the District's highest court has recognized that banning self-defense in the home is the intent of the gun lock statute, and has upheld that ban.[45] Moreover, handguns are often superior and safer for self-defense *especially* in urban environments. That is why 80% of defensive uses of firearms are with handguns.[46] That is why almost all police officers use handguns when entering a building, and why so many police officers use handguns for defense of their homes and families when off-duty:

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[44] Adrian Fenty & Linda Singer, *Fighting for Our Handgun Ban*, WASH. POST, Sept. 4, 2007.

[45] *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. 1977)(noting the Council's finding that "that for each intruder stopped by a firearm there are four gun-related accidents within the home"—and thereby showing that elimination of self-defense against intruders was considered by the Council to be a price worth paying).

- A handgun is much easier to hold while phoning (or for police, radioing) for help.
- The ability to summon help while simultaneously keeping the gun pointed at the criminal reduces the chance that the home-owner or the police officer will have to shoot the criminal; it is preferable that criminals be captured rather than killed.
- Especially in a home, a long gun is harder to maneuver (e.g., around corners) and shoot, and, because of its length, is easier for a criminal to grab. Thus, handguns are far superior as defensive arms for use in small urban spaces such as apartments.
- For persons who have relatively weak upper body strength (such as the elderly, or small persons, or some women), a handgun is much easier to hold, control, and aim accurately.

The reason that handguns have been called "equalizers"[47] is that they are the best tool for a person to

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[46] Kleck & Gertz, 86 J.CRIM.L. & CRIMINOLOGY, at 175.

[47] "Be not afraid of any man,
No matter what his size.
When danger threatens, call on me
And I will equalize."

(Continued on following page)

defend herself against larger or more numerous attackers, especially in a close-range setting such as the home.

IV. The Handgun and Self-Defense Bans Violate Precedent and Original Intent

While strict scrutiny is the appropriate standard of review for most gun controls, it unnecessary here, for this Court's own precedents indicate the unconstitutionality of a handgun ban.

Robertson v. Baldwin declared "the carrying of concealed weapons" (presumably, handguns and knives) to be an exception to the Second Amendment. 165 U.S. 275, 281-82 (1897). The exception proves the rule: that a ban on all handguns in the home violates the Second Amendment. Similarly, Justice Holmes' opinion in *Patsone v. Pennsylvania* upheld a state statute against legal aliens possessing long guns for hunting, because the statute "does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defence." 232 U.S. 138, 143 (1914).

Petitioners' extreme and unusual law is well outside the constitutional mainstream. *Cf. Lawrence v. Texas*, 539 U.S. 558 (2003)(only four states had the law at issue; here, only Chicago and a few of its

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Late 19th century advertisement for the Equalizer, a Colt handgun (which is now antique, but banned in the District).

suburbs ban handguns, and even they do not outlaw home self-defense with long guns); *Romer v. Evans* 517 U.S. 620 (1996)(emphasizing extreme, unique nature of the law); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (unusual statute "forbidding the use" of a lawful product in the home).

St. George Tucker—the leading legal scholar of the Early Republic, on whom this Court has relied many times for original intent—used an example of a law like the one at bar to illustrate the necessity of judicial review. 1 WILLIAM BLACKSTONE, COMMENTARIES, App. at 289 (St. George Tucker ed., Lawbook Exch., 1996)(1803)(arguing that the Necessary and Proper clause barred disarming citizens, because disarmament could never be necessary or proper). He further stated that self-defense is part of the Second Amendment: "This may be considered as the true palladium of liberty....The right of self defence is the first law of nature." *Id.* at vol. 1, App. at 300. Justice Story later adopted the "true palladium" image of the Second Amendment in his own treatise. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 607 (2ded. 1851).

In a passage ignored by Petitioners' *amici* historians, Tucker wrote: "The right of the people to keep and bear arms shall not be infringed. Amendments to C. U.S. Art. 4, and this without any qualification as to their condition or degree, as is the case in the British government." *Id.* at vol. 2, 143 n.40. (The right to arms was originally the fourth of 12 amendments Congress proposed to the people.)

Like all 19th century commentators, Tucker recognized the Second Amendment as an individual right belonging to all citizens, and including the right to possess arms for self-defense. *See* David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L.Rev. 1359.

In 1846, the Supreme Court of Georgia held that a ban on handguns violated the Second Amendment, but that restrictions on concealed carry did not. *Nunn v. Georgia*, 1 Ga. 243 (1846); *see also* Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 Minn. L.Rev. 1 (2007)(observing that post-*Barron*, many state courts still applied the Bill of Rights to state laws, and several did so with the Second Amendment); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1203-17 (1992)(*Nunn* was one of several state opinions which provided the intellectual foundation for the Fourteenth Amendment).

The District has a legitimate interest in a screening system, such as the National Instant Check System, for purchasers of firearms. However, banning handguns and home defense because of invidious prejudice amounts to unconstitutionally piling "inference upon inference"[48] and "prophylaxis upon prophylaxis."[49]

CONCLUSION

"I don't intend to run this government around the moment of survival," declared D.C. Councilman David A. Clarke, chairman of the committee that created the handgun and self-defense ban.[50] The Second Amendment forbids banning the tools of survival. Petitioners' dangerous laws deprive the public and law enforcement of the life-saving, crime-reducing effects of gun ownership which are apparent in the 50 states.

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[48] *Gonzales v. Raich*, 545 U.S. 1, 35 (2005)(Scalia, J., concurring); *Sabri v. United States*, 541 U.S. 600, 608 (2004); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Mathews v. Lucas*, 427 U.S. 495, 522 (1976)(Stevens, J., dissenting); *Anderson v. United States*, 417 U.S. 211 (1974); *Ingram v. United States*, 360 U.S. 672, 680 (1959); *Pereira v. United States*, 347 U.S. 1, 15 (1954)(Minton, J., concurring and dissenting); *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943); *United States v. Classic*, 313 U.S. 299, 332 (1941)(Douglas, J., dissenting); *United States v. Ross*, 92 U.S. 281, 282 (1875).

[49] *Fed. Election Comm'n v. Wis. Right to Life*, ___ U.S. ___, 127 S.Ct. 2652, 2673 (2007).

[50] Daniel Greene, *The Case for Owning a Gun*, THE WASHINGTONIAN, Mar. 1985.

The decision below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A
Self-Defense Data

1. The 13 studies of the frequency of defensive gun use

Survey	Field	Bordua	DMI one	DMI two
Area	Calif.	Illinois	U.S.	U.S.
Year of interviews	1976	1977	1978	1978
Gun type covered	Handgun	All	All	All
Recall period	Ever/1 yr./ 2 yrs.	Ever	Ever	Ever
Exclude uses against animals?	No	No	No	Yes
Exclude military/ police uses?	Yes	No	Yes	Yes
DGU question refers to	Self	Self	Househld.	Househld.
% who used gun	8.6/1.4/3[a]	5.0	15	7
% who fired gun	2.9	n.a.	6	n.a.
Implied annual # of DGUs[b]	3,052,717	1,414,544	2,141,512	1,098,409

Survey	**Hart**	**Ohio**	**Mauser**	**Gallup**	**Gallup**
Area	U.S.	Ohio	U.S.	U.S.	U.S.
Year of interview	1981	1982	1990	1991	1993
Gun type covered	Handgun	Handgun	All	All	All
Recall period	5 year	Ever	5 year	Ever	Ever
Exclude uses against animals?	Yes	No	Yes	No	No
Exclude military/police uses?	Yes	No	Yes	No	Yes
DGU question refers to	Household	Self	Household	Self	Self
% who used gun	4	6.5	3.79	8	11
% who fired gun	n.a.	2.6	n.a.	n.a.	n.a.
Implied annual # of DGUs[b]	1,797,461	771,043	1,487,342	777,153	1,621,377

Survey	Kleck & Gertz	L.A. Times	Tarrance	Police Foundation
Area	U.S.	U.S.	U.S.	U.S.
Year of interviews	1993	1994	1994	1994
Gun type covered	All	All	All	All
Recall period	1 year	Ever	5 year	1 year
Excluded uses against animals?	Yes	No	Yes	Yes
Excluded military/ police uses?	Yes	Yes	Yes	Yes
DGU question refers to	Self	Self	Self/Household	Self
% who used gun	1.326	8[c]	1/2[d]	1.44
% who fired gun	0.63	n.a.	n.a.	0.70
Implied annual # of DGUs[b]	2,549,862	3,609,682	764,036	1,460,000

Defensive Gun Use Surveys are from Gary Kleck, Targeting Guns (1997), chapter 5; Philip Cook & Jens Ludwig, Guns in America 62-63 (1996)

Notes to Table:

[a] 1.4% in past year, 3% in past two years, 8.6% ever.

[b] Estimated annual number of DGUs of guns of all types against humans, excluding uses connected with military or police duties.

[c] Covered only uses outside the home.

[d] 1% of respondents, 2% of households.

2. National Crime Victim Survey calculations

Most of the NCVS data are not published in a narrative format. Instead, they are available for researchers at the website of the Inter-University Consortium for Political and Social Research (ICPSR), http://www.icpsr.umich.edu/.

The NCVS data for 1992-2005 suggest 97,000 defensive gun uses annually during that period. The figure is based on "National Crime Victimization Survey, 1992-2005: Concatenated Incident-Level File." (Available at: http://search.icpsr.umich.edu/NACJD/query.html?nh=500&rq=0&col=abstract&op0=%2B&rf=3&tx0=national+crime+victimization+survey&fl0=title%3A&ty0=p&ty1=w&op1=%2B&fl1=archive%3A&tx1=NACJD).

Tabulate V4144. Self-protective action: Attacked offender with gun

	Frequency	Percent	Cumulative
No	29,906	17.53	17.53
Yes	83	0.05	17.58
Out of Universe	140,639	82.42	100
Total	170,628		100

Tabulate V4147, Self-protective action: Threatened offender with gun

	Frequency	Percent	Cumulative
No	29,708	17.41	17.41
Yes	281	0.16	17.58
Out of Universe	140,639	82.42	100
Total	170,628		100

The combined tabulations suggest a DGU rate of 1.2% for violent crimes. The NCVS average crime rate per 1,000 US population over the age of 12 in 1992-2005 was 35.8. The average population of the US between 1992 and 2005 was 275,768,380. Of that population, 82% was over the age of 12. So:

Multiply total US population by .82 = 226,130,072 (population over age 12)
Divide by 1,000 = 226,130.072 (over-12 population in thousands)
Multiply by 35.8 = 8,095,457 (number of annual violent crimes)
Multiply by 1.2% (NCVS rate of DGUs for 1992-2005) = 97,145 (average annual DGUs)

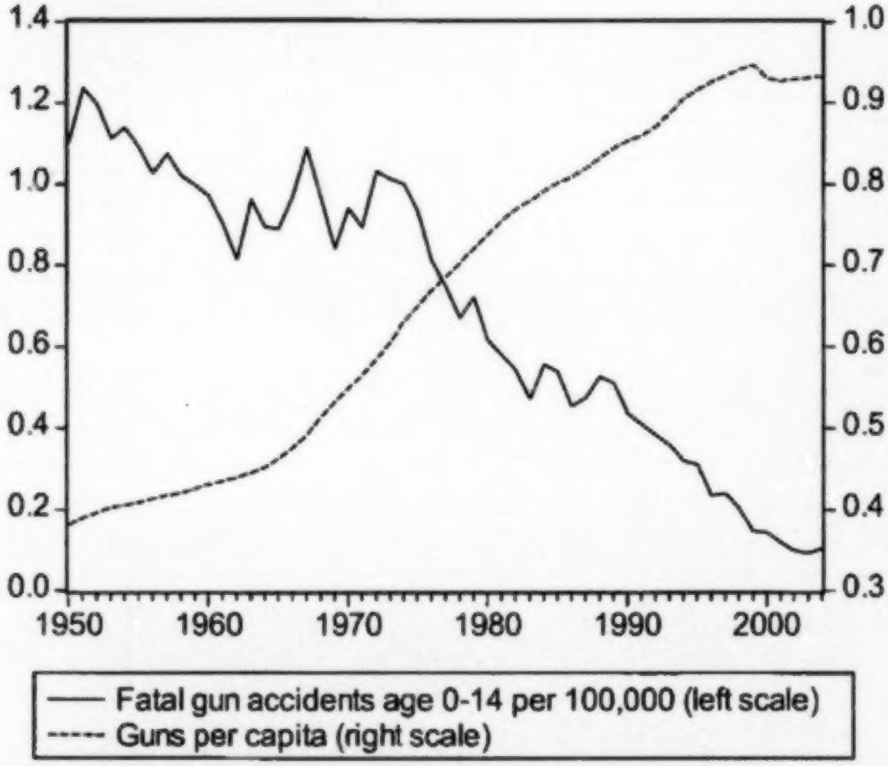
Sources :
Population:
http://www.fbi.gov/ucr/cius2006/data/table_01.html
Percent of the population over 12:
http://www.census.gov/prod/2001pubs/c2kbr01-12.pdf
NCVS violent crime rate per 1,000 persons over age 12
http://www.ojp.usdoj.gov/bjs/glance/tables/viortrdtab.htm

The data for 2005 suggest 74,695 DGUs that year. Calculations are as follows:

US Population in 2005: 296,410,404
Subtract 20% = 237,128,323 (population over age 12)
Divide by 1,000 = 237,128.404 (over-12 population in thousands)
Multiply by 21 (the NCVS 2005 violent crime rate per thousand persons over the age of 12) = 4,979,695 (number of violent crimes in 2005)
Multiply by 1.5% (NCVS rate of DGUs for 2005) = 74,695 (DGUs in 2005).

APPENDIX B
Accident Data

1. Child gun fatality rate compared to guns per capita, 1950-2004



Important note: There is a magnitude difference of 100,000 between the left and right scales. The right scale measures a single gun; it begins with less than .4 guns per American in 1950, and ends with more than .9 guns per American in 2004. The scale on the left is fatal accidents per 100,000 persons aged 14 or under. The youth fatal gun accident rate declines by 91%, from 1.1 fatalities per 100,000 youths in 1950, to about 0.1 per 100,000 youths in 2004.

Sources: Fatal gun accidents from Centers for Disease Control, *Compressed Mortality File*, http://wonder.cdc.gov/mortSQL.html.
Guns per capita from GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 96-97 (1997), and Bureau of Alcohol, Tobacco, Firearms & Explosives, *Annual Firearms Manufacture and Export Report*, http://www.atf.gov/firearms/stats/index.htm.

Data Table for the Chart

Year	**Fatal gun accidents for ages 14 & under**	**Population under 14**	**Fatal accidents per 100,000 children**	**Guns per capita**
1950	451	40,853,299	1.10	0.38
1951	520	42,064,604	1.24	0.39
1952	519	43,376,761	1.20	0.40
1953	498	44,759,194	1.11	0.40
1954	527	46,265,590	1.14	0.40
1955	522	47,866,820	1.09	0.41
1956	508	49,448,548	1.03	0.41
1957	549	51,079,515	1.07	0.42
1958	538	52,698,698	1.02	0.42
1959	542	54,345,325	1.00	0.43
1960	544	55,971,292	0.97	0.43
1961	507	56,045,549	0.90	0.43
1962	456	56,018,882	0.81	0.44
1963	538	55,946,055	0.96	0.44

1964	500	55,835,037	0.90	0.45
1965	494	55,618,888	0.89	0.46
1966	535	55,287,117	0.97	0.48
1967	598	54,889,988	1.09	0.49
1968	527	54,491,901	0.97	0.51
1969	455	54,088,773	0.84	0.53
1970	506	53,802,863	0.94	0.55
1971	481	53,834,598	0.89	0.57
1972	554	53,699,935	1.03	0.58
1973	541	53,450,214	1.01	0.61
1974	532	53,162,742	1.00	0.63
1975	495	52,894,592	0.94	0.65
1976	428	52,604,523	0.81	0.67
1977	392	52,325,064	0.75	0.69
1978	349	52,059,828	0.67	0.70
1979	372	51,523,398	0.72	0.72
1980	316	51,368,905	0.62	0.74
1981	298	51,275,045	0.58	0.76
1982	279	51,367,319	0.54	0.77
1983	243	51,458,409	0.47	0.78
1984	287	51,580,345	0.56	0.79
1985	278	51,615,831	0.54	0.80
1986	234	51,592,128	0.45	0.81
1987	247	51,965,425	0.48	0.82
1988	277	52,603,938	0.53	0.83
1989	273	53,404,219	0.51	0.84

1990	236	54,065,132	0.44	0.85
1991	227	55,352,258	0.41	0.86
1992	216	56,297,147	0.38	0.87
1993	205	57,202,683	0.36	0.89
1994	185	57,918,481	0.32	0.91
1995	181	58,379,928	0.31	0.92
1996	138	58,850,406	0.23	0.93
1997	142	59,217,153	0.24	0.93
1998	121	59,659,176	0.20	0.94
1999	88	59,955,368	0.15	0.95
2000	86	60,253,375	0.14	0.93
2001	72	60,434,835	0.12	0.93
2002	60	60,646,433	0.10	0.93
2003	56	60,737,916	0.09	0.93
2004	63	60,821,996	0.10	0.93

Before 1950, mortalities from child firearm accidents were combined with all non-motor vehicle accidents, so reliable firearm-only data before 1950 were not available.

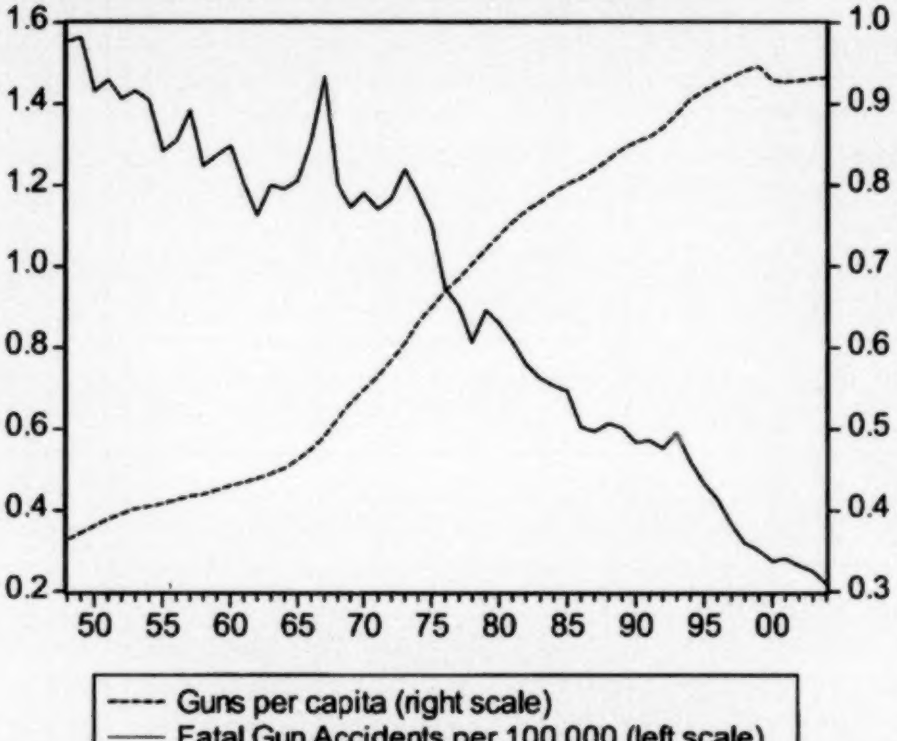
Caveat: The guns per capita figure in this Table and the next Table are based on manufacturer data recorded by the BATFE, then modified to account for net imports and exports. The data do not account for the home manufacture of firearms (which is generally legal for personal use, but not for sale). Nor do they account for guns which are seized by the police and then destroyed. (Many seized guns are re-sold by the police to licensed manufacturers or gun dealers, and thereafter re-sold to ordinary buyers.) Nor do the data account for guns that become dysfunctional due to rust or wear and tear. There are no general studies on the subject. However, unless a gun is exposed to a moist climate for an extended time, is neglected, and then rusts, guns can remain functional for centuries. A heavily-used target competition gun might eventually need to have the barrel or a spring replaced in order to retain optimal accuracy, but in general, guns may be one of the most durable consumer products in existence. Over the last few decades, an increasingly large fraction of guns (such as pistols from Glock, or Smith & Wesson) have been partially made from plastic polymers, and such guns appear to be even more durable.

Even if one made an arbitrary assumption that no gun lasts for longer than 50 years (or 40 years, or 30 years), the revised data would still show an increase in guns per capita being accompanied by an enormous decline in accidents. A 1994 study by the Police Foundation estimated that there were 192 million privately-owned guns in the United States—lower than the 235 million estimate in the table below, but broadly consistent with the evidence of a large increase in the U.S. gun supply in the past half-century. *See* PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 13 (1996).

The Small Arms Survey, an international research organization affiliated with the Graduate Institute of International Studies, Geneva, Switzerland, reports that estimates of the current U.S.

civilian gun supply range from 250 million to 290 million, while the Survey's own methodology suggests a supply of about 317 million (for a U.S. population of about 300 million). SMALL ARMS SURVEY 2007, at 59 (Eric G. Berman et al. eds., 2007). These estimates are generally compatible with the per-capita figures presented in the Data Table below, with 273 million guns as of 2004.

2. Fatal gun accident rate compared to the number of guns per capita, 1948-2004



Again, the left and right scales differ by a magnitude of 100,000. The right scale (ownership) is guns per person. In 1948 there were .36 guns per person. (That is, about one gun for every three Americans.) By 2004, there was nearly one gun for every American. The left scale (accidents) is per 100,000 persons. In 1948, there were 1.6 fatal gun accidents per 100,000 persons. By 2004, the rate had fallen by 86%, so that there were .22 fatal accidents per 100,000 persons.

Sources: fatal gun accidents from Centers for Disease Control, *Compressed Mortality File*, http://wonder.cdc.gov/mortSQL.html, and GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 323-24 (1997).

The gun supply figures are from GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 96-97 (1997), and Bureau of Alcohol, Tobacco, Firearms & Explosives, *Annual Firearms Manufacture and Export Report*, http://www.atf.gov/firearms/stats/index.htm.

Data Table for the Chart

Year	**Total gun stock**	**Fatal gun acdnts.**	**Popul. (in 1000s)**	**Guns per capita**	**Fatal gun acdnts. per 100,000 persons**
1948	53,203,031	2,270	146,091	0.36	1.55
1949	55,406,460	2,326	148,666	0.37	1.56
1950	57,902,081	2,174	151,871	0.38	1.43
1951	59,988,664	2,247	153,970	0.39	1.46
1952	61,946,315	2,210	156,369	0.40	1.41
1953	63,945,235	2,277	158,946	0.40	1.43

1954	65,558,052	2,281	161,881	0.40	1.41
1955	67,387,135	2,120	165,058	0.41	1.28
1956	69,435,933	2,202	168,078	0.41	1.31
1957	71,416,509	2,369	171,178	0.42	1.38
1958	73,163,450	2,172	174,153	0.42	1.25
1959	75,338,188	2,258	177,136	0.43	1.27
1960	77,501,065	2,334	179,972	0.43	1.30
1961	79,536,616	2,204	182,976	0.43	1.20
1962	81,602,984	2,092	185,739	0.44	1.13
1963	83,834,808	2,263	188,434	0.44	1.20
1964	86,357,701	2,275	191,085	0.45	1.19
1965	89,478,922	2,344	193,457	0.46	1.21
1966	93,000,989	2,558	195,499	0.48	1.31
1967	97,087,751	2,896	197,375	0.49	1.47
1968	102,302,251	2,394	199,312	0.51	1.20
1969	107,111,820	2,309	201,298	0.53	1.15
1970	111,917,733	2,406	203,798.7	0.55	1.18
1971	116,928,781	2,360	206,817.5	0.57	1.14
1972	122,304,980	2,442	209,274.9	0.58	1.17
1973	128,016,673	2,618	211,349.2	0.61	1.24
1974	134,587,281	2,513	213,333.6	0.63	1.18
1975	139,915,125	2,380	215,456.6	0.65	1.10
1976	145,650,789	2,059	217,553.9	0.67	0.95
1977	150,748,000	1,982	219,760.9	0.69	0.90
1978	156,164,518	1,806	222,098.2	0.70	0.81
1979	161,888,861	2,004	224,568.6	0.72	0.89

1980	167,681,587	1,955	227,224.7	0.74	0.86
1981	173,262,755	1,871	229,465.7	0.76	0.82
1982	178,218,890	1,756	231,664.4	0.77	0.76
1983	182,273,263	1,695	233,792.0	0.78	0.73
1984	186,683,867	1,668	235,824.9	0.79	0.71
1985	190,658,136	1,649	237,923.7	0.80	0.69
1986	194,182,072	1,452	240,132.8	0.81	0.60
1987	198,526,508	1,440	242,288.9	0.82	0.59
1988	203,306,821	1,501	244,499.0	0.83	0.61
1989	208,489,609	1,489	246,819.2	0.84	0.60
1990	212,823,547	1,416	249,438.7	0.85	0.57
1991	216,695,946	1,441	252,127.4	0.86	0.57
1992	222,067,343	1,409	254,994.5	0.87	0.55
1993	228,660,966	1,521	257,746.1	0.89	0.59
1994	235,604,001	1,356	260,289.2	0.91	0.52
1995	240,770,928	1,225	262,764.9	0.92	0.47
1996	245,379,137	1,134	265,189.8	0.93	0.43
1997	249,748,101	981	267,743.6	0.93	0.37
1998	254,199,406	866	270,248.0	0.94	0.32
1999	257,991,026	824	272,690.8	0.95	0.30
2000	261,592,676	776	281,421.9	0.93	0.28
2001	264,360,377	802	285,317.6	0.93	0.28
2002	267,556,289	762	287,973.9	0.93	0.26
2003	270,695,992	730	290,809.8	0.93	0.25
2004	273,643,000	649	293,655.4	0.93	0.22

APPENDIX C

Statement of Interest of Additional *Amici*

Maryland State Lodge, Fraternal Order of Police

Founded in 1967, the Maryland State Lodge of the Fraternal Order of Police is the largest organization of rank and file law enforcement officers in Maryland, comprising 19,198 members and 68 subordinate lodges. The Maryland FOP's mission is to support the interests of law enforcement and public safety.

San Francisco Veteran Police Officers Association

San Francisco Veteran Police Officers Association (SFVPOA) represents retired San Francisco officers. SFPVOA members and their families need to be able to defend themselves from the criminals they have arrested throughout their careers, and SFPVOA recognizes the self-defense needs of all law-abiding citizens. The SFVPOA participated in the lawsuit that overturned a handgun ban in San Francisco. *Fiscal v. City & County of San Francisco*, ___ Cal. Rptr. 3d ___, 2008 WL 81550 (Cal. Ct. App. 2008).

Long Beach Police Officers Association

The Long Beach Police Officers Association represents members in the police officer, corporal, sergeant and lieutenant ranks, who police the 35th-largest city in the United States.

Texas Police Chiefs Association

The Texas Police Chiefs Association was founded in 1958 to promote, encourage and advance the professional development of Chiefs of Police and senior police management personnel throughout the State of Texas. TCPA represents over 600 law enforcement executives in Texas.

Texas Municipal Police Association

Founded in 1950 to promote professionalism in law enforcement, the Texas Municipal Police Association represents 14,000 officers. TMPA provides law enforcement training in a wide variety of subjects, with special emphasis on bringing courses to rural departments that cannot afford to send officers to big cities for classes.

New York State Association of Auxiliary Police

The New York State Association of Auxiliary Police represents uniformed police volunteers in 55 police departments throughout New York State. Auxiliary police in New York date back to 1932; their status was formalized by the statewide Defense Emergency Act of 1951.

Alpine County, California, District Attorney Will Richmond

Will Richmond previously served as District Attorney for Tulare County, and as Deputy Chief Assistant U.S. Attorney for Eastern District of California. He was appointed Alpine County District Attorney in 2002, and then elected to the position.

Amador County, California, District Attorney District Attorney Todd Reibe

First elected in 1999, Todd Reibe was re-elected in 2002 and 2006.

Butte County, California, District Attorney Michael Ramsey

Michael Ramsey has served as a prosecutor for 29 years, and as Butte County District Attorney for over 20 years. During his administration the department has instituted 17 special prosecution units and investigative programs.

Colusa County, California, District Attorney John Poyner

John Poyner was first elected District Attorney in 1986, and has been re-elected ever since. He is California District Attorneys Association President-Elect for 2007-2008.

Del Norte County, California, District Attorney Michael D. Reise

Michael D. Reise was elected to his first term in 2002, and re-elected in 2006.

El Dorado County, California, District Attorney Vern Pierson

As a career prosecutor, Vern Pierson has served as a vertical prosecutor for domestic violence and sexual assault. He helped create the *Field Guide* used by thousands of California police officers, and he is the author of the annually-updated *California Evidence Pocketbook*. He teaches trial advocacy and the laws of evidence to California prosecutors. Since 1999, he has served on the committee that provides the annual legal revisions for Peace Officers Standards and Training (P.O.S.T.).

Fresno County, California, District Attorney Elizabeth A. Egan

Elizabeth Egan was elected in 2002. She heads one the of the largest prosecutorial agencies in California.

Glenn County, California, District Attorney Robert Holzapfel

Robert Holazpfel was first elected District Attorney of Glenn County in 1990 and was re-elected 1994, 1998, 2002, and 2006.

Imperial County, California, District Attorney Gilbert Otero

Gilbert Otero as first elected in 1992, and is currently serving his fourth term. He is Past President of the California District Attorneys Association.

Kern County, California, District Attorney Edward Jagels

Edward Jagels was first elected District Attorney of Kern County in 1983, at the age of 33. He is a Past President of the California District Attorneys Association. He has served on the Governor's Law Enforcement Steering Committee, the Attorney General's Policy Council on Violence Prevention, and was co-author and campaign chair of the Crime Victims Justice Reform Act (Prop. 115).

Kings County, California, District Attorney Ron Calhoun

Ron Calhoun was first elected in 1999, and is currently serving his third term.

Madera County District Attorney Ernest J. LiCalsi

Ernest J. LiCalsi was first elected in 1992. He is an Adjunct Professor at California State University, Fresno, where he teaches Criminal Legal Process and Advanced Criminal Legal Process for the Department of Criminology.

Mariposa County, California, District Attorney Robert H. Brown

Former Naval Commander Robert H. Brown began his career as a lawyer after retiring from the U.S. Navy. He has been a prosecutor since 1985, and was elected District Attorney in 2002 and re-elected in 2006.

Mendocino County, California, Sheriff Thomas D. Allman

Thomas Allman has been a law enforcement officer since 1981. He has served in a variety of assignments, including undercover narcotics work targeting methamphetamine. He was elected Sheriff in 2006.

Merced County, California, District Attorney Larry Morse

Larry Morse joined the District Attorney's office in 1993, and was elected District Attorney in 2006. He was named Prosecutor of the Year by A Women's Place of Merced County and by the Central Valley Arson Investigators Association.

Modoc County, California, District Attorney Gary Woolverton

After more than 30 years in private practice, specializing in workman's compensation, Gary Woolverton was elected District Attorney in 2006.

Mono County, California, District Attorney George Booth

George Booth has worked as both a criminal defense attorney and Deputy District Attorney and Assistant District Attorney for Mono County. He has been in the District Attorney's Office for 18 years.

Orange County, California District Attorney, Tony Rackauckas

Before being elected District Attorney, Tony Rackauckas had served as Presiding Judge of the Appellate Department of the Superior Court, and before that as a judge of the Superior Court and the Municipal Court. He was elected District Attorney in 1998, and re-elected in 2002 and 2006. During his time in office, gang membership has decreased by 8,500 members, a reduction of 45 percent. There are 55 fewer gangs.

Placer County, California, District Attorney Brad Fenocchio

Brad Fenocchio joined Placer County District Attorney's office in 1985, and was first elected District Attorney in 1994. He received the Rural and Medium County Outstanding Prosecutor of the Year Award for the State of California in 2003; the National Association of Counties 2003 Achievement Award presented to the Placer County District Attorney's Office for its innovative Community Agency Multidisciplinary Elder Team; and the Attorney General's Distinguished

Service Award for Elder Abuse Prosecution presented by California Attorney General's Office in 2003.

San Bernardino, California, District Attorney Michael Ramos

Michael Ramos was elected 2002 and re-elected in 2006. In 2004 he was appointed to California Victim Compensation and Government Claims Board, and was elected to the California District Attorneys Association Board of Directors. He was given the Latino of the Year Award in 1999, by the Redlands Northside Impact Committee.

Santa Barbara County, California, District Attorney Christie Stanley

Christie Stanley joined the Santa Barbara County District Attorney's office in 1980. In 1984 she was recognized as "Deputy District Attorney of the Year." She was elected in 2006.

Shasta County, California, District Attorney Gerald C. Benito

Shasta County, California, District Attorney Gerald C. Benito Gerald C. Benito was first elected District Attorney in 2003.

Sierra County, California, District Attorney Larry Allen

Larry Allen was elected District Attorney/Public Administrator of Sierra County on March 5, 2002 and took office as the County's 37th District Attorney on January 6, 2003.

Siskiyou County, California, District Attorney J. Kirk Andrus

J. Kirk Andrus was appointed District Attorney in 2005, and was elected in 2006. He is the youngest District Attorney in California.

Solano County, Calif., District Attorney David W. Paulson

Before joining the District Attorney's Office in 1977, David W. Paulson had served as a military trial judge and as an appellate military judge on the Navy's highest court, the Navy-Marine Corps Court of Criminal Appeals.

He was appointed District Attorney by the Board of Supervisors in 1993, elected in 1994, and re-elected in 1998, 2002, and 2006. He is a Past President (2004-2005) of the California District Attorneys Association (CDAA), and served as CDAA Director in 1995-1997.

He is also a Past President (2005-2006) of the Board of Directors of the Institute for the Advancement of Criminal Justice (IACJ), and currently serves as the Editor-in-Chief of *The Journal of the Institute for the Advancement of Criminal Justice*. Mr. Paulson was recently appointed Chair of the Board of Advisors for the new LL.M. in Prosecutorial Science program at Chapman University School of Law.

Sutter County, California, District Attorney Carl V. Adams

Carl V. Adams is the senior elected District Attorney in California. He was first elected in 1982, and has been re-elected six times after that. He serves on the Board of the California District Attorneys Association.

Tehama County, California, District Attorney Gregg Cohen

Gregg Cohen was first elected in 1998, and is serving his 3rd term. He served on the California District Attorneys Association Board of Directors in 2005 and 2006, as Vice-Chairman of Rural Counties in 2007, and also served on the Corrections and Parole Committee. His prior experiences includes service in the Criminal Division of the San Diego City Attorney's Office, the Shasta County District Attorney's Office, in the U.S. Attorney's Office in San Diego, and in private firms specializing in toxic tort litigation.

Trinity County, California, District Attorney Michael Harper

Michael Harper was elected in 2006. Prior to taking office he was Deputy District Attorney in Trinity County from 2001-2007, and has worked as a prosecutor for 15 years.

Tulare County, California, District Attorney Phil Cline

Phil Cline began his career as a prosecutor in 1978 with the Tulare County District Attorney's Office. Before being appointed District Attorney in 1992, he had specialized for seven years in homicide cases. He was first elected in 1994. He created Tulare County's Rural Crime Program, the first of its kind in the nation. He is a Past President of the Tulare County Police Chiefs Association.

Ventura County, California, District Attorney Gregory Totten

Gregory Totten was first elected in 2002, and was re-elected in 2006. He has been named the Ventura County Kiwanis "Law Enforcement Officer of the Year." He serves on the Board of Directors of the California District Attorneys Association

Rep. Andy Olson

Oregon State Rep. Olson is Vice-chair of the Human Services and Women's Wellness Committee, and also the Deputy Republican Leader. Before joining the legislature, he was a Lieutenant in the Oregon State Police, where he served for 29 years.

National Police Defense Foundation (NPDF)

The National Police Defense Foundation (NPDF) is a non-profit organization of over 100,000 members and supporters dedicated to protecting and defending law enforcement. The NPDF offers free medical support services to all law enforcement personnel who experience a job-related illness and disability. NPDF also provides legal support for police officers who are the victims of fabricated allegations, or of retaliation for whistle-blowing. NPDF's "Safe Cop" program was recognized by Congress in 1995; the program offers a $10,000 reward for public information leading to the arrest and conviction of any person who shoots a law enforcement officer. Safe Cop produced the information that led to the arrest and conviction of the murderers of Orange, New Jersey, Police Officer Joyce Carnegie and of Deputy Sheriff Paul Rein of the Broward County Sheriff's Department. The State Troopers Coalition of the National Police Defense Foundation was established to address the needs of state troopers nationwide. More than 60 law enforcement organizations are affiliated with NPDF.

Law Enforcement Alliance of America

Founded in 1991, the Law Enforcement Alliance of America (LEAA) has 75,000 members and supporters; they are law enforcement officers, crime victims, and concerned citizens. LEAA's focus is public education on effective crime control policies.

Independence Institute

Founded in 1985, the Independence Institute is a nonpartisan, nonprofit public policy research organization dedicated to providing information to concerned citizens, government officials, and public opinion leaders. It is based in Golden, Colorado.

Independence Institute staff have written or coauthored scores of law review and other scholarly articles on the gun issue, and several books, including the only law school textbook on the subject: ANDREW McCLURG, DAVID B. KOPEL & BRANNON P. DENNING, GUN CONTROL AND GUN RIGHTS (NYU Press, 2002). The Institute's work has been cited in over 400 law review articles.

International Association of Law Enforcement Firearms Instructors

The International Association of Law Enforcement Firearms Instructors (IALEFI) is the world's largest association of police firearms instructors. Founded in 1981, IALEFI conducts national and regional training conferences for instructors. IALEFI comprises over 10,000 members, approximately ninety percent of whom are active, non-retired instructors. IALEFI instructors include members of every federal law enforcement agency, and every branch of the U.S. military. Most IALEFI members are Americans, with Canadians comprising the largest group from the 15 other nations also having members. IALEFI publishes a quarterly magazine, *The Firearms Instructor*, and also publishes various manuals, including *Firearms Training Standards for Law Enforcement Personnel* and the *Standards & Practices Reference Guide for Law Enforcement Firearms Instructors*. IALEFI strongly supports the right of law-abiding citizens to own handguns for self-defense, and is particularly cognizant of how widespread civilian handgun ownership leads to better police firearms training, as described in Part I.G. of this Brief.

AMICUS
CURIAE
BRIEF

No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
PETITIONERS

v.

DICK ANTHONY HELLER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF INTERNATIONAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici Curiae are International Scholars with a special interest in the fundamental right of self-defense, the availability of arms to protect that right and how the laws of foreign countries observe and protect those principles. Amici have a strong interest in the Court having an informed understanding of the international aspects of those issues and how those principles are observed within the laws of other nations. The individual Amici appearing herein are identified by country, name and academic affiliation in Appendix "A" hereof.[1]

SUMMARY OF ARGUMENT

Petitioners partially justify their draconian gun laws based upon an assertion that they are no more onerous than similar laws in foreign countries. This assertion is unwarranted. The simple fact is that most Western democracies do not restrict the availability of the means of self-defense to the degree that Petitioners do. To the contrary, Petitioners' gun laws represent a sharp departure from the international norm, which generally provide for some level of civilian handgun ownership and also provide for the use of firearms in self- defense.

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief. On January 25, 2008, written notice of the intent to file this brief was given to the parties. No person other than the individual Amici named herein or their counsel have made a monetary contribution to the preparation or submission of this brief.

The fundamental right of self-defense provide the context upon which the laws of nations and the law of international relations are premised. The common law tradition that we inherited is echoed in the very birth of our nation. "We hold these truths to be self evident..." is not merely inspiring rhetoric. It represents what "We the People" believe and what "We the People" have endeavored to preserve, protect and cherish as our birthright.

International comparisons should be viewed objectively and without the use of manufactured criteria designed to obscure the rationales for laws. When those comparisons are made objectively, the overwhelming evidence demonstrates that, if anything, there is a correlation between high firearm ownership rates, lower crime, lower homicide and suicide rates and a higher level of individual freedoms and economic prosperity.

A closer examination of just a few Western democracies demonstrates the extreme and draconian nature of Petitioners' gun laws. Austria, Canada, France, Germany and Italy all provide for the civilian ownership of handguns. Each of these countries provides for the use of firearms in conjunction with the exercise of the right of self-defense.

ARGUMENT

In the Petition for Writ of Certiorari, Petitioners represent that other nations have reached the same conclusion concerning handguns as they have. "[M]ost industrialized countries strictly control civilian access to handguns and allow the carrying of handguns for personal protection only under very restrictive conditions . . .".[2]. Petitioners repeat this assertion in their merits brief where they state: "Many cities, states, and nations regulate or ban handguns based on the unique dangers of those deadly weapons."[3]

Contrary to this assertion, most foreign gun laws in democratic nations are not nearly as restrictive as those found in Washington D.C., where private individuals are burdened by an outright ban of all functional firearms in their homes.[4] Indeed, the full quotation of the citation used by Petitioners reads as follows:

> **While fifty of the sixty-nine countries [surveyed] do allow handgun ownership for the purpose of protection of person or property**, most industrialized countries strictly control civilian access to handguns and allow the carrying of handguns for personal protection only under very restrictive conditions.[5]

I. A Fundamental Right To Self-Defense

Self-defense is a universally accepted concept upon which the laws of nations necessarily rely. Indeed, our own Declaration of Independence, in perhaps its most inspirational phrase, declares: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[6]

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[2] Pet. for Cert, at 23 (citations omitted).

[3] Petitioners' Brief, at 50.

[4] "[T]he District of Columbia [gun laws] are stricter than almost any European state." James B. Jacobs, *Can Gun Control Work?*, at 35 (Oxford University Press, 2003).

[5] Wendy Cukier & Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47*, p. 144 (2006). (*emphasis added*). It should also be noted that the limitation on the "carrying" of handguns is not an issue in this case.

The idea that the preservation of one's life is a right of such magnitude so as to deserve mention above all others was not something that originated with Thomas Jefferson. The importance of such a right has long been recognized.

Thomas Hobbes is the founding father of modern political philosophy and his work *Leviathan* established the foundation for current Western political philosophy.[7] Hobbes' "First Law of Nature" states:

> [T]hat every man ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war. [8]

Hobbes believed that the primary purpose for which societies are formed was to enhance the ability to protect oneself, and as such, the first law of nature could never be compromised, altered or diminished by any contract establishing that society. This right was so fundamental that it was deemed unalienable: "A covenant not to defend myself from force, by force, is always void."[9]

This concept is deeply imbedded not only in the laws of our own country, and of the laws of those countries which share our Common Law heritage, but in the laws of all countries. The right of personal self-defense is recognized as part of the law of every legal system in the world today.[10]

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[6] The Declaration of Independence para. 1 (U.S. 1776).

[7] *See* Aloysius Martinich. *Introduction in*, Thomas Hobbes, LEVIATHAN, at pg. vii, (Aloysius Martinich ed., 2002) (1651).

[8] *Id.*, at pg. 99, (emphasis supplied).

[9] *Id.*, at 106

A. The Common Law Tradition

The fundamental right of self-defense is deeply entrenched in Common Law jurisdictions.[11] Reflecting the tradition of Thomas Hobbes, *supra,* the Common Law treated self-defense as an unalienable natural right. Thus, Blackstone wrote:

> Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable.[12]

Blackstone explains this common law tradition, stating "[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[13] To buttress this fundamental right, the Common Law provided what Blackstone calls "The Fifth Auxiliary

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[10] *See* Schlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 999 (2005) ("the right to self-defense is recognized in all jurisdictions").

[11] *See, e.g.* Criminal Code, R.S.C., ch. C-46, Part I, §§ 27, 34-42 (1985) (Can.).

[12] William Blackstone, *Commentaries on the Laws of England*, Introduction, §2, at 54 (1765).

[13] 1 Blackstone 125.

Right":

> THE fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2. c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression. [14]

Interestingly, it is claimed by some that Blackstone's Fifth Auxiliary Right does not pertain to self-defense but refers to some nebulous civic obligation owed by the citizen to the sovereign, such as the militia, posse comitatus and/or hue and cry.[15] The justification (if any) for this claim seems to be that Blackstone discusses the right of self-defense elsewhere in his *Commentaries*, so it must follow that he can not possibly be referring to self-defense in the First Chapter of Book 1.[16] This claim is totally unfounded. Firstly, the chapter of Blackstone's work in which the Fifth Auxiliary Right is articulated is entitled **"Of the Absolute Rights of Individuals."**[17] Secondly, the issues of the militia, posse comitatus and hue and cry are also treated in more detail elsewhere in *Commentaries* and are not even mentioned by name in the first chapter.[18] Thirdly, Blackstone uses the exact terminology, "self-preservation", to describe the rationale for both self-defense and his Fifth Auxiliary Right.[19] Lastly, Blackstone refers to the individual right of self-defense in the same First Chapter of Book 1 where he states:

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[14] *Id.*, at 139.

[15] *See e.g.*, Brief of Amici Curiae American Jewish Committee (AJC Brief), at 12, fn. 3; Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 73-76. (2006).

[16] *Id.*

[17] 1 Blackstone, *supra*, at 117 (*emphasis supplied*).

> BOTH the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed se defendendo, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion.[20]

The statutory citation contained in Blackstone's articulation of the Fifth Auxiliary Right is to the English Bill of Rights, which states in pertinent part: "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."[21]

The historical context giving rise to the English Bill of Rights helps explain the nature of the protection intended by its provisions. In 1671 Parliament passed a Game Act which provided that "person and persons, not having Lands and Tenements of the clear yearly value of One hundred pounds ... are ... not allowed to have or keep... any Guns..[22] The avowed purpose of the Game Act was to prevent illegal hunting, but the effect of the Act was to make the owning of firearms illegal for the vast majority of the population.[23] King James II then used the Game Act as a ruse to systematically disarm the population, while at the same time creating a select militia, manned by his supporters, in order to insure the security of his throne.[24] This directly led to the "Glorious Revolution" and the accession of William and Mary to the throne. However, their accession was made conditional to their ratification of the English Bill of Rights, so as to guard against future similar abuses.[25]

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[18] The militia is referred to in numerous portions of Commentaries with the primary treatment being given in Chapter 13 of Book 1 entitled *"Of the Military and Maritime States"*. The posse comitatus and hue and cry also are mentioned in numerous chapters and appear prominently in Chapter 9 of Book 4 and in Chapter 9 of Book 1.

[19] *Compare* 1 Blackstone 139 with 4 Blackstone 182.

[20] 1 Blackstone 126.

[21] 1 W. & M., Sess. 2, ch. 2 (1689).

Following the adoption of the English Bill of Rights, a series of English cases helped define the right to arms enjoyed by English subjects. These cases held that the Game Acts did "not extend to prohibit a man from keeping a gun for his necessary defence"[26]; "the mere having a gun was no offense . . . for a man may keep a gun for the defense of his house and family . . ."[27];

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[22] 22 & 23 Car. 2, ch. 25 (1671).

[23] Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 69-76 (1994)

[24] *Id.*, at 31, 105. It is important to note that the object of the disarmament campaign was the private arms of individuals which would be employed in hunting during a more peaceful era, as the supposed purpose of the Act was to curtail illegal hunting.

[25] David B. Kopel, *It Isn't About Duck Hunting: The British Origins of The Right to Arms*, 93 Mich. L Rev. 1333, 1342 (1995).

[26] *Rex v. Gardner*, 87 Eng. Rep. 1240, 1241 (K.B. 1739).

[27] *Mallock v. Eastley*, 87 Eng. Rep. 1370, 1374 (K.B. 1744).

and "a gun may be kept for the defense of a man's house."[28] The individual nature of the right to arms protected by the English Bill of Rights was affirmed by the Recorder of London[29] in a legal opinion which specifically provided that one of the rights protected thereby was individual self-defense.[30] Finally, a common contemporary jury instruction on the meaning of the right to arms in the English Bill of Rights stated in part: "A man has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business."[31]

From the foregoing it is clear that the Common Law tradition and the English Bill of Rights protected the individual right to firearms as an "auxiliary right" to the fundamental and individual right of self-defense. Indeed, other noted historians have reached the same conclusion, dismissing any civic duty to arms and affirming that the "wording suggested only that it was lawful to keep a blunderbuss to repel Burglars."[32]

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[28] *Wingfield v. Stratford*, 96 Eng. Rep. 787 (K.B. 17[illegible], *accord, The King v. Thompson*, 100 Eng. Rep. 10, 12 (K.B. 1787) (it is "not an offence to keep or use a gun"), and *Rex v. Hartley*, II Chitty 1178, 1183 (1782) ("a gun may be used for other purposes, as the protection of a man's house.").

[29] A position roughly equivalent to the chief justice and general counsel of the City. *See* JOWITT'S DICTIONARY OF ENGLISH LAW 1510 (2d ed. 1977).

[30] "Legality of the London Military Foot-Association" (July 24, 1780), reprinted in William Blizard, *Desultory Reflections on Police: With an Essay on the Means of Preventing Crimes and Amending Criminals* 59-63 (London 1785). " The lawful purposes, for which arms may be used, (besides immediate self-defence,) ..."

[31] I REPORTS OF STATE TRIALS (New Series) 601-02(1970).

It has been argued however, that this can not be the case due to the restrictions now found in other nations sharing our Common Law heritage.[33] The answer to this argument is that our Constitution is the Supreme Law of the land. Our Bill of Rights may not be overturned by a mere statute as in the case of both Canada and the UK. The UK employs what is known as "parliamentary supremacy" which allows Parliament to override any right otherwise established by law or custom. Indeed, even the Magna Carta and the English Bill of Rights are subject to the express intervention of Parliament.[34] Similarly, Canada has the Canadian Charter of Rights and Freedoms. However, and unlike our Constitution, Section One contains the "reasonable limits" clause, which allows the government to limit an individual's Charter rights. Additionally, the Charter contains what is known as the "notwithstanding clause" which allows the Canadian Parliament or any provincial parliament to override fundamental individual rights.[35]

We could, of course, entertain the novel argument that our rights should be measured by their present day treatment in other common law countries. If that were the case, we would have to concede that the bar of double jeopardy does not apply in "serious" cases".[36] We would also find it quite simple to avoid a jury trial for an accused if a case is too "complex" or if the jury may be "tampered" with.[37] Once we have completed the dismantling our criminal justice system, we can then proceed to reining in our free press and free speech rights, as England does.[38]

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[32] J. R. Western, *Monarchy and Revolution: the English State in the 1680's* at 339 (1972).

[33] *See, e.g.*, AJC Brief, at 27.

[34] *Thoburn v Sunderland City Council*, [2003] QB 151 (Div Ct).

[35] There are "limitations" on this power, including a provision that such legislation only be effective for 5 years, but the legislation may be continuously renewed. Canadian Charter of Rights and Freedoms, §33.

B. International Law

Some of the earliest works on the subject of International Law were by fourteenth century Milanese scholar Giovanni da Legnano (hereinafter Legnano), whose work, *De Bello, De Represealiis et de Duello* was one of the first attempts to establish international rules for warfare.[39] Legnano's treatise closely examined the individual right of self-defense as the basis of establishing a derivative right of a nation to engage in war.[40]

Legnano believed that, "self-defense proceeds from natural law, and not from positive law, civil or canon."[41] Self-defense was not an artificial construct of positive law, but instead was an inherent instinct.[42] Legnano did not confine the natural right to merely protecting one's life. He explained that self-defense was proper not only in defense of life, but also in defense of one's property,[43] and that deadly force to protect that property was justified if necessary.[44] Further, the principle of self-defense allows a person to come to the aid of a relative or friend whose person or property is being attacked.[45] Finally, Legnano noted that a victim is not required to use only the exact level of force that his assailant uses by posing the rhetorical affirmation: "suppose a strong and vigorous man strikes me with his fist, and I am a poor fellow who cannot stand up to him with the fist. May I defend myself with a sword?"[46]

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[36] Criminal Justice Act 2003 (2003, c.44) §75 (UK).

[37] *Id.*, at §43, §44.

[38] *See generally*, Joseph E. Olson and David B. Kopel, *All the Way down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 Hamline L. Rev. 399-465, 439-441 (1999).

[39] David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense* 22 BYU Journal of Public Law 43, 60(forthcoming, 2008), available at: http://davekopel.org/2A/LawRev/The-Human-Right-of-Self-Defense.pdf.

[40] *Id.*

[41] Thomas Erskine Holland, *Introduction, in* GIOVANNI DA LEGNANO, DE BELLO, DE REPRESEALIIS ET DE

Following in the footsteps of Legnano was the sixteenth century Spanish scholar, Francisco de Victoria. (hereinafter Victoria). Victoria wrote several works on the subject of the "just war" and his classroom at the University of Salamanca became known as "the cradle of international law."[47]

Like Legnano, Victoria believed that the justification for war was necessarily predicated upon adopting the individual right of self-defense as its derivative source. Thus, Victoria's first proposition articulated the individual right of self-defense:

DUELLO a2 (Thomas Erskine Holland ed., James Leslie Brierly trans., William S. Hein 1995)(1360), at 278.

[42] *Id.*

[43] Kopel, *supra* at 61.

[44] *Id.*

[45] *Id.*

[46] Legnano, *supra* at 303 (ch. 112).

[47] Kopel, *supra* at 63.

> Any one, even a private person, can accept and wage a defensive war. This is shown by the fact that force may be repelled by force.[48] Hence, any one can make this kind of war, without authority from any one else, for the defense not only of his person, but also of his property and goods.[49]

The foundation established by Legnano and Victoria created the platform for the father of International Law, Dutch scholar, Hugo Grotius. His work, *The Rights of War and Peace,* is considered the cornerstone of modern International Law and Grotius is hailed as "the founder of modern civilized interstate relations."[50]

The essential elements of Grotius' works were founded upon the precepts of self-defense and self-preservation. Grotius wrote that even human babies, like animals, have an instinct to defend themselves.[51] Further, this instinct extended to the protection of property rights and was one of the fundamental elements of the social fabric of modern society, because if people were barred from using force to protect their property from those who would take it by force, then "human Society and Commerce would necessarily be dissolved."[52]

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[48] FRANCISCI DE VICTORIA, DE INDIS ET DE IURE BELLI RELECTIONES 63 (Ernest Nys ed.,John Pawley Bates trans., William S. Hein 1995)(1532) .

[49] Kopel, *supra,* points out that Victoria was quoting from Justinian's *Corpus Juris,* the compilation of Roman Law which was still enormously influential in Europe.

[50] Kopel, *supra* at 75-76.

[51] 1 Grotius, *The Rights of War and Peace* 183-84 (book 1, ch. 2, § 1.3).

[52] *Id.*, at 184-85 (book 1, ch. 2, § 1.3).

Grotius based his rules for war between nations predicated on the underlying individual natural right of self-defense and observed that the rationale for both were based upon the same moral principle: "[I]t is allowed to Repel Force by Force."[53] It is upon the foundation of the fundamental individual right of self-defense that the structure of International Law is built.

Second only to Hugo Grotius was 17th century scholar Samuel Pufendorf, whose eight volume masterpiece, *Of the Law of Nature and Nations*,[54] incorporated theories of Grotius, and the philosophies Thomas Hobbes and John Locke.[55] Pufendorf, like Grotius, used natural law theory to construct the law of nations.[56] The primary natural law employed by Pufendorf was that of self-defense: "Defence is a thing of more ancient date than any Civil Command . . ." and that no state can therefore forbid self-defense.[57]

The natural right to self-defense which forms the very core of the principles of International Law, has one final component which protects the means by which the right can be exercised. Thomas Hobbes explained "it is in vain for a man to have a right to the End, if the right to the necessary means be denied him, it follows, that since every Man hath a right to preserve himself, he must also be allowed a right to *use all the means, and do all the actions, without which he cannot*

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[53] *Id.*, at 185–89 (bk. 1, ch. 2, §§ 2–4) (quoting Titus Livius, History of Rome (Ab Urbe Condita), bk. 42, ch. 41).

[54] Samuel Pufendorf, *of the Law of Nature and Nations* (The Lawbook Exchange 2005) (reprint of 1726 London edition of the 1706–07 Barbeyrac French translation and annotation, with English translation by Mr. Carew) (1672).

[55] *See*, Kopel, *supra* at 81.

[56] *Id.*

[57] Pufendorf, *supra* at 198 (bk. 2, ch. 5, § 16).

preserve himself."[58]

II. International Comparisons

Caution must be exercised when making international comparisons, especially regarding the topic of firearms. The oft repeated saying, attributed to Mark Twain, that there are "three types of lies: lies, damn lies and statistics",[59] has special significance here due to the divergence in the manner in which data is presented. Sometimes the information reports the full number of suicides, at other times, it merely reports the number of "firearm" deaths, or the number "handgun" homicides. An example of this type of analysis is found in this statement: "Japan represents another powerful example of gun control effectiveness. Japan has one of the most stringent gun laws in the democratic world . . . Japan had a total of 19 ***firearms-related*** homicides . . ."[60] What this information fails to disclose is that the suicide rate in "gun free" Japan is greater than the ***combined*** suicide-homicide rate in the United States.[61]

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[58] Thomas Hobbes, *Man and Citizen* (*De Homine and De Cive)*, 275 (Berand Gert ed., Charles T. Wood, T.S.K. Scott-Craig & Bergnard Gert trans., Hackett 1991)(De Cive 1647)(*emphasis in original*).

[59] Twain attributes the statement to Disraeli: "Figures often beguile me . . . in which case the remark attributed to Disraeli would often apply with justice and force: 'There are three kinds of lies: lies, damned lies, and statistics.'" Mark Twain, *Chapters from My Autobiography*, 186.

[60] Brief of the American Academy of Pediatrics, at 28 *(emphasis supplied)*.

[61] The Japanese suicide rate was 24/100,000 in 2004. World Health Organization, Suicide Rates by Gender – Japan – 1950-2004, available at: http://www.who.int/mental_health/media/japa.pdf. The US suicide rate for 2004 was 11.05/100,000 in 2004. Centers for

The problem with presentations that limit the scope of the examination to a single tool employed is that they obscure what is commonly known as "substitution", where one tool is used to complete a task after another has become unavailable. Attention should properly be given to lowering overall levels of crime, homicide and suicide, not merely shifting the manner in which those activities are accomplished.

International comparisons are also difficult because of the many variables involved including, cultures, customs and relative wealth of the countries being compared. However, as a recent study of all European nations for which data was available demonstrates, countries with lower levels of murder also tend to have higher levels of gun ownership.[62] This study merely strengthens what study after study has previously shown; there is no significant correlation between high gun ownership rates and high rates of crime, homicide and/or suicide.[63] In fact, the raw data

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Disease Control, Suicide Facts at a Glance (Summer 2007); available at http://www.cdc.gov/ncipc/dvp/suicide/SuicideDataSheet.pdf The US homicide rate in 2004 was 5.9/100,000. Centers for Disease Control, Fastats – Assault/Homicide; available at: http://www.cdc.gov/nchs/fastats/homicide.htm. Thus, the combined suicide-homicide rate for the US was 16.95/100,000.

[62] Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 HARVARD JOURNAL OF LAW & PUBLIC POLICY 651 (2007).

[63] "[N]o statistically significant relationship between guns and murder rates." Jeffrey Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 JOURNAL OF LAW AND ECONOMICS, 615."[N]no significant correlations (of gunstock levels) with total suicide or homicide rates were found." Abstract to Martin Killias, et al., "*Guns, Violent Crime, and Suicide in 21 Countries*," 43 CANADIAN J. OF CRIMINOLOGY 429 (2001). "[R]emoving an easy and favored method of suicide was not likely to affect substantially

trends toward the reverse. Norway has one of Western Europe's highest household gun ownership rates, and also one of its lowest murder rates. Holland has the lowest gun ownership rate but its murder rate is 50% greater than Norway's. Finland has a gun ownership rate 14 times greater than its neighbor Estonia, yet Estonia's murder rate is about seven times higher than Finland's and it has higher suicide rates as well.[64]

The final question to be addressed with international comparisons is the effect upon the overall health of a society. A recent study of the 59 countries shows that countries with the highest gun ownership rates also tend to have the lowest corruption rates and the most personal and economic freedom.[65] Conversely, autocratic or authoritarian countries tend to have lower gun ownership rates and have substantially fewer personal and economic freedoms.[66] These facts epitomize the wisdom of the author of the 2nd Amendment, James Madison:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a

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the overall suicide rate because other methods would be chosen." World Health Organization, *Changing Patterns in Suicide Behavior* (1982).

[64] Kates, *supra* (Table 4).

[65] Howard Nemerov & David B. Kopel, *Is there a Relationship between Guns and Freedom? Comparative Results from 59 Nations*; available at: http://ssrn.com/abstract=1090441.

[66] *Id.*

> simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.[67]

III. Foreign Gun Laws

The following is a short survey of foreign gun laws involving the countries of Austria, Canada, France, Germany and Italy to address the impression that Petitioners' firearms bans represent the "mainstream" of Western nations' gun laws. As noted previously, fifty of the sixty-nine countries, or over 72% of the countries surveyed in the study cited by Petitioners, allow civilian handgun ownership for the purpose of protection of person or property.[68] It should also be noted that there is a recent trend to broaden the scope of deadly force self-defense in Europe.[69] Several European nations have either passed, or are considering laws which expand the legitimate use of firearms for self-defense.[70]

This Brief covers non-U.S. firearms laws in general but with a focus on their application to handguns. A glossary of common terms relating to firearms is found in Appendix B and includes the technical terminology and distinctions made commonly within firearms laws.

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[67] *The Federalist*, No. 46 (James Madison).

[68] Cukier, *supra*.

[69] Renee Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L., ECON. & POL'Y 331 (2006)

[70] *Id.*

A. Austrian Laws

1. Possession.

Austrian gun law does not distinguish between handguns and other firearms. Self-defense is something that is expressly provided as a reason for obtaining a firearm. Firearms are segregated into four distinct classes. Class A firearms are illegal,[71] Class B firearm, require an ownership license (Waffenbesitzkarte), and Class C and Class D firearms which require no license but individual firearms must be registered.[72]

Handguns are classified as either Class B firearms or Class C firearms. A semi-automatic handgun is a Class B firearm unless it also qualifies as an illegal Class A firearm.[73] Revolver style handguns are classified as Class C firearms.[74]

To possess any firearm under Austrian law, one must be 18 years of age but exceptions can be granted for minors at least 16 years of age for purposes of hunting or sport.[75] For ownership of Class B firearms, the applicant must be 21 years of age and establish a justification to own the firearm.[76] One of the specific justifications provided for by law is self-defense in the home and this justification must be assumed by the licensing authority if the applicant alleges a need for home defense.[77] The number of these Class B firearms a person may acquire is limited to two unless the applicant can show special justification.[78]

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[71] There are five types of Class A weapons which are illegal in Austria. These are described as weapons that mimic other objects, weapons that are more collapsible than average or designed to be quickly disassembled, shotguns smaller than 90cm overall or with a barrel length of less than 45cm, "Pump action guns," with detachable magazines and weapons with silencers and lighting devices. Waffengesetz Bundesgesetzblatt [RGB1 I] No. 12/1997., §17 no. (1).

[72] Waffengesetz [Weapons Act] Bundesgesetzblatt [RGB1 I] No. 12/1997.

[73] *Id.*, at §19.

[74] *Id.*, at §30.

[75] *Id.*, at §11.

Revolvers and other firearms that are not illegal and do not require a permit to own, fall under the category of firearms that require registration only (Class C and D firearms). Registration of the firearm must be completed within four weeks of purchase.[79] If you buy one of these firearms without a carrying permit, an ownership permit, or a hunting license, then a three day waiting period is imposed.[80]

To carry these firearms outside the home requires a Waffenpass (carrying permit) which is obtained the same way as the ownership license and by showing a need to carry the firearm.[81] The Weapons Act states that a person must be issued a carrying permit if the applicant is reliable and a justification exists to carry the firearm.[82] The need to carry one of these firearms must be assumed by the jurisdiction if the applicant can show that he is especially endangered outside the home.[83]

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[76] *Id.*, at §21.

[77] *Id.*, at §22 no. (1).

[78] *Id.*, at §23.

[79] *Id.*, at §30.

[80] *Id.*, at §34.

[81] *Id.*, at §21.

[82] *Id.*, at §35.

[83] *Id.*, at §22 no. (2).

2. Storage.

The only provision to storage of firearms in Austrian law is that if a person owns over twenty firearms, he must then inform the local authority regarding measures used to keep them safe and the authority makes a determination if the measures are satisfactory.[84]

2. Self-Defense.

As noted previously, self-defense is established as an explicit justification under Austrian law to both own and to carry a handgun.[85] In addition, the Austrian Penal Code explicitly recognizes the right to self-defense.[86] This provision is quite similar to the German model, creating justified and excusable degrees of self-defense based upon the quantum employed versus the quantum of force confronted. However, justified self-defense extends specifically to the defense of another and to the property of another.[87] Further, it becomes excusable rather than justified, only if it is "obvious" that the force employed is not proportionate to the threat.[88] On its face, this approach seems to go beyond Anglo-American law since it allows even excessive uses of deadly force to be excused on the ground that the judgment of the victim of a crime was affected by fear, panic, outrage or other strong emotion.

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[84] *Id.*, at §41.

[85] *Id.*, at §23, §22 no. (2).

[86] Strafgesetzbuch [StGB] [Penal Code] Bundesgesetz [BG] No. 15/2004, §3 (Austria).

[87] *Id.*

[88] *Id.*

B. Canadian Laws

1. Possession.

Canada divides firearms into three different categories for regulatory purposes: non-restricted, restricted and prohibited. Depending on the category a firearm belongs to, different levels of regulation apply.

Prohibited firearms include handguns with a barrel of less than 105mm (4.13 inches) or those adapted to use .25 or .32 caliber cartridges.[89] There are exceptions to these prohibitions for these special handguns when used in certain international shooting competitions.[90] Other prohibited firearms include rifles or shotguns with a barrel of less than 457mm (18") or less than 660mm (26") overall length; an automatic firearm (even if altered to function only in semi-automatic mode), and any firearm proscribed by the legislature as a prohibited firearm.[91] Firearms proscribed by the legislature are listed by name in regulations and typically include semi-automatic firearms capable of accepting large capacity magazines, though certain rifles such as variants of the M16 used by the Canadian military are specifically exempted from the prohibited list.[92] Prohibited firearms are generally not available to the public although exceptions are made for those who possessed the firearm prior to the legislature adding those firearms to the prohibited list and had either registered it or attempted to register it.[93] Handguns with barrels less than 105mm or adapted to use .25 or .32 caliber cartridges were added to the prohibited list on December 1, 1998.[94] Persons who owned those firearms prior to the effective date of the legislation are allowed to keep these firearms under a grandfather clause and their next of kin may also possess these grandfathered firearms and obtain a license to possess them.[95]

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[89] Criminal Code, R.S.C., ch. C-46, Part III, §84 (1) (1985) (Can.), *available at* : http://laws.justice.gc.ca/en/C-46/ (last visited January 12, 2008)

[90] *Id.*

[91] *Id.*

[92] Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted, SOR/98-462 (Can.), *available at*: http://laws.justice.gc.ca/en/ShowFullDoc/cr/SOR-98-462///en (last visited January 17, 2008).

Restricted firearms are defined as: any handgun that is not a prohibited firearm, any long gun that has a barrel less than 470mm (18.5") and is a semi-automatic centerfire firearm and is not a prohibited firearm, a firearm that can be fired when less than 660mm (26") in length due to folding, telescoping, etc., and any firearm prescribed by the legislature.[96]

In order to possess restricted firearms, which includes most handguns, the individual must possess a valid Possession and Acquisition License (PAL) or an earlier valid firearms license that has not expired and a valid registration.[97] Individuals must pass both a non-restricted firearms safety course and a restricted firearms safety course.[98]

A permit to carry may be issued allowing restricted firearms to be carried of the home in self-defense.[99] Also notably, self-defense is specifically listed as a reason to authorize the transfer of a restricted firearm to a new owner.[100]

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[93] Firearms Act, R.S.C. ch. F-11.6, c. 39, §12 (1-6) (1995) (Can.), *available at* http://laws.justice.gc.ca/en/F-11.6/ (last visited January 12, 2008)

[94] *Id.*, at §12 (6).

[95] *Id.*, at §12 (7).

[96] Criminal Code, R.S.C., ch. C-46, Part III, §84 (1) (1985) (Can.).

[97] Criminal Code, R.S.C., ch. C-46, Part III, §92 (1985) (Can.).

[98] Firearms Act, R.S.C. ch. F-11.6, c. 39, §7 (1995) (Can.).

All remaining firearms that are neither prohibited nor restricted are classed as non-restricted. In practice, this means most rifles and shotguns. To obtain a PAL covering a non-restricted firearm, the individual must pass the non-restricted firearms safety course, be at least 18years of age,[101] not be convicted for any crime punishable by more than one year imprisonment within the last ten years, not be under court order or prohibition order, and have no history of threatened or attempted violence.[102]

3. Storage.

Canadian storage requirements generally require both restricted firearms and non-restricted firearms to be properly stored by keeping them unloaded and either secured with a locking device or stored in a locked container, receptacle or room with the ammunition stored separately.[103] Restricted firearms include the additional requirement of both being secured by a locking device and locked again in a secure compartment or container.[104]

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[99] *Id.*, at §20.

[100] Firearms Act, R.S.C. ch. F-11.6, c. 39, §28 (1995) (Can.).

[101] Exceptions may allow children aged 12 years and older to possess a non-restricted PAL for hunting and some competition, *see* Firearms Act, R.S.C. ch. F-11.6, c. 39, §8 (1995) (Can.).

[102] Firearms Act, R.S.C. ch. F-11.6, c. 39, §5-§7 (1995) (Can.).

[103] Storage, Display, Transportation and Handling of Firearms by Individuals Regulations SOR/98-209 §1, §5.

[104] *Id.*, at §6 and §11.

However, the Canadian storage requirements have specific exceptions for certain self-defense situations.[105] Canadian storage requirements are not nearly as onerous as the provisions of Petitioners.[106] Under the D.C. Code, the firearm must always be stored in an inoperable condition ". . . unless such firearm is kept at his place of business, or while being used for lawful recreational purposes . . ."[107] Under Canadian law, a firearm may be properly in use and used for self-defense purposes.[108]

4. Self-Defense.

In addition to the specific provisions delineated by the firearms laws covering self-defense, discussed *supra*, The Canadian Criminal Code makes specific reference to the right of self-defense.[109] The situations in which this right may be exercised include the use of force to prevent the commission of a crime, defense of person and defense of property. Canada considers the exercise of the right to be justifiable rather than either justified or excusable, as is the case in some jurisdictions. Justifiable self-defense includes situations where an unlawful and unprovoked attack threatens "death or grievous bodily harm" and the response is based upon a reasonable belief "that he cannot otherwise preserve himself."[110] Justifiable self-defense also extends to situations where the actor was the initial aggressor but where he has declined further aggression and has retreated as far as "feasible."[111] Defense of one's home is provided enhanced protection under Canadian law:

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[105] *Id.*, at (2)-(3).These exceptions apply to those who reasonably require it for predators or hunting in remote wilderness areas.
[106] D.C. Code § 7-2507.02.
[107] *Id.*
[108] Criminal Code, R.S.C., ch. C-46, Part 1, §86(1) (1985) (Can.): "Every person commits an offence who, **without lawful excuse**, uses, ... transports or stores a firearm ... or any ammunition ... in a careless manner or without reasonable precautions for the safety of other persons." (*emphasis supplied*). *See also, discussion, infra.*
[109] *Id.*, at §27, §§34-42.

> Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.[112]

C. French Law

1. Possession.

French gun laws generally assume that a firearm's purpose is for self-defense. Arms are categorized into eight classes or categories. French law treats each category separately in terms of right of ownership, transportation, use, and registration.[113] For civilians, the most significant categories are the first, which include larger caliber semi-automatic firearms, and the fourth which includes all revolvers as well as semiautomatic handguns that are .32 caliber or smaller.[114]

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[110] *Id.*, at §34.

[111] *Id.*, at §35.

[112] *Id.*, at §40.

[113] Law No. 95-589, *Decree of May 6, 1995 (n° 95-589)*, Journal Officiel de la Republique Francaise [J.O][Official Gazette of France], November 17, 2007, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000736335&dateTexte=19971117 (last visited January 31, 2008). Fully automatic weapons and certain semi-automatic weapons having military characteristics are included in Class 1 but are generally unavailable to civilians.

The primary requirements for ownership of Class 1 and Class 4 firearms include being 21 years of age or older, having no criminal history and not being found to be "mentally deficient".[115] Additional requirements provide that hunters pass a test on firearms and on wildlife; sporting enthusiasts must be members in an official gun club, and all other persons must demonstrate that they engage in a dangerous profession.[116] Permits to own these firearms are issued following a police check of the applicant and must be renewed every five years.[117] In addition to a permit, all Class 1 and Class 4 firearms must be registered with the police.[118] An individual may own up to twelve of these firearms of which no more than seven may be Class 1 firearms.

Notable exceptions to the to the registration process are those firearms in the seventh and eighth categories. Class 7 includes "Percussion annular" guns (.22LR) and Class 8 covers antique guns and functional reproductions of guns originally manufactured prior to 1870.[119] Thus, fully functional reproductions of black powder revolvers are not subject to the restrictions applicable to Class 1 and Class 4 firearms.

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[114] *Id.*, at Article 2.

[115] *Id.*

[116] *Id.*, at Article 31.

[117] *Decree of May 6, 1995, supra* at Article 2.

[118] *Id.*

[119] Arrêté du 7 Septembre 1995 fixant le régime des armes et des munitions historiques et de collection [*Article 2 of Decree of May 6, 1995 (n° 95-589), implemented by Ordinance of September 7, 1995*].

2. Storage.

When not in use Class 1 and Class 4 firearms must be stored in a safe or reinforced cabinet in the owner's home in a manner which protects the firearm from theft.[120] There is no requirement that the firearm be disassembled or unloaded.[121] When applying for a permit to purchase a gun from these categories, applicants must establish that they have a compartment for this purpose.[122]

3. Self-Defense.

In addition to the underlying premise of self-defense found in its gun laws, the French Penal Code provides explicit protection for self-defense.[123] One is presumed to act in self-defense when confronting a nighttime burglary of a dwelling or in defending against a robbery.[124] This right extends to protecting other persons.[125]

D. German Laws

1. Possession.

German law does not distinguish between handguns, shotguns, and rifles. The Weapons Act refers to the entire group as firearms and then it defines certain banned firearms.[126] For all non-banned firearms a permit is required.

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[120] *Decree of May 6, 1995, supra.*

[121] *Decree of Dec 16, 1998 modifying Decree of May 6, 1995.*

[122] *Id.*

[123] Code Pénal (CP) [Penal Code], 122-5 through 122-7(Fr).

[124] *Id.*, at 122-6.

[125] *Id.*, at 122-5.

There are six elements for obtaining a weapons permit (Waffenbesitzkarte). These are age, trustworthiness, aptitude, an examination, demonstrating a need, and proof of a 1 million Euro liability insurance policy.[127]

One must be 18 years of age to use firearms or ammunition.[128] There are exceptions for minors if possession of the firearm relates to their vocational training or work requirements, but then only if they are under the supervision of a permitted adult.[129] The particular jurisdiction can also make exceptions if not violating public policy.[130]

The permit to use firearms or ammunition requires the permittee to have "trustworthiness."[131] The act does not affirmatively define this, it only defines those who do not possess it. People convicted of a crime for which imprisonment was over one year and less than 10 years have passed since that conviction, do not meet this standard.[132] If other facts about the applicant justify an assumption that he will misuse the firearm, that the firearm will not be used carefully, or that it will be given to someone without a permit, then he lacks the trustworthiness.[133] Anybody who committed a crime resulting in personal injury with a firearm and anybody who was sentenced to 60 days or more in jail for violating the Weapons Act is also not trustworthy.[134]

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[126] The following weapons are illegal for civilians to own (with rare exceptions): fully automatic weapons, a pump action shotgun with a pistol grip and which is missing the rear stock, firearms that look like other objects (e.g. flashlights, umbrellas, etc), weapons that can be abnormally quickly disassembled or collapsed, firearms with laser scopes, and firearms with night vision scopes. Waffengesetz, Oct. 16, 2002 BGBl. I, at 3999. Weapons classified as "War Weapons" are also illegal. Included in this classification are machine guns, automatic rifles/shotguns, and certain semi-automatic weapons. Gesetz über die Kontrolle von Kriegswaffen [Regulation over control of War Weapons], April 20, 1961, BGBl. I S. at 444, §5 (F.R.G.).

[127] Waffengesetz [Weapons Act], Oct. 16, 2002 BGBl. I at 3972,(F.R.G)

[128] *Id.*, at §2 no. 1.

[129] *Id.*, at §3 no. 1.

[130] *Id.*, at §3 no. 3.

[131] *Id.*, at §4 no. (1)2.

The permit to use firearms requires that the applicant possess personal aptitude for the use of firearms . Similar to the trustworthiness requirement, there are no guidelines as to who has the requisite aptitude, but rather an explanation of who does not have it. If the facts indicate a justified assumption that the applicant is incompetent to use a firearm, then the applicant lacks the required aptitude.[135] The applicant lacks aptitude if he is an alcoholic, dependent on other substances, or is psychologically impaired.[136] If there is a concrete fear that the person will use the firearm to harm himself he lacks the requisite aptitude.[137] Applicants who are under 25 and are applying for their original permit must furnish a certification from a doctor or government agency as to the mental fitness or suitability of the applicant.[138]

The permit requires the applicant to take an appropriate state-regulated examination regarding firearms which encompasses the general education of firearms.[139]

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[132] *Id.*, at §5 no. 1.

[133] *Id.*, at §5 no. (1).

[134] *Id.*, at §5 no. (2) (b,c).

[135] *Id.*, at §6 no. (1)1.

[136] *Id.*, at §6 no. (1)2.

[137] *Id.*, at §6 no. 1(3).

[138] *Id.*, at §6 no. (3).

The permit requires that the applicant demonstrate a need for the weapons permit.[140] The basic requirement is that the personal need must outweigh the risk to public safety.[141] However, the criteria employed to determine need are not onerous. The act gives a list of exceptionally noteworthy needs for firearms as examples where the personal need predominates. Those noteworthy needs include hunters, gun club members, gun collectors, endangered or threatened persons, firearm manufacturers or dealers, and security guards.[142]

Once a person obtains the weapons permit, she has one year in which to purchase the firearm and then two weeks to report the purchase to the appropriate agency. The firearm can then be kept indefinitely.[143] The ammunition for this same type of firearm must be acquired within six years but also can be kept indefinitely.[144]

2. Storage.

When a firearm is not being carried or in use, it is subject to storage requirements. Firearms and ammunition must be stored separately, unless they are in a safe.[145] If not stored in a safe, the firearm and the ammunition must be stored in a manner calculated to prevent loss or theft.[146] However, this restriction is not nearly as onerous as the provisions of the Petitioners [147] Under the D.C. Code, the firearm must always be disabled by a trigger lock or disassembled ". . .unless such firearm is kept at his place of business, or while being used for lawful recreational purposes . . .".[148] Under German law a firearm may be used for self-defense purposes in the home.[149]

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[139] *Id.* at §7.

[140] *Id.* at §4 no. 4.

[141] *Id.* at §8 no (1).

[142] *Id.* at §8 no. (1)2.

[143] *Id.* at §10 no. (1).

[144] *Id.* at §10 no. (3).

[145] *Id.* at §36 no. (1).

3. Self-Defense.

The right of self-defense is specifically covered in four separate sections of the German Penal Code.[150] German Law provides for two different categories of self-defense, either justified or excusable. Justified self-defense consists of situations involving "...an imminent danger to life, limb, freedom, honor, property . . " and where "... the act is a proportionate means to avert the danger."[151] Excusable self-defense is provided for in situations where the force employed is not proportionate or when excess force is employed due to "...confusion, fear or fright."[152]

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[146] *Id.*

[147] D.C. Code § 7-2507.02.

[148] *Id.*

[149] *See discussion, infra.*

[150] Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, BGBI. I at 945, §§32-35 (F.R.G.).

[151] *Id.*, §34.

[152] *Id.*, §33, §35.

E. Italian Law

1. Possession.

Under Italian common law, every citizen with a record clear of questions regarding sanity or general reputation has the right to acquire a gun.[153] Italians may own up to three handguns at one time, or have a collection license.[154] To acquire a gun an Italian adult must either have already obtained a license, or must go to the police headquarters of the locality in which he wants to acquire the gun and obtain a "no impediment" certification. Depending on the jurisdiction and the reason for the request (hunting vs. sporting vs. personal defense), the police may require a certificate of sanity that can come from the family doctor or the local health agency (Azienda Sanitaria Locale). It is not necessary to present any evidence of physical fitness with regards to gun usage.[155] But some jurisdictions will require those who have never served in the military to obtain a certificate of fitness for managing guns. Citizens can obtain these through the Tiro a Segno Nazionale [National Shooting Gallery], which has locations throughout the country.[156]

Italian gun law treats handguns differently from "white arms" (swords, knives, etc.), hunting guns, antique guns, and other "instruments of offense"[157] Handguns fall under the classification of "arms to shoot."[158] Typical handguns are considered "common arms" as opposed to war/military arms. Without a permit from the Ministry of the Interior, a citizen may not own arms of military caliber, which include automatic weapons, semi-automatic rifles that have both a military appearance and elevated firing capacity, and 9mm parabellum pistols.[159] Common arms also include compressed air or compressed gas guns whose bullets deliver a level of kinetic energy that does not exceed 7.5 Joules and replicas of antique guns that are single-shot muzzle-loading muskets made before 1890.[160] Sporting guns are classified with hunting guns and governed by the same rules.[161]

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[153] Regio Decreto [R.D.] 18.6.1931, N.773 (Italy).

[154] Edoardo Mori, *Sintesi del Diritto delle Armi* [Synthesis of Right to Arms], at 13 (2006).

[155] *Id.*, at 11.

[156] Art. 8 L. 110/75 (Italy).

[157] Codice Penale [C.P.] Art. 585 1931 (Italy).

2. Storage.

The only Italian requirement regarding the specific manner of storage is that it be "adequate."[162] Guns may be loaded and ready to use at all times.[163] However, the law recommends that they be kept in a place in which they will not be easily stolen and out of reach of children and minors.[164]

3. Self-Defense.

Recently, the Italian Parliament passed a new law enhancing self-defense rights in Italy. On February 13, 2006, a modification to Article 52 of the Italian penal code was codified. Under the revision, a citizen will not be punished if he uses a gun or other appropriate means to defend his or another's safety; his or another's property when there is no sign the criminal will desist, or when the person is in danger of aggression from the criminal. An Italian may also use a gun in the same situation if it occurs in a place in which commercial, entrepreneurial or professional activities take place.[165] Prior to the modification, the law required that the act of defense be proportional to the offense taking place. This requirement allowed criminals to prosecute shopkeepers and homeowners for protecting themselves and defending their property with arms and directly led to the modification of the self-defense provisions of Italian law.[166]

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[158] Art. 7 18.4.1975, N.110 (Italy).

[159] Art. 28, Testo Unico Leggi di Pubblica Sicurezza [T.U.L.P.S.] 1926.

[160] Decreto 9 agosto 2001, n.362, Ministero dell'Interno (Decree 362, August 9, 2001, Ministry of the Interior)

[161] Mori, *supra* at 5.

[162] Art. 46-7 D.P.R. 28/12/2000, N. 445

[163] Mori, *supra* at 12.

[164] *Id.*

CONCLUSION

Petitioners' firearm laws are an extreme departure from international norms, are not justified by any legitimate interest of Petitioners and infringe upon the fundamental right of self-defense. For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,
James R. Schaller*

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[165] Art. 52 C.P.

[166] Edoardo Mori, *Legge sulla legittima difesa* [Law on the legitimate defense]. http://www.earmi.it/diritto/leggi/legittima%20difesa.htm (last visited Jan. 18, 2008).

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APPENDIX "A"

The individual Amici consist of distinguished foreign scholars from around the globe. Their individual names, country of residence and academic affiliation are as follows:

AUSTRALIA: John Furedy, an emeritus professor at the University of Toronto who is currently living and teaching in Australia (Bond University).

BELGIUM: Prof. Boudewijn R.A. Bouckaert of the Univerity of Ghent Law School; Prof. Frank van Dun, Faculty of Law University of Ghent.

CANADA: Prof. Germain Belzile, University of Montreal; Gabrielle A. Brenner, University of Montreal; Barry Cooper, a professor at the University of Calgary; Ron Hamowy, professor emeritus at the University of Alberta; Pierre Lemieux, a professor at the University of Quebec; Jan Narveson, a professor at Waterloo University; David Romano, Canadian teaching International Studies at Rhodes College in KY; Judith Ross, a now-retired Special Lecturer at the University of Toronto.

ENGLAND: J. C. Davies, Professor Emeritus at the University of Reading; Professor Frank Furedi, at the University of Kent; Dr. Sean Gabb, a lecturer at London Metropolitan University; Heinrich Harke, Visiting and Honorary Research Fellow, University of Reading; Prof. Richard Horrocks, University of Bolton; Dr Mark Pennington, Senior Lecturer in Political Economy, Queen Mary College, University of London;

Roger Scruton, currently visiting professor at Princeton University in the U.S.; Prof. Kevin Yuill of Sunderland U. in England.

FRANCE: Prof. Pierre Garello, Université Paul Cezanne Aix-Marseille; Prof. Bertrand Lemennicier, University of Paris; Professor Joseph Pini (Law Professor at the Université Paul- Cezanne Aix-Marseille).

GERMANY: Prof. Michael Zoeller of the University of Bayreuth; Hardy Bouillon, a German philosopher teaching at the University of Trier who is Head of Academic Affairs for a think tank, the Centre for the New Europe in Brussels.

ITALY: Prof. Enrico Colombatto of the University of Turin; Prof. Carlo Lottieri. Law School of Siena (Italy).

DENMARK: Peter Kurrild-Klitgaard, a professor at the University of Copenhagen;

PORTUGAL: Professor Jose Manuel Moreira is a Full Professor at the University of Aveiro.

APPENDIX "B"

ACTION[1]
The combined parts of a firearm that enable it to be loaded, discharged and unloaded.

ACTION, AUTOMATIC
A firearm that loads, fires and ejects cartridges continually as long as the trigger is depressed and there are cartridges available in the feeding system (i.e., magazines or other such mechanism). Automatic action firearms are machine guns. Somewhat confusingly, semi-automatic handguns are sometimes called "auto pistols" in gun magazine.

ACTION, BOLT
A firearm, typically a rifle, that is manually loaded, cocked and unloaded by pulling a bolt mechanism to eject a spent cartridge and load.

ACTION, BREAK
A firearm that loads and unloads by means of opening the action by pivoting the barrel(s) away from the breech while activating a release lever. Most commonly used in singleshot and double-barreled shotguns and rifles Used in some revolvers in the 19th and 20th centuries.

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[1] Most definitions were derived from: National Shooting Sports Foundation, Writer's Guide to Firearms and Ammunition, Glossary (2006), available at: http://www.nssf.org/share/PDF/Writers_Guide.pdf (last visited January 26, 2008). Some definitions include additional explanations.

ACTION, LEVER

A firearm, typically a rifle, that is loaded, cocked and unloaded by an external lever usually located below the receiver.

ACTION, PUMP

A firearm that features a movable forearm that is manually actuated to chamber a round, eject the casing and chamber a subsequent round.

ACTION, SEMI-AUTOMATIC

A firearm in which each pull of the trigger results in a complete firing cycle, from discharge through reloading of the chamber. It is necessary that the trigger be released and pulled for each cycle. These firearms are also called "auto-loaders" or "self-loaders." Note: An automatic-action firearm loads, discharges and reloads as long as ammunition is available and the trigger is depressed. A semi-automatic firearm only discharges one cartridge with each squeeze of the trigger.

AIR GUN[2]

A gun that uses compressed air or gas (carbon dioxide) to propel a projectile. Projectiles in U.S. are normally .17 to .22 caliber and are either round or cup-shaped lead "pellets." True air guns should not be confused with the common BB gun, exemplified by the Daisy Red Ryder, that use spring force to propel projectiles instead compressed air or gas. Common usage will oftentimes refer to spring force guns as "air guns" and some of the high end "air guns" employ a spring force mechanism. Air guns are also called Air Rifles, Pellet Rifles, Pellet Guns. Invented in the 17th century,[3] and used by Lewis & Clark's expedition.

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[2] Sporting Arms and Ammunition Manufacturers Institute, Glossary (2008), available at: http://www.saami.org/Glossary/display.cfm?letter=G (last visited January 27, 2008).

AMMUNITION

A loaded cartridge, consisting of a primed case, propellant and a projectile. Among the many types of ammunition are centerfire, rimfire and shotshells. Until the development of metallic cartridges, this often referred to lead balls or shot and gunpowder, whether formed into a paper cartridge or not.

BALL

In the 17th through early 19th century, this term is often used to describe the spherical bullets used in muskets, rifles, and handguns.

BARREL

That part of a firearm through which a projectile travels. The barrel may be rifled (i.e., with spiral grooves on the interior) or smooth bore (i.e., a smooth interior barrel with no grooves, usually a shotgun).

BORE

The interior of the barrel forward of the chamber.

BULLET

A spherical (before about 1850) or cylindrical projectile for use in a firearm or air gun. Rifles and handguns use bullets. Shotguns instead use round pellets called shot

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[3] M. OZANAM, M. MONTUCLA, CHARLES HUTTON, RECREATIONS IN MATHEMATICS AND NATURAL PHILOSOPHY, 137 (London: G. Kearsley, 1803).

(or, occasionally, a single projectile called a "slug").

CALIBER

A term used to designate the specific cartridges for which a firearm is chambered. It is the approximate diameter of the circle formed by the tops of the lands of a rifled barrel. It is the numerical term included in the cartridge name to indicate a rough approximation of the bullet diameter. (Because the bullet is slightly narrower than the barrel, the bullet and barrel do not have exactly the same diameter). It is expressed in either fractions of an inch (.30 cal.) or millimeters (7mm).

CARRY[4]

To carry a firearm on or about one's person in a loaded condition ready for defensive use. Typically, carry in public places requires additional licensing and training.

CARTRIDGE

A single round of ammunition consisting of the case, primer, powder and one or more projectiles. Before the development of metallic cartridges in the 1850s, these components were wrapped in a paper case, simplifying reloading.

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[4] See, e.g., Tex. Government Code Ann. §411 (2007); Fla. Stat. §790.06 (2007). Forty eight states have laws for the issuance of licenses allowing concealed carry of handguns on one's person according to different regulatory criteria, and also specify circumstances in which a license is not needed. Wisconsin and Illinois have no licensing provisions, but allow unlicensed open or concealed carry in specified statutory circumstances, or pursuant to the state constitutional right to arms. Vermont and Alaska require no permits for carrying either openly or concealed. *See,* 720 Ill. Comp. Stat. Ann. § 5/24-1&2; *State v. Hamdan,* 264 Wis.2d 433, 665 N.W.2d 785 (2003). *See also,* David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts,* 68 Albany Law Review 305 (2005).

CARTRIDGE, CENTERFIRE
Any cartridge intended for use in rifles, pistols, and revolvers that has its primer central to the axis at the head of the case.

CARTRIDGE, RIMFIRE
A cartridge containing the priming mixture in the rim of the base.

CHAMBER
In a rifle, pistol or shotgun, it is the part of the barrel that accepts the ammunition. In a revolver, it refers to the holes in the cylinder where the cartridges are loaded.

CYLINDER
The round, rotatable part of a revolver that contains the cartridge chambers.

FIREARM
An assembly of a barrel and action from which a projectile is propelled as a result of combustion. In standard American usage, a "firearm" is approximately equivalent to a "gun." (Except that air guns are not firearms, nor are specialized tools such as nail guns.) However, the National Firearms Act of 1934 (a tax and registration law) has a unique definition of "firearm" that encompasses machine guns, short-barreled shotguns, and short-barreled rifles, but not ordinary

handguns, rifles, and shotguns. In the United Kingdom, "firearm" laws have applied to rifles and handguns, but not to shotguns (which are regulated separately). However, the term had a more restricted meaning during the Revolutionary and early Republic period. As early as 1775, and as late as 1806, the term "firearm" included muskets, but not pistols, or blunderbusses. On April 27, 1775, "the people delivered to the selectman 1778 fire-arms, 634 pistols, 973 bayonets, and 38 blunderbusses . . ."[5] An 1806 Congressional committee report used the phrase "fire arms and rifles," suggesting that "fire arm" may have been used the sense of "military musket," rather than the broader definition in use today.[6]

GAUGE

A term used to identify most shotgun bores, with the exception of the .410 shotgun. It relates to the number of bore diameter lead balls weighing one pound. Common gauges are 12 gauge, 16 gauge, 20 gauge, and 28 gauge. The lower the number, the greater the diameter of the shotgun shell.

GUN

This term today is commonly used to refer to all firearms. In the 18th and early 19th centuries, it referred only to cannon and long guns. A number of statutes specify both "gun" and "pistol" on a list of arms. Colonial statutes requiring churchgoers to be armed in

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[5] RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON, AND OF THE BATTLES OF LEXINGTON, CONCORD, AND BUNKER HILL 94-95 (Little, Brown, and Co., 6th ed. 1903) (emphasis added).

[6] 1 *American State Papers: Military Affairs* 198, *available at* http://memory.loc.gov/ll/llsp/016/0200/02040198.tif (emphasis added).

South Carolina (1743)[7] and Georgia (1770)[8] both distinguish between "a gun" and a pair of pistols. Perkin & Coutty of Philadelphia advertised in 1781 that they made firearms "in all its branches, where Gentlemen may be supplied with Guns and Pistols of the neatest and best quality, on the shortest notice . . . ."[9] As late as 1828 this distinction appeared in a proclamation from Washington, D.C. Mayor Joseph Gales,

"WHEREAS it has been too much the habit of idle and inconsiderate persons, on Christmas and New Year's Day and Eve to indulge in firing off guns, pistols, squibs, and crackers, and burning of gun-powder in divers other ways, to the great annoyance of the peaceable inhabitants of this city, and to the manifest danger of their persons and property . . . ."[10]

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[7] 7 DAVID J. MCCORD, STATUTES AT LARGE OF SOUTH CAROLINA 417-19 (A. S. Johnson 1840), *available at* http://www.claytoncramer.com/primary/militia/SCStatAtLarge7-417.jpg, http://www.claytoncramer.com/primary/militia/SCStatAtLarge7-418.jpg, and http://www.claytoncramer.com/primary/militia/SCStatAtLarge7-419.jpg.

[8] 19 ALLEN D. CANDLER, THE COLONIAL RECORDS OF THE STATE OF GEORGIA 137-40, pt. 2 (Chas. P. Byrd 1911), *available at* http://www.claytoncramer.com/primary/militia/GA1770BringGunsToChurch.pdf.

[9] PENNSYLVANIA GAZETTE, May 2, 1781 (emphasis added).

[10] Jo. Gales, Jr., A Proclamation (1828) *reprinted in* AN AMERICAN TIME CAPSULE: THREE CENTURIES OF BROADSIDES AND OTHER PRINTED EPHEMERA (Library of Congress, Rare Book and Special Collections Division 1999), *available at* http://hdl.loc.gov/loc.rbc/rbpe.19301000 (emphasis added).

HANDGUN[11]

A short barreled firearm designed to be held and fired with one hand.

LOAD

The combination of components used to assemble a cartridge or shotshell. The term also refers to the act of putting ammunition into a firearm.

MAGAZINE

A receptacle on a firearm that holds cartridges or shells for feeding into the chamber. Magazines take many forms, such as box, drum, rotary or tubular, and may be fixed or removable. The magazines most commonly used for pistols have the shape of a rectangle or parallelogram.

MUZZLE

The front end of a firearm barrel from which the bullet or shot emerges. Breech-loading firearms (in which the user does not have to use a ramrod to push the bullet down the barrel, into the action) entered widespread commercial production in the early 19th century, and the vast majority of firearms produced today are breech loaders. Breech loaders are much less accident-prone than muzzle-loaders.

MUZZLE LOADER

Any firearm loaded through the muzzle. Also called

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[11] Sporting Arms and Ammunition Manufacturers Institute, Glossary (2008), available at: http://www.saami.org/Glossary/display.cfm?letter=G (last visited January 27, 2008).

"black powder" firearms. They may be antique, replica or of modern (in-line) design.

PISTOL

Often used as a synonym for "handgun", both today, and in early America. In more precise modern usage, "pistol" is a term for a hand-held firearm with a single chamber. A revolver has at least five chambers. so a revolver would be distinct from a pistol. Thus the name of the Winnipeg Revolver & Pistol Association. Single-shot pistols can hold only a single round. More common are semi-automatic pistols (a/k/a self-loading pistols), which hold several rounds in a magazine.

POWDER

Commonly used term for the propellant in a cartridge or shotshell.

RECEIVER

The basic unit of a firearm which houses the firing mechanism and to which the barrel and stock are assembled. In revolvers, pistols and break-open firearms, it is called the frame. This is the part serial numbered by the manufacturer in accordance with federal law.

REVOLVER

A firearm with a cylinder having multiple chambers so arranged as to rotate around an axis and be discharged successively by the same firing mechanism. (A semi-automatic pistol is not a revolver because it does not have a revolving cylinder.)

RIFLE
A long-barreled firearm having spiral grooves in the bore, which provide aerodynamic stability for the bullet. Handguns usually have rifled barrels as well, but because they have short barrels, and can be used with a single hand, they are not rifles.

RIFLING
Spiral grooves formed in the bore of a firearm barrel to impart rotary motion to a projectile, to enhance accuracy.

ROUND
One complete cartridge.

SAFETY
A device on a firearm designed to provide protection against accidental or unintentional discharge when the safety is properly engaged. Unlike trigger locks, a safety is integral to the firearm, and not an accessory.

SEMI-AUTOMATIC
A firearm that fires, extracts, ejects and reloads once for each pull and release of the trigger. "Self-loading" is an equivalent term, which is sometimes used in the United States, and frequently used in Commonwealth nations.

SHOTGUN
A smooth-bore shoulder firearm designed to fire shells containing numerous pellets or a single slug.

SHOTSHELL
A round of ammunition containing multiple pellets for

use in a shotgun.

STOCK
The wood, fiberglass, wood laminate or plastic component to which the barrel and receiver of a rifle or shotgun are attached.

TRANSPORT[12]
Moving a firearm from one location to another in the manner prescribed by law for transport of firearms by those without additional licensing or training.

TRIGGER LOCK
An accessory for blocking a firearm's trigger from unauthorized use.

TRIGGER PULL
The average force which must be applied to the trigger to cause the firearm to fire. Some competitive target shooters use special guns with a very light trigger pull, of about one pound. Much more commonly, firearms have a minimum trigger pull of three pounds. Double action revolvers may have a long, heavy trigger pull of around 10 pounds.

UNLOAD
To remove all unfired ammunition from a firearm.

VELOCITY
The speed of a projectile at any point along its trajectory, usually designated in feet per second.

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[12] *See* 18 U.S.C. §926A

B-12

Velocity depends greatly on barrel length, so handguns have much slower velocity than rifles.

AMICUS
CURIAE
BRIEF

5917 S

21pgs

No. 07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND
MAYOR ADRIAN M. FENTY,

Petitioners,

-v-

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Jews for the Preservation of Firearms Ownership ("JPFO") is a non-profit tax-exempt Wisconsin corporation with more than 5,000 members and many more Internet-based supporters. Not a lobbying group, JPFO is an educational organization with a vital interest in preserving the individual right to keep and bear arms. Based upon original historical research and analysis, JPFO has observed that the 70 million innocent civilians murdered in the 20th Century's eight major genocides were direct victims of "gun control" laws and policies that disarmed them.

To JPFO, the Second Amendment to the United States Constitution stands as the Founding Fathers' clear and unmistakable legal statement that an armed citizenry is the bulwark of liberty and provides the fundamental basis for law abiding Americans to defend themselves, their families, their communities and their nation against all aggressors, including, ultimately, a tyrannical government.

As a civil rights organization, JPFO's paramount interest is the preservation of liberty under the Bill of Rights, and a uniform, proper interpretation of the Second Amendment advances that interest. The instant case represents the very first time this Court will take up a detailed and comprehensive analysis of the nature and scope of the Second Amendment, a provision of the Bill of Rights that is arguably the very last line in the defense of American liberty.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

In his dissent in *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003), Judge Kozinski articulated the fundamental concept that "tyranny thrives best where government need not fear the wrath of an armed people." This simple observation captures the essential nature of the Second Amendment.

Throughout history, the disarmament of populations has all too frequently resulted in genocide and mass oppression. History is replete with this familiar pattern. To limit the right to keep and bear arms to a state regulated militia is to disregard what the Framers understood – that individual possession of arms is essential to preventing usurpation by the state.

During the 20th Century, more than 70 million people were slaughtered on a massive scale by their own governments after first being disarmed. This pattern repeated itself in Ottoman Turkey (1915-17), the Soviet Union (1929-45), Nazi Germany and Occupied Europe (1933-1945), Nationalist China (1927-1949), Communist China (1949-52, 1957-60, and 1966-70), Guatemala (1960-81), Uganda (1971-79), Cambodia (1975-79) and Rwanda (1994) just to name a few.

In many cases, firearm confiscation followed only after the groundwork was laid by purportedly "reasonable" regulation and registration of firearms. History illustrates just how readily the standardless "reasonable" regulation of firearms invites large scale abuse by the state and ultimately paves the way for wholesale confiscation of arms and the mass slaughter of the disarmed (much like the massive censorship that likely would arise under a rule permitting "reasonable" regulation of speech and press).

The critical role an armed populace plays in resisting tyranny and genocide was amply demonstrated not only by the manner in which a handful of Jews in the Warsaw Ghetto held off the Nazi military machine for nearly a month, but also by the armed resistance against the Nazis by some Jews in Poland, Lithuania, and Byelorussia – resistance that resulted in a dramatically greater survival rate for the Jews in those communities who were able to arm themselves.[2]

Restricting the right to keep and bear arms to a select group, such as members of a state regulated militia, fundamentally undermines the ability of a population to resist such mass oppression. Accordingly, the Framers understood that a broad right of a population to keep and bear arms is critical to prevent the rise of tyranny. Thus, the Second Amendment was created as the final barricade against the unthinkable – the day when the rest of our Constitutional safeguards have failed us and we stand exposed to the brutal reality that so many in history have understood only too late.

Because disarmament so naturally and inextricably goes hand in hand with mass oppression and genocide, and because restricting the right to keep and bear arms to state regulated militia members fundamentally undermines the Framers' intention that the American people never be stripped of their ability to defend themselves from such tyranny, it is of critical importance that this Court affirm the judgment below.

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[2] Even in our own history we saw African Americans in the South systematically denied arms in an effort to facilitate oppression.

ARGUMENT

THE COURT SHOULD AFFIRM THE JUDGMENT OF THE COURT OF APPEALS BECAUSE AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS, SEPARATE FROM STATE REGULATED MILITIA SERVICE, IS FUNDAMENTAL TO PREVENT THE RISE OF TYRANNY AND GENOCIDE

> . . . the simple truth – born of experience – is that tyranny thrives best where government need not fear the wrath of an armed people.

Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting).

This simple observation by Judge Kozinski encapsulates the core issue that forms the basis and the essential nature of the Second Amendment.

The position urged by Petitioners, that the guarantee afforded by the Second Amendment is limited to service in a state regulated militia, would eviscerate one of the essential purposes of the Second Amendment – to ensure that an armed populace is available to discourage the ambitions of a potential tyrant.

The propensity for governments to disarm their populations to pave the way for tyranny is, unfortunately, well known today and was well known to the Framers. During the course of the 20th century, the human race saw disarmament translate into not simply tyrannical governments but outright genocide, time and time again.

> All too many of the great tragedies of history -- Stalin's atrocities, the killing

> fields of Cambodia, the Holocaust, to name a few -- were perpetrated by armed troops against unarmed populations.

Silveira, 328 F.3d at 569-70 (Kozinski, J., dissenting).

Denying the right to keep and bear arms has been a *modus operandi* of official repression since the advent of the modern state. To limit the scope of the right to keep and bear arms to organized militia use only is to disregard what the Framers understood – that individual possession of arms is essential to preventing usurpation by the state. Because of the tragic history of citizen disarmament, this Court should declare that the Petitioners' approach to the right to keep and bear arms is inconsistent with our Constitution.

It is sobering to realize that every instance of genocide of the Twentieth Century was preceded by the disarming of a civilian population. More than 70 million people in the aggregate were killed in Ottoman Turkey (1915-17), the Soviet Union (1929-45), Nazi Germany and Occupied Europe (1933-1945), Nationalist China (1927-1949), Communist China (1949-52, 1957-60, and 1966-70), Guatemala (1960-81), Uganda (1971-79), Cambodia (1975-79), and Rwanda (1994). Aaron Zelman & Richard W. Stevens, Death by "Gun Control:" The Human Cost of Victim Disarmament 3 (2001); *see also* R.J. Rummel, Death by Government 3-10 (1997) (comprehensive analysis of genocide resulting from imbalance of power between civilians and governments).

In the past, some oppressive governments have simply engaged in the direct and outright confiscation of privately held weapons prior to committing mass murder. In other cases, however, confiscation only followed after the groundwork was laid by "reasonable" regulation and registration of firearms. History illustrates just how readily "reasonable" regulation of firearms invites large scale abuse by the state and ultimately paves the way for wholesale confiscation of arms and the mass slaughter of the disarmed.[3]

A prime example is the Ottoman Empire's attempted extermination of the Armenians. After deposing Sultan Abdul Hamid II in 1908, the reforming "Young Turks" enacted Article 166 of the Ottoman Penal Code (1911) prohibiting the possession, carrying, and importation of "prohibited weapons" without government permission. ZELMAN & STEVENS, *supra*, at 145. Subsequently the Turkish government ordered that all Armenians turn over all firearms, bombs, and daggers. The government further ordered that the Armenians be deported to concentration camps, and that any Armenians "who dare to use arms" to resist deportation were to be "arrested dead." *Id.* at 136-38 (*citing* Official Proclamation to Deport Armenians, June 26, 1915, Preamble, Item 5, Item 6).

Ultimately, between 1 and 1.5 million Armenians were murdered by their government. The victims had been rendered ill-equipped to raise a hand in their own defense.

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[3] Invariably the proponents of "reasonable" firearms regulations intend by this terminology a largely standardless approach which invites the type of abuse which has been rampant worldwide within the last century. One need not strain too hard to imagine the type of broad censorship that could be implemented under the guise of "reasonable" regulation of speech or of the press.

In April of 1918, shortly after coming to power, the Bolshevik government that would soon become the Soviet Union enacted its first gun control law by requiring the licensing of all firearms owners through the issuance of "certificates." ZELMAN & STEVENS, *supra*, at 160. As of August 17 of that year, by resolution of the Central Executive Committee, the certificates evolved into registration documents, requiring that gun owners identify with specificity the firearms in their possession. *Id.* at 161.

In October and December 1918, the government issued a series of decrees providing for the wholesale surrender of firearms by the population. Significantly, however, an exception was carved out for members of the Communist Party. *Id.* at 161-63. In the spring of 1920 war erupted with Poland, and on July 12, 1920 an even more stringent law was enacted further circumscribing the class of individuals who may possess firearms, imposing criminal liability on officials who failed to strictly enforce the requirements of these laws and empowering the secret police to enforce the firearm confiscation laws. *Id.* at 163-65.

Accordingly, after Stalin rose to power in 1924, the wholesale slaughter of those under Soviet rule was underway, with the population having been rendered utterly unable to resist. Between the forced collectivization of agriculture from 1929 through 1933, the show trials of 1934 to 1938 and the continued slaughter of Soviet citizens both during and after World War II by their own government, the *tens of millions* of Soviet citizens murdered by their own government simply had no recourse. They had been thoroughly disarmed years earlier because they were not Party members, high ranking officials or otherwise within the class of persons permitted to possess arms. *Id.* at 166-73.

Certainly the most infamous genocide of the Twentieth Century was the Nazi slaughter of the European Jews. Less well-known, however, is the role that legal gun control played. Seemingly innocuous, a 1928 law enacted by the liberal pre-Nazi Weimar government prohibited firearms ownership without a license. After they attained power, however, the Nazis were able to selectively enforce this law against the Jews. A 1936 memorandum of the Bavarian Political Police documents the procedure:

> In principle, there will be very few occasions where concerns will not be raised regarding the issuance of weapons permits to Jews. As a rule, we have to assume that firearms in the hands of the Jews represent a considerable danger to the German people.

Id. at 89-90 (*citing* Bayerishe Politische Polizei, Waffenscheinen an Juden, February 5, 1936). Eventually the Nazis ended the "registration" charade. In a series of decrees issued in November 1938, all German Jews were prohibited from possessing firearms. *Id.* at 95-98 (*citing, inter alia, Nazis Smash, Loot and Burn Jewish Shops and Temples Until Goebbels Calls Halt*, N.Y. Times, Nov. 11, 1938, at 1).

In 1938, the Nazis also updated the 1928 law and severely limited and regulated the rights of non-Jews to own firearms. Exempt from this law were "authorities of the Reich," "various government entities," and "departments and their subdivisions of the National Socialist Workers' Party designated by the deputy of the Führer." *Id.* at 90-91 (*citing* Reichgesetzblatt 1938, I, 265, §11). The Nazi laws simplified the job of rounding up Jews and other declared "enemies of the State."

In his dissent in *Silveira*, Judge Kozinski illustrated the impact of having an armed populace ready to resist a genocidal regime:

> If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

Silveira, 328 F.3d at 570 (Kozinski, J., dissenting). *See also* Steven P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMP. L. 483 (2000) (Nazi augmentation of Weimar gun control laws rendered Jews defenseless to officially sanctioned arms roundups and eventual victimization).

In fact, while the armed resistance at the Warsaw Ghetto is well known, less well known are the multiple instances of armed resistance against the Nazis by some Jews in Poland, Lithuania and Byelorussia resulting in a dramatically greater survival rate for the Jews in those communities who were able to arm themselves. *See* David B. Kopel, *Armed Resistance to the Holocaust,* 19 J. FIREARMS & PUB. POL'Y 144, 150-58 (2007), http://ssrn.com/abstract=1022081.

More recently, the world saw nearly 800,000 members of the Rwandan Tutsi tribe slaughtered by their Hutu rulers during the Spring and Summer of 1994 due to a 1979 law that left the Tutsi minority largely disarmed. ZELMAN & STEVENS, *supra*, at 123-31 (citing original sources).

The same formula has recently been playing out in Zimbabwe as the government has supported large-scale violence against white land owners and has undertaken a comprehensive round up of firearms owned by those landowners. *Id.* at 183-97 (citing original reports).

Civilian disarmament also played an unfortunate part in our own nation's history of state-approved repression of African Americans. There was a wide variety of "gun control for blacks" legislation, both before and after the Civil War, including both naked prohibition and licensing. ZELMAN & STEVENS, *supra*, at 204 (citing numerous sources).

When slavery was legal, the slave states had comprehensive legal and customary prohibitions on black ownership of firearms. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Towards an Afro-American Reconsideration*, 80 GEO. L.J. 309, 335-38 (1991). The authors note that, for example, in Florida "patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process." *Id.* In the North, however, blacks successfully defended themselves against mob violence by bearing arms in their own defense. *Id.* at 341-42 (cited in *Silveira*, 328 F.3d at 569, Kozinski, J., dissenting).

In *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857), Chief Justice Taney noted that black citizenship was unthinkable because blacks would have "the right to keep and carry arms wherever they went."

Disarmament consistently appeared as a component of the post-Civil War Black Codes designed to limit blacks' freedom as much as possible. *Silveira* 328 F.3d at 577. (Kleinfeld, J., dissenting); Cottrol & Diamond, *supra*, at 344. For instance, Mississippi enacted a statute specifically prohibiting freed blacks from owning and possessing any weapon without a license. Louisiana and Alabama followed suit. Cottrol & Diamond, *supra*, at 344-45 nn.176-78 (citing and quoting original sources).

The passage of the Fourteenth Amendment invalidated the expressly racial "gun control" laws, but restrictions on firearms possession continued. Examples included laws that permitted the carrying of military firearms but not inexpensive weapons that freed blacks could afford.[4] Such laws rendered blacks defenseless in public places where racial attacks often occurred. *See* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population:" Firearms Regulation and Racial Disparity – the Redeemed South's Legacy to a National Jurisprudence*, 70 CHI.-KENT L. REV. 1307-35 (1995). "The model of gun control that emerged from the redeemed South is a model of distrust for the South's untrustworthy and unredeemed class, a class deemed both different and inferior, the class of Americans of African descent." *Id.* at 1333.

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[4] Compare such laws to modern day laws banning so-called "Saturday Night Specials," the most significant feature of which is not that they are any more deadly than other firearms (which they are not) but that they are inexpensive and thus affordable to the poor for self defense.

The racial design of civilian disarmament laws was no secret. Thus, in *Watson v. Stone*, 4 So.2d 700, 703 (Fla. 1941), in his special concurrence, Justice Buford noted that the Florida gun control provision at issue was specifically passed to "for the purpose of disarming Negro laborers . . . [and] was never intended to be applied to the white population."

The black freedmen understood that their disarmament would only be the beginning of white oppression.

> "As one of the disfranchised race," said a Louisiana black, "I would say to every colored soldier, 'Bring your gun home'."

ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 120 (1988).

Legal restrictions on blacks' firearm ownership meant that blacks frequently were unable to protect themselves from white terrorists and lynchers. "Disarmament was the tool of choice for subjugating both slaves and free blacks in the South." *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting).

Further, "[p]rivate terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments' refusal to protect black citizens, and the violence of such could groups could only be realistically resisted with private firearms." *Silveira,* 328 F.3d at 577 (Kleinfeld, J., dissenting).

These Nineteenth and Twentieth Century examples illustrate how well the Framers of the Constitution understood the essential role an armed citizenry plays in the defense of a free people. They had before them a rich history of European despotism from which to draw the keen understanding that armed people are free people and thus were unmistakably aware of the essential nexus between firearms ownership and liberty.

Contemporary writings amply evidence that the Framers knew this truth. In the debates over ratification of the Constitution, one New York anti-federalist writing as "Brutus" (thought to be New York judge and convention delegate Robert Yates) noted that the great imbalance of power between government and the people posed a great risk:

> The liberties of the people are in danger from a large standing army, not only because the rulers may employ them for the purposes of supporting themselves in any usurpations of power . . . but there is a great hazard that any army will subvert the forms of government, under whose authority they are raised, and establish one according to the pleasure of their leader.

BRUTUS NO. X, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 287 (Ralph Ketcham ed., 1986)

Alexander Hamilton's answer, in FEDERALIST 29, emphasized how armed citizens would oppose and deter the excesses of a standing army:

> . . . if circumstances at any time should oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.

THE FEDERALIST NO. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

James Madison, similarly, argued that the American people, unlike most of their counterparts in Europe, have the advantage of being armed, and thus a standing army in the hands of a tyrant could not overcome the collective armed defensive efforts of the citizenry. THE FEDERALIST NO. 46 (James Madison).

On January 7, 1788, "The Republican" affirmed the benefits of maintaining an armed citizenry:

> In countries under arbitrary government, the people oppressed and dispirited neither possess arms or know how to use them. Tyrants never feel secure until they have disarmed the people.

THE ORIGIN OF THE SECOND AMENDMENT 190 (David E. Young ed., 1991) (quoting article in The Connecticut Courant).

In his dissent in *Silveira*, Judge Kleinfeld noted that the "historical context of the Second Amendment is a long struggle by the English citizenry to enable common people to possess firearms." *Silveira*, 328 F.3d at 582 n.76.

The struggle culminated in the drafting of the English Declaration of Rights. In the aftermath of Charles II's and James II's attempts to disarm the people, the Declaration of Rights became an explicit condition to the accession of William and Mary to the throne in 1689. It is the Declaration of Rights that forms the basis of Blackstone's understanding of the basic rights of Englishmen. *Id.* at 582-83.

Aptly describing the Second Amendment as a "doomsday provision," Judge Kozinski saw the Second Amendment as:

> one designed for those exceptionally rare circumstances where all other rights have failed --- where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies seem today, facing them unprepared is a mistake a free people get to make only once.

Silveira, 328 F.3d at 570.

Thus the basic function of the Second Amendment is rendered a nullity if the right to keep and bear arms is limited to a narrow category of state regulated militia members. In fact, such a limitation turns the very concept of self defense on its head. As the bloody history of disarmament has shown, a people can only protect itself when the right to possess basic personal arms is widespread.

Categorical limitation serves precisely to deprive a populace of its ability to defend itself from tyrannical and genocidal rulers. This much was obvious to the Framers – and also, unfortunately, well known to the tyrants of the Twentieth Century and today.

The great fortune of the American people is that our Constitution was crafted in such a manner as to minimize the likelihood of needing our arms to oppose a tyranny arising from within. Yet, the Second Amendment was created as the final barricade against the unthinkable – the day when the rest of our Constitutional safeguards have failed us and we stand exposed to the brutal reality that so many in history have understood only too late.

Historical documents disclose the Framers' deep concern about the potential rise of tyranny and the people's means to deter it. *See United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 55-87 (2d ed. 1994) (quoting and citing numerous original sources).

The tragic history of civilian disarmament cries a warning against any systematic attempts to render innocent citizens ill-equipped to defend themselves from tyrants, terrorists, despots or oppressive majorities. Given the grave consequences of civilian disarmament and the Framers' express efforts to preclude such disarmament, it is essential that this Court confirm that the Second Amendment guarantees an individual right to keep and bear arms separate and apart from any membership in a regulated militia.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

AMICUS CURIAE BRIEF OF THE LIBERTARIAN NATIONAL COMMITTEE, INC. IN SUPPORT OF RESPONDENT

◆

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INTEREST OF THE AMICUS[1]

Amicus Libertarian National Committee is the national organization of the third largest political party in the United States, founded in 1971 as an alternative to the two main political parties. Its interest in the present case is twofold.

First, Amicus is an established political party dedicated to a strict adherence to the Constitution and the protection of rights both natural and enumerated, including the right of an individual to keep and bear arms in the defense of life, liberty and property.

Second, as America's third largest political party, it has considerable experience with litigation involving parties gaining ballot access, which is the subject of the precedent invoked by the Solicitor General in proposing a standard of review.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made any such monetary contributions. This brief is filed with the written consent of the parties. Amicus complied with the conditions by providing seven days advance written notice to both parties.

SUMMARY OF ARGUMENT

Amicus the Solicitor General proposes a deferential standard of review, which it describes as a balancing test involving heightened scrutiny. It invokes for this proposition two prior decisions of this Court: *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) and *Timmons v. Twin City Area New Party,* 520 U.S. 351, 358-359 (1997). Sol. Gen. Br. at 8, 24, 30-31.

It then asks for reversal, since the Circuit applied strict scrutiny, *id.* at 30-31, and goes so far as to suggest that to apply its standard would require individual fact-finding: the "right of the people" apparently would mean different things for different people, depending upon their size, strength and even whether they had two arms. *Id.* at 33 n.9.

Burdick and *Timmons* evolved in a unique corner of the First Amendment, an area in which Amicus has considerable experience – that of regulation of political party activities and ballot access. We will first discuss how the Solicitor General misinterprets the standard it proposes, then show the unusual features of that arena and why its standards should not be applicable to the Second Amendment. Finally, we will demonstrate that even if its standards *were* applicable, affirmance would be the proper response.

ARGUMENT

I. The Solicitor General Misinterprets the Standard it Proposes.

The Solicitor General treats the precedent it invokes as if it establishes that some manner of general balancing test was involved. In fact, the situation is considerably more complex. *Burdick*, *Timmons*, and their progeny are ballot access cases, and apply a unique, two-tiered approach to review. Under their teachings, only party-neutral regulations that have minor impact on First Amendment rights receive a lessened standard of review; regulations that significantly impact such rights receive strict scrutiny.

Burdick v. Takushi, 504 U.S. 428, 434 (1992), involved a First Amendment challenge to Hawaii's refusal to allow write-in votes; the challenger alleged that he desired to vote for a person who had not filed a nominating petition and thus was not on the ballot. The Court treated this as the converse of a ballot-access challenge, and concluded that Hawaii's system posed only minimal barriers to the entry of a potential candidate.

Discussing the standard of review, the *Burdick* majority indicated that ballot-access laws that impose "severe" burdens on constitutional rights require strict scrutiny, while "reasonable, nondiscriminatory" limitations can be justified by a State's "important regulatory interests." 504 U.S. at 434.

In *Clingman v. Beaver*, 544 U.S. 581 (2005), upholding a ban on parties inviting members of other parties into their primaries, this Court drew a distinction between "minimal infringement" and "severe" burdens,[2] a paraphrase of the *Burdick* test. *Clingman* held that requiring voters to register with a party before voting in its primary was a minimal barrier to so voting. *Cf. Munroe v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (requirement that candidate receive 1% of total primary votes to gain ballot access in general election upheld: State may respond to anticipated electoral problems so long as they "do[ ] not significantly impinge on constitutionally protected rights").

Timmons applied the same standard to a ban on "fusion" candidates (those running as candidates of two or more parties). A small political party was disabled from selecting a major party candidate as its joint standard-bearer, but it was still free to run anyone else on its ticket.

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[2] In some subsequent cases, however, this Court does not appear to have applied either test. *See Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989) (Statute extensively regulating internal party activities: "If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the state shows that it advances a compelling state interest . . . "); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (statute forcing a "blanket primary" upon parties, in which nonparty members could vote). As the burdens upon associational freedoms were quite apparent in those cases, the Court may have seen no necessity of beginning with the two-tier test.

The test is thus a unique, two-tiered one; the impact upon the right involved itself determines which level of review is employed. It is emphatically *not* a simple balancing test, and in fact justifies strict scrutiny if serious impairment of the right is involved. Thus this Court applied strict scrutiny in *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) (party desired to allow independents to vote in its primary, which State law forbade), and in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (mandatory "blanket" primary).

Moreover, even the lesser test of the "important regulatory interests of the State" does not reflect a regulatory blank check. In *Anderson v. Celebreeze*, 460 U.S. 780, 788 n.9 (1983), for example, this Court defined these as "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *See also San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 831 (9th Cir. 1987) ("[A]ny state regulation of political parties beyond that necessary to further orderly elections must be viewed with great skepticism.").

The Solicitor General thus erroneously treats this Court's rulings, establishing a two-tiered standard of review in certain election law situations, as if they simply established the lower tier as the universal rule.

II. The Standard Proposed Is and Should Be Restricted to the Unique Area of Regulation of Certain Electoral Activities.

State-organized elections are unique, in that they involve First Amendment protected activities that can only be meaningfully exercised if subject to a variety of controls, many rather arbitrary in nature. *Burdick*, 504 U.S. at 435. We can think of no other First Amendment activity that can be exercised only upon rare occasions, with the State determining its "time, place, and manner." U.S. Const., Art. I, §4. As this Court has noted, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown,* 415 U.S. 724, 730 (1974).

Moreover, the regulations often must be rather arbitrary. One cannot justify with reasons why an election is held on one day rather than another, at one place rather than elsewhere, why a political party should need to have 1% rather than 2% of total voter registrations to gain a place on the ballot, or why candidate petition deadlines were put at ninety rather than sixty days before an election. Choices have to be made, and one choice is as good as the other, so long as a fair and neutral result ensues.

The two-tiered test evolved within this unique legal environment. The test's double standard, and its "important regulatory interests of the State," branch are, to the best of our knowledge, to be found nowhere else in this Court's teachings. The two-tier standard functions simply to avoid imposing a "compelling state interest" standard on fixing deadlines or picking a number, even though the deadline or number might have some minor First Amendment impact. *See Rosario v. Rockefeller*, 410 U.S. 752 (1973) (deadline for voter registration alleged to have restricted voting rights).

These principles are simply inapplicable here. The right of the American people to keep and bear arms is not a right that cannot be practically exercised absent considerable, and often arbitrary, regulation.

III. Even If the Proposed Standard Were Adopted, the Appropriate Result Would Be Affirmance, not Remand.

As we have noted, this Court has applied strict scrutiny under the two-tiered test when the statute at issue significantly affected the underlying rights. *Tashjian v. Republican Party*; *California Democratic Party v. Jones*.

We would suggest that a ban on all handguns, applicable to all persons, no matter how law-abiding, is by definition a significant impairment of "the right of the people to keep and bear arms." In *California Democratic Party v. Jones*, by way of comparison, this Court rejected the Circuit's finding that the burden of allowing cross-over primary voting was minor. The Circuit found that very few races would be affected, but this Court responded that winning or losing a single major race might be sufficient to create or destroy a political party. If applied here by analogy, we would suggest the ordinance at issue clearly passes the threshold for strict scrutiny.

The D.C. Circuit applied strict scrutiny. The Solicitor General's proposed test would likewise require strict scrutiny. Were this test applied here, the result would be affirmance, with perhaps a note that strict scrutiny is not inevitable in contexts where a statute minimally burdens the underlying right.

◆

CONCLUSION

The Solicitor General cites certain precedent of this Court without noting that they are applicable only to a narrow subset of First Amendment situations – those involving access to the ballot. This, in turn, involves the unique situation in which a First Amendment right can only be exercised, in a practical manner, with extensive government regulation. Even if those standards were applied here, strict scrutiny would be required, and the ruling below therefore affirmed.

To Americans of the Framing Period, the Second Amendment was no "second class right." On the contrary, St. George Tucker described it as "the true palladium of liberty." BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND

LAWS 300 (1803). Its infringement here, by an ordinance outlawing possession of a large class of arms by citizens, no matter how law-abiding, clearly requires strict scrutiny.

The ruling of the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND
MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF *AMICI CURIAE* MAJOR AMERICAN CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are eleven of America's largest cities, The United States Conference of Mayors, and Legal Community Against Violence. Each *amicus* is actively engaged in efforts to reduce the costs inflicted by gun violence upon local, and especially urban, communities.

Amici cities are: Baltimore, Maryland; Cleveland, Ohio; Los Angeles, California; Milwaukee, Wisconsin; New York City, New York; Oakland, California; Philadelphia, Pennsylvania; Sacramento, California; San Francisco, California; Seattle, Washington; and Trenton, New Jersey. Each of these cities has suffered extensive loss of life, threats to the safety and security of law enforcement personnel, disruption to their economies, and massive health care costs associated with gun violence. Each has developed regulatory programs to address the particular risks and threats posed by gun violence in their communities. *Amici* thus have a critical interest in ensuring that states and localities retain the flexibility to counter the risks of guns and to protect public safety through reasonable firearms regulations.

The United States Conference of Mayors is the official non-partisan organization of all United States cities with populations of more than 30,000. Its members suffer a disproportionate share of gun violence in the United States and have a common interest in maintaining the flexibility to address this problem in the manner local officials determine to be most effective and appropriate.

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[1] Pursuant to this Court's Rule 37.3, the parties have filed conditional consents to the filing of *amicus curiae* briefs. *Amici curiae* have satisfied the parties' condition. Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Legal Community Against Violence ("LCAV") is a public interest law center dedicated to preventing gun violence, formed in the wake of the 1993 assault weapon massacre at 101 California Street in San Francisco. The nation's only organization devoted exclusively to providing legal assistance in support of gun violence prevention, LCAV assists cities and counties in crafting a variety of local regulations to fit community needs.

SUMMARY OF ARGUMENT

Gun violence poses a serious threat to American cities. In roughly the last thirty years, the United States Department of Justice reports that there were over 340,000 homicides in large American cities. Over sixty percent of the nation's homicides during that period were committed using a gun. In addition, law enforcement personnel are disproportionately the victims of gun violence: while about 64% of homicides nationally involved guns, over 90% of officers killed in the line of duty were killed by guns. In addition to this terrible human toll, communities such as *amici* cities face massive economic costs and losses due to the fear and danger associated with gun violence.

While gun violence is a national concern, major American cities such as *amici* bear the brunt of the problem. Sixty percent of all gun homicides in the United States occur in large cities. Urban dwellers are 60% more likely to be the victim of a violent crime than are residents of suburbs and 82% more likely than those living in rural areas. The on-the-ground statistics from *amici* cities paint a sobering picture of the human and fiscal toll exacted by gun violence.

Firearms regulation is a critical part of cities' efforts to protect the health and safety of their residents. Cities have adopted a wide range of measures—from bans on certain types of weapons and ammunition to eligibility and registration requirements—to reduce the threat of gun violence in their communities. The range of measures cities have adopted reflects the variety of challenges cities face and underscores the need for local flexibility in this area.

The Second Amendment does not constrain the ability of local elected officials to respond to the problems that confront their communities, and the Court of Appeals erred in invalidating the District of Columbia's ordinance. As explained in Petitioners' brief, the Second Amendment applies only to the national government and does not limit firearms regulation in the District of Columbia. Because this case involves the District of Columbia, and not a State or one of its political subdivisions, the question of the Second Amendment's application to the States and their local entities through the Fourteenth Amendment's due process clause is not presented and need not be addressed in this case. Nevertheless, this Court's precedents and the federalism-promoting purpose of the Second Amendment firmly establish that the Second Amendment imposes no barrier to state and local regulation of firearms.

This Court has already held that the Second

Amendment constrains the federal government alone—not the States or their political subdivisions. *See United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886). The Founders adopted the Second Amendment to preserve the balance between federal and state power embodied in the Constitution. A review of the debates surrounding the Amendment's drafting confirms that the Amendment shields States from federal incursion into the one area in which States retained military power—the militia. Because the Second Amendment was designed to reinforce state sovereignty and limit federal control, it would be contrary to the purpose of the Second Amendment to apply its limits against state and local action. This history and purpose, moreover, make clear that nothing in this Court's more recent incorporation jurisprudence compromises the vitality of *Cruikshank*'s and *Presser*'s conclusion that the Second Amendment applies exclusively to the federal government.

ARGUMENT

I. AMERICA'S CITIES FACE SUBSTANTIAL COSTS FROM GUN VIOLENCE AND MUST HAVE THE FLEXIBILITY TO REGULATE GUNS TO PROTECT AGAINST LOSS OF LIFE, THREATS TO PUBLIC SAFETY, KILLING OF POLICE OFFICERS, AND CRIPPLING HEALTH CARE AND ECONOMIC COSTS POSED BY CERTAIN TYPES OF GUNS AND GUN ACCESS

Gun violence poses a major threat to America's cities. Between 1976 and 2005, there were over 340,000 homicides in large American cities. U.S.

Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States, available at* http://www.ojp.usdoj.gov/bjs/homicide/ tables/urbantab.htm. Sixty-four percent of the nation's homicides during that period were committed using a gun. *Id., available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/weapons tab.htm. Although the rate of violent crime has declined since its peak in the 1990s, over 9,000 homicides were committed in 2006 in American cities with populations over 100,000. U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States*, 2006, *available at* http://www.fbi.gov/ucr/cius2006/data/ table_12.html. In addition, between 1965 and 2000, over 60,000 people died from accidental shootings. David Hemenway, *Private Guns Public Health* 27 (2004) (hereinafter *Private Guns Public Health*).

Gun violence is a national problem, but large cities such as *amici* are disproportionately affected. Between 1976 and 2005, nearly 60% of all gun homicides in the United States took place in large cities. U.S. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Trends by City Size*, *available at* http://www.ojp.gov/bjs/ homicide/city.htm. According to the most recent statistics from the United States Department of Justice, urban dwellers are 60% more likely to be the victim of a violent crime than are residents of suburbs and 82% more likely than those living in rural areas. U.S. Department of Justice, *Criminal Victimization in the United States, 2005 Statistical Tables*, Table 57, *available at* http://www.ojp.usdoj. gov/bjs/pub/pdf/cvus05.pdf. Estimates indicate that one quarter of low income urban youth have witnessed a murder. Firearm Injury in the U.S., Firearm & Injury Center at the University of Pennsylvania, at 5, *available at* http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf (hereinafter Firearm Injury in the U.S.).

The experience of *amici* cities highlights these national statistics. For example, Baltimore, a city of approximately 631,000, witnessed 232 homicides by gun and 650 non-fatal shootings in 2007. The number of homicides in Baltimore in 2007 was the highest since 1999. In 2007, the number of homicides in San Francisco hit its highest level since 1995. There were nearly 1,900 shooting victims in Los Angeles last year. Eighty percent of the homicides in Los Angeles in 2007 involved a gun. In 2007, there were 1,734 shooting victims in Philadelphia, and 330 gun homicides. Eighty-four percent of homicides in Philadelphia last year were committed using a firearm. Milwaukee saw 84 firearms-related homicides in 2007. In Sacramento, a city of approximately 467,000 residents, there were 180 gun-related assaults and 26 gun-related homicides in 2007. There were 2,056 arrests in Cleveland for crimes involving firearms in 2006. In Seattle in 2005, over 550 violent firearm crimes (assaults, robberies, and homicides) were committed.

Handguns pose a particular threat. From 1993 to 2001, an average of 737,360 violent crimes were committed with handguns each year, making handguns seven times more likely to be used to commit violent crimes than other firearms. Office of Justice Programs, U.S. Dep't of Justice, *Bureau of Justice Statistics Special Report, National Crime*

Victimization Survey, 1993-2001 – Weapons Use and Violent Crime 3 (Sept. 2003). Handguns are used in approximately 75% of all firearm homicides and 70% of all firearm suicides. Firearm Injury in the U.S., *supra,* at 7. On the local level, in Baltimore, approximately 82% of all homicides in 2007 were committed using a firearm, and of those, nearly 99% involved a handgun.

Guns also pose particular dangers to first responders. Of the 562 police officers killed in the line of duty in the United States between 1997 and 2006, 521 were killed with a gun. U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed & Assaulted, Table 27, available at* http://www.fbi.gov/ucr/killed/2006/table27.html. In 2006, 46 of 48 officers killed in the line of duty were killed with a gun. U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed & Assaulted, Officers Feloniously Killed, available at* http://www.fbi.gov/ucr/killed/2006/feloniouslykilled.html. In Washington state, the number of police officers assaulted with a firearm grew 76% between 2001 and 2006.

The threats posed by guns have a profound effect not only on human lives but also on city budgets and policies. It is estimated that half of the medical costs of gunshot injuries are paid by American taxpayers; gun injuries are the leading cause of uninsured hospital stays in this country. *Private Guns Public Health, supra,* at 4. For example, in San Francisco, the estimated annual cost for government services relating to firearm violence is at least $31.2 million. In Washington state, private insurance was the primary payer for the treatment of gun shot wounds in only 26% of the cases between 1997 and 2006; the remainder was covered by government programs or by no insurance at all. In Baltimore in 2006, it cost roughly $30.2 million to provide hospital care and treatment for the city's 657 non-fatal shooting victims. In Milwaukee, it can cost the city over $4,000 to respond to each shooting: $3,000 for police officers, detectives, and supervisors to respond on the scene, and $1,200 for fire department paramedics to give first care and rush the patient to the hospital. The average bill in 2005 to provide medical care for a shooting victim admitted at one Milwaukee hospital was $38,172 (not including physician fees and rehabilitation).

Cities have responded to these threats to their communities through various forms of firearms regulation tailored to the particular needs of their communities. *See generally* Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws, Legal Community Against Violence (2006), *available at* http://www.lcav.org/library/reports_analyses/National_Audit_Total_8.16.06.pdf. The variety of local regulations of firearms reflects the range of challenges that gun violence poses and the flexibility localities need to address these challenges.

A number of cities face a proliferation of especially dangerous types of weapons, and thus have banned the sale or possession of particular kinds of guns or ammunition. For example, Boston, Chicago, and Denver ban the possession and sale of assault weapons. *See* 1989 Mass. Acts 596, §§ 1-7; Chicago Code § 8-24-025; Denver Code § 38-130. Boston, Chicago, and Los Angeles prohibit large capacity ammunition magazines. 1989 Mass. Acts 596, § 2; Chicago Code §§ 8-20-030(i), 8-24-025; Los Angeles Mun. Code ch. V, art. 5, § 55.13. Los Angeles and San Francisco prohibit the sale of 50-caliber handguns. Los Angeles Mun. Code ch. V, art. 5, § 55.18; San Francisco Police Code art. 9, § 613.10-1. Oakland prohibits firearms dealers from selling ultra-compact handguns. Oakland Mun. Code §§ 9.36.400–9.36.440.

In addition to placing restrictions on certain types of weapons, some localities have determined that certain types of persons pose a greater risk of abusing guns in their communities, and have thus restricted those groups' access to weapons. Thus, for example, while federal law prohibits the sale of firearms to individuals who have, among other things, been convicted of certain offenses or who have been adjudged mentally ill, 18 U.S.C. § 922(g), a number of cities have adopted other eligibility criteria or have forbidden gun ownership by persons under 21. *See, e.g.*, Hartford Code §§ 21-71, 21-72 (requiring applicant for permit to carry handgun outside the home or business to provide three character references as well as fingerprints and to take a range safety and qualification test); Omaha Code § 20-253(b) (prohibiting a concealed firearm from being registered to persons who, among other things, have provided false information on the registration request or who have a record of a mental disorder that would show the applicant to be a danger to himself or others); 1993 Mass. Acts 491 (Boston ordinance generally prohibiting those under 21 from purchasing or possessing a firearm); N.Y. Charter §§ 462-464 (same).

Cities have also determined that law enforcement may be enhanced by making it easier to locate guns in the event they are later used in a crime. Thus, a number of cities require local licenses for owners and/or purchasers of certain firearms or registration of certain firearms. *E.g.*, Chicago Code § 8-20-040; Hartford Code § 21-59; N.Y. Rules tit. 38, ch. 5; N.Y. Admin. Code §§ 10-303, 10-304; Omaha Code §§ 20-200, 20-251, *et seq.* Baltimore requires those who have been convicted of gun-related offenses to register with the Police Commissioner and periodically update their information. Baltimore City Code Art. 19, § 60-1, *et seq.*

New York City's experience with gun regulation provides a good case study on how locally tailored firearms regulations can address the threat of gun violence. In the early 1990s, New Yorkers saw a dramatic escalation in violent and gun-related crime. New York City's homicide rate reached a historic high of 2,245 in 1990. This surge in violence prompted the City to institute an innovative, multi-faceted anti-crime campaign, in which new restrictions on firearms played a prominent role, as did proactive policing aimed at curbing gun violence. For example, in 1991, a city-wide ban on assault weapons went into effect, adding another layer of firearms regulation to long-standing state statutes requiring the licensing of handguns and a local ordinance requiring the licensing of long guns. In 1998, the City began to require all handguns to be sold with locking devices, a requirement that was extended to long arms in 2000. The State of New York followed suit shortly thereafter, instituting a statewide ban on assault weapons and a gun-lock requirement in 2000. In 2006, the State adopted the nation's toughest penalty for carrying a loaded, unlicensed handgun or assault weapon, raising the mandatory minimum sentence from one year to three-and-a-half years.

These new initiatives succeeded in curbing gun-related violence. Shooting incidents in New York City declined sharply from 5,259 in 1993 to only 1,533 by 2005. In the period between 1995 and 2005, 1,177 homicides fell to 539—at that time, the lowest rate since reliable crime statistics had been kept. The number of aggravated assaults dropped from 52,322 to 27,950; and 115,153 violent crimes became 54,623. Assaults involving the use of a firearm against a police officer dropped from 442 to 112. And these reductions occurred while New York City's population grew from 7.3 million to approximately 8.1 million. Recent statistics show that the trend continues. After a short-lived rise in 2006 to 596, the City's homicide rate was at its lowest level ever in 2007, at 494. There can be no doubt that New York City has been able to achieve this success through its creative, locally tailored approach to firearms regulation.

As the above examples of municipal regulations make clear, cities have adopted a range of approaches to confront the particular threats of gun violence that their communities face. This range puts in sharp focus "the theory and utility of our federalism . . . [as] the States [] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581-82 (1995) (Kennedy, J., concurring) ("If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds. Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are charged with maintaining." (citations omitted)). The data from cities and their varying approaches to municipal firearms regulation also show that cities need flexibility to craft locally tailored solutions to the particular threats and costs of gun violence that their residents face.

II. THE SECOND AMENDMENT DOES NOT LIMIT THE OPTIONS AVAILABLE TO CITIES TO ADDRESS THE PROBLEM OF GUN VIOLENCE

The Court of Appeals erred in reversing the District Court's order dismissing Respondent's claim. As outlined in Petitioners' brief, the Second Amendment is a limit on the national government alone and does not constrain the District of Columbia's legislative authority. *See* Br. of Petitioners at 35-40. For analogous reasons, the Second Amendment does not serve as a limit on the States and their political subdivisions. Although the Court need not address this issue in this case—which does not involve a challenge to a law passed by a State or one of its political subdivisions—it is well established that the Second Amendment does not apply to the States.

1. This Court has long held that the Second Amendment restricts the federal government only, and does not constrain the ability of States to regulate firearms.

In *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), the Court held that the Second Amendment "has no other effect than to restrict the powers of the National government . . . ." "The Second Amendment declares that it shall not be infringed," the Court explained, "but this . . . means no more than that it shall not be infringed by Congress." *Id.*

In *Presser v. Illinois*, 116 U.S. 252, 256 (1886), the Court re-affirmed this principle in rejecting a Second Amendment challenge to an Illinois law prohibiting groups of citizens outside the State's own organized militia from drilling or parading with arms without a license from the Governor. The Second Amendment, the Court concluded, "is a limitation only upon the power of Congress and the National government, and not upon that of the state." *Id.*

Although *Presser* and *Cruikshank* pre-date many of this Court's decisions incorporating certain provisions of the Bill of Rights against the States through the Fourteenth Amendment, nothing since *Presser* and *Cruikshank* were decided has compromised their conclusion that the Second Amendment applies only to the federal government. "[P]roperly understood, [the Second Amendment] is no limitation upon arms control by the states." Antonin Scalia, Response, *in A Matter of Interpretation: Federal Courts and the Law* 137 n.13 (Amy Gutmann ed., 1997).

2. The Second Amendment cannot properly be applied against the States and their subdivisions

because the Amendment was intended to prevent an undue concentration of power in the federal government relative to the States. To apply it to limit state authority would be inconsistent with its purpose.

The Framers of the Constitution sought to avoid placing too much power in any one body. Power was balanced among the three branches of the federal government and between the federal and state governments. *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." (internal quotation marks omitted)).

The delegates to the Constitutional Convention were particularly concerned about the allocation of military power. 2 The Records of the Federal Convention of 1787, at 329-32 (Max Farrand ed., 1966); *see also Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990) (noting "widespread fear" at the Constitutional Convention "that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States"). Some participants in the Philadelphia Convention contended that the federal government should not be permitted to form a standing army. 2 The Records of the Federal Convention of 1787, at 329. Those more concerned that the nation be capable of defending itself carried the day, however, and Congress was granted the power to raise and support armies. *Id.* at 330; U.S. Const. art. I, § 8, cl. 12.

In the hope of avoiding the necessity of forming a standing army, George Mason proposed that the national government be given the power to regulate the militia. 2 The Records of the Federal Convention of 1787, at 326, 330. A concern was raised, however, that to transfer control over the militia from the States and repose all martial authority in the federal government would eliminate the States' power and, therefore, their independent political significance. Oliver Ellsworth argued that, if the States were deprived of all authority over the militia, the States' "consequence would pine away to nothing after such a sacrifice of power." *Id.* at 331. Others suggested that the States would never give up their power over the militia. *Id.* at 332. The matter was referred to a committee, which proposed a compromise in which the federal government would have authority over organizing, arming, and disciplining the militia, while the States would retain the power to appoint its officers and conduct training. *Id.* at 384-85.

The committee's compromise proposal prevailed, and the federal government was granted the authority "to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. art. I, § 8, cl. 16; *see also United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992). The key to the compromise was the vesting of control over the selection of officers in the States, which ensured that militia would continue to be a source of state power. As Edmund Randolph succinctly put it, "Leaving the appointment of officers to the States protects the people agst. every apprehension that could produce murmur." 2 The Records of the Federal Convention of 1787, at 387; *see also* The Federalist No. 29, at 141 (Alexander Hamilton) (Garry Wills ed., 1982) ("What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia and to command its services when necessary; while the particular States are to have the *sole and exclusive appointment of the officers*?" (emphasis in original)).[2]

In The Federalist No. 46, Madison himself explained that the compromise struck in the Militia

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[2] The importance placed on this grant of authority to the States was again highlighted when Madison proposed to modify the language to make an exception to the States' appointment power for general officers. 2 The Records of the Federal Convention of 1787, at 388. This proposal was soundly rejected. *Id.* Roger Sherman called the amendment "absolutely inadmissible," saying that "if the people should be so far asleep as to allow the Most influential officers of the Militia to be appointed by the Genl. Government, every man of discernment would rouse them by sounding the alarm to them." *Id.* Elbridge Gerry echoed the sentiment still more vehemently, suggesting that the Convention might just as well eliminate states altogether if they were to be so deprived of power. *Id.* ("Let us at once destroy the State Govts[,] have an executive for life or hereditary . . . and then there would be some consistency in giving full powers to the Genl Govt."). Gerry went on to express his surprise that, as the Convention had not chosen to eliminate the states, efforts were nonetheless being made to grant the national government powers that he considered inconsistent with the very existence of the states. *Id.* ("[A]s the states are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence.").

Clauses (in particular state control over the selection of officers) was a crucial part of the balance between federal and state power. Hypothesizing an attempted use of a federal standing army to impose tyranny, Madison noted that such an army "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands, *officered by men chosen from among themselves*, fighting for their common liberties, and united *and conducted by governments possessing their affections and confidence*." The Federalist No. 46, at 242 (James Madison) (Garry Wills ed., 1982) (emphasis added).

The militia could provide the balance between federal and state power, however, only if the federal government could not disable the militia by disarming it. Article I granted Congress the authority to arm the militia. U.S. Const. art. I, § 8, cl. 16. It did not specify whether this power encompassed the authority to withhold arms from the militia when not in service to the federal government. Precisely this question was raised during the ratification debates in the States. Jack Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chicago-Kent L.R. 103, 137-38 (2000); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L.R. 309, 345-48 (1998). During the debate in Virginia, George Mason asserted that "[t]he militia may be here destroyed by that method which has been practised in other parts of the world before. That is, by rendering them useless, by disarming them." Rakove, *supra*, at 137-38.

As explained in greater detail in Petitioners' brief, the drafting history confirms that the Second

Amendment was intended to clarify that Congress did not have the power to render the militia impotent, the militia "being necessary to the security of a free State."[3] *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997), *vacated in part on other grounds*, 133 F.3d 1412 (11th Cir. 1998); Bogus, *supra*, at 369 ("Specifically, Madison sought to assure that Congress's power to arm the militia would not be used to disarm the militia."). From the origin of its language in the Virginia ratifying convention (where Mason and Patrick Henry raised the concern that the national government might disable the militia) to the congressional debates and revisions, the development of the Second Amendment demonstrates that its purpose was to protect the militia from being disarmed by the federal government. Br. of Petitioners at 22-35. This Court has emphasized the connection between the Militia Clauses and the

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[3] The Court of Appeals suggested that this understanding of the Second Amendment's purpose is implausible because, in the majority's view, the drafters could have stated more directly that the militia were not to be disarmed if that was their concern. *Parker v. District of Columbia*, 478 F.3d 370, 379 (D.C. Cir. 2007). This approach to constitutional interpretation provides a far more compelling argument *against* the Court of Appeals' reading of the Amendment than for it. If the drafters had intended the Amendment to protect the right to possess guns for self defense and hunting, models of such language were readily available. *See, e.g.*, Dissent of the Minority of the Pennsylvania Convention, Pennsylvania Packet (Philadelphia), Dec. 18, 1787, reprinted at 1 The Debate on the Constitution 526, 533 (1993) ("That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game."). The drafters chose to omit any such language and instead to highlight the importance of the militia.

Second Amendment, noting that the Amendment was enacted "[w]ith [the] obvious purpose to assure the continuation and render possible the effectiveness of" the militia referenced in Article I. *United States v. Miller*, 307 U.S. 174, 178 (1939).

Contrary to Respondent's assertions, moreover, the Second Amendment was not intended to vest armed power in citizens acting outside of any governmental military effort—either federal or state. For the Framers of the Constitution, irregular bands of armed citizens were a threat to be countered, not a guarantor of their liberties. Bogus, *supra*, at 390-96. As discussed in the brief filed by *amici* constitutional historians, the 1786-87 uprising in western Massachusetts known as Shays's Rebellion was a significant impetus for the abandonment of the Articles of Confederation and the creation of a stronger central government. It was his alarm over this insurrection that brought George Washington out of retirement to lead the Constitutional Convention. Leonard L. Richards, *Shays's Rebellion: The American Revolution's Final Battle* at 131-32 (Univ. of Penn. 2002).

The debate at the Convention reflected this concern. Charles Pinckney made reference to the Massachusetts uprising, commenting that the lack of a national military had resulted in "rapid approaches toward anarchy." 2 The Records of the Federal Convention of 1787, at 332. More significantly, the Convention debate regarding how authority over the militia would be allocated was exclusively concerned with whether the national government or the States would exercise control; there was no discussion of the militia operating outside of governmental authority.

Id. at 330-32, 385-87. Indeed, Convention delegates viewed the suppression of "insurrections," *i.e.*, armed uprisings by persons outside of government control, as a principal purpose of the militia. *Id.* at 332; U.S. Const. art I, § 8, cl. 15.

This country does not countenance the use of violence as a political tool and never has. *See* U.S. Const. art. III, § 3, cl. 1 (defining "treason" to include "levying War against" the United States); 18 U.S.C. § 2383 (making it unlawful to engage in "rebellion or insurrection against the authority of the United States"); 18 U.S.C. § 2384 (making it unlawful to "conspire to overthrow, put down, or to destroy by force the Government of the United States . . . or to oppose by force the authority thereof"). The Second Amendment embodies this understanding—referring as it does to a "well regulated" militia. The Amendment cannot reasonably be understood, as Respondent suggests, to protect a right to possess firearms for the purpose of engaging in violence against a government that an individual believes to have overstepped its bounds.

Unlike portions of the Bill of Rights that have been applied against the States, the Second Amendment is a structural provision, designed to remedy a perceived weakness in the system of balances that the Constitution erected to protect against tyranny. In particular, the Second Amendment shielded States from federal incursion into the one area in which States retained military power—the militia. This purpose cannot be served by limiting state regulation of firearms: state power is undermined by restricting the States' authority in this area.

3. *Presser* and *Cruikshank*'s conclusion that the Second Amendment limits only the federal government is also fully consistent with this Court's more recent approach to incorporation. The Court has declined to apply all of the first eight amendments in the Bill of Rights to the States automatically by virtue of the Fourteenth Amendment's due process clause. Rather, the Court has adopted a selective incorporation approach by which the Court examines each amendment on its own terms and decides whether its provisions are suitable for incorporation against the States. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the Sixth Amendment jury trial guarantee is incorporated against the States via the Fourteenth Amendment due process clause because "trial by jury in criminal cases is fundamental to the American scheme of justice").

The Second Amendment cannot apply against the States under this framework. As explained above, the Second Amendment was designed to limit the federal government and to protect state sovereign interests. Unlike provisions of the Bill of Rights that, for example, ensure fair procedures for criminal defendants or protect an individual's right to speak without governmental interference, the Second Amendment was designed to serve a much different, structural function. It would make little sense to hold that an amendment designed expressly to limit federal power and *preserve* state authority operates as a limit on States' power. Such a result would turn the Second Amendment on its head.[4]

The Second Amendment, moreover, by no means stands alone as applying exclusively to the federal government. This Court, for example, has held that the Fifth Amendment's requirement of a grand jury indictment does not apply against the States. *E.g.*, *Hurtado v. Calfornia*, 110 U.S. 516 (1884). Although the Court's initial ruling that the States were under no federal constitutional obligation to proceed by grand jury indictment dates back to 1884, its holding has consistently been applied since. *See Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972) (noting that

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[4] One scholar has argued that, while the Second Amendment was adopted as a federalism-promoting provision designed to prevent Congress from disarming the militia, the Fourteenth Amendment transformed its meaning into a protection of individual freed slaves' ability to arm themselves against the Ku Klux Klan. Akil Amar, *The Bill of Rights: Creation and Reconstruction* 266 (1998). Not only is this novel theory without any support in the caselaw, it rests on an erroneous historical premise. Amar contends that the Republicans who enacted the Fourteenth Amendment wanted to prevent states from enacting restrictions on guns because then "only the Klan would have guns." *Id.* This contention does not withstand scrutiny. Saul Cornell and Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 518-22 (2004) (explaining that, while the view relied upon by Amar was articulated at the time, it was not widely held either by the ratifiers of the Fourteenth Amendment or the general public). In fact, consistent with the Founders' original vision, the Republicans turned *to the militia*—not unorganized armed individuals—to protect the freed slaves, forming integrated militias and arming them to fight the insurrectionist former Confederate soldiers who opposed the post-war order. Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 176 (2006).

"indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment" and citing *Hurtado*); *Beck v. Washington*, 369 U.S. 541, 545 (1962) ("Ever since *Hurtado v. California*, this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions." (citation omitted)). Similarly, the Seventh Amendment's civil jury guarantee does not bind the States. *E.g.*, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438 (1996); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916). Nor has this Court held that the Eighth Amendment's ban on excessive fines or the Third Amendment's prohibition on quartering soldiers apply against the States. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) ("We shall not decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment . . . ."); Rotunda & Nowak, *Incorporation of the Bill of Rights*, 2 Treatise on Const. L. § 15.6(b) (4th ed. 2007) (noting that the Court has not decided whether the Third Amendment applies to the States).

Finally, the lower courts are virtually unanimous in their conclusion that the Second Amendment does not apply against the States or their subdivisions. *E.g.*, *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-71 (7th Cir. 1982); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995) ("The Second Amendment does not apply to the states."); *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005) ("join[ing] five of our sister circuits" in holding that "the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts"). As one court explained, "[w]hatever rights in this respect the people may have depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right." *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942).

In sum, although the Court need not address the issue of the Second Amendment's incorporation against the States or their subdivisions in this case, this Court's precedents and the federalism-promoting purpose of the Second Amendment firmly establish that the Second Amendment imposes no barrier to state and local regulation of firearms.

CONCLUSION

American cities need flexibility to respond to the serious threat of gun violence facing their communities. Although the Court need not address this issue in this case, nothing in the Second Amendment restrains the authority of States or their political subdivisions to meet this threat through the regulation of firearms within their borders. The Second Amendment applies to the federal government alone. It does not constrain firearms regulations in the District of Columbia or in the States or their political subdivisions. The Court of Appeals decision was in error and should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA
and
ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK HELLER,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MARICOPA COUNTY ATTORNEY'S OFFICE AND OTHER PROSECUTOR AGENCIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions — D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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INTEREST OF *AMICI CURIAE*

This amicus curiae brief is submitted on behalf of the Maricopa County Attorney's Office led by County Attorney Andrew P. Thomas (the "Maricopa County Attorney's Office") along with several other state prosecutorial agencies nationwide.[1] The Maricopa County Attorney's Office is one of the largest state prosecutorial agencies in the nation with 15 specialized bureaus and over 900 attorneys, investigators, administrators, paralegals, victim advocates, and support staff. It prosecutes approximately 40,000 criminal cases every year in Maricopa County, Arizona. "Over the last few years, the number of threats to prosecutors and prosecutor staff [in Maricopa County] has increased. Prosecutors in the Homicide and Gang/Repeat Offender Bureaus, particularly, have been targeted." Maricopa County Attorney's Office, General Office Administrative Procedures, Procedure 6.24.[2] The Maricopa County Attorney's Office therefore has a policy in place allowing county prosecutors and prosecutor staff to provide sufficient means of protecting themselves from physical harm, including the carrying of a firearm. *Id.* Pursuant to this policy, Maricopa County Attorney prosecutors who receive specific threats are eligible to receive a firearm, firearms training, and appropriate permits. *Id.* at 2.

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[1] The other amici who are signatories on this brief are set forth on the signature page after the conclusion of the brief. Pursuant to Supreme Court Rule 37(3)(a), this amicus brief has been filed with the consent of all parties. In accordance with Supreme Court Rule 37(6), amicus curiae affirm that no party's counsel has authored this brief, in whole or in part, and that no party has made a monetary contribution to the preparation or submission of this brief to the Court.

[2] On file with Maricopa County Attorney's Office, Phoenix, Arizona.

The Maricopa County Attorney's Office's experience of an increased rate of violence directed at its prosecutors and prosecutorial staff is not uncommon among large state prosecuting agencies across the United States. In 2005, 40% of all prosecutor offices reported receiving work-related threats or actual assaults on their staff members. Reported threats include threatening letters, threatening calls, face to face threats, and physical assaults. Among large prosecutor offices, the percentage of agencies reporting violent threats rose to 84%. *See* Bureau of Justice Statistics, Prosecutors in State Courts, 2005 at 7, *available at* http://www.ojp.usdoj.-gov/bjs/pub/pdf/psc05.pdf. Security measures employed by prosecuting agencies are therefore high. Overall, 20% of the chief prosecutors carry a firearm for personal protection and 44% of assistant prosecutors in large prosecutor offices carry a firearm for protection, commensurate with the high rate of violent threats those large offices receive. *Id.* The seriousness of the danger faced by prosecutors nationwide has been the subject of recent commentary. *See generally* Patricia L. Fanflik, *Forgotten Victims: Workplace Aggression Encountered By Prosecutors,* 39-OCT Prosecutor 36 (Sept./Oct. 2005); Stephen D. Kelson, *Violence in the Legal Profession: Methods of Protection and Prevention*, 49-May Advocate (Idaho) 19 (May 2006). Consequently, the Maricopa County Attorney's Office and the other amici prosecutor agencies joining in this brief have a significant interest in the proper construction of the Second Amendment.

SUMMARY OF THE ARGUMENT

For the last two centuries, the questioned scope of the Second Amendment has been debated, frequently upon a social or political basis, without a Constitutionally-based answer from this Court. The text of the Second Amendment and its celebrated history as the "true palladium of liberty," however, beg to be finally recognized. That text and history support the propsition that the "right to keep and bear arms" belongs, not to an undefined or no longer existent state governed militia force, but to "the people." Despite the speculation that recognizing this empirical truth will somehow dismantle centuries of gun control legislation, the only answer must be that which is determined to be the correct answer guided by the text and history of the amendment alone. Moreover, the anxious musings of the politically motivated have been disproved. Countless cases upholding various firearms regulations, even under a strict scrutiny standard of review, defy the argument that a ruling in favor of heightened scrutiny (assuming the right is recognized as individual) will put the final nail in the coffin of all gun laws alike. The state's compelling interest in ensuring public safety will safeguard long-standing, narrowly tailored regulations. Only those laws, like the District of Columbia Code provisions at issue here, which amount to an outright prohibition on the private right to possess firearms, will be subject to reprisal and possible invalidation. Accordingly, this Court should affirm the opinion of the District of Columbia Circuit in its entirety.

ARGUMENT

I.

SPECULATION ON HOW THIS COURT'S DECISION MAY IMPACT EXISTING REGULATIONS ON FIREARMS IS IRRELEVANT.

Several of the amici curiae briefs filed in support of the Petitioner, the District of Columbia (the "District"), contend that their unsupported speculation on the potential impact this Court's decision may have on existing state and federal statutes involving the regulation of guns is a sufficient basis on which to reverse the District of Columbia Circuit's ("D.C. Circuit") opinion. Notwithstanding the great fears enumerated by special interest groups of every make and model, this Court need not stand as a policymaker on the issue of gun control. Rather, the purpose of this decision is to settle a long-standing debate on what right the Second Amendment was designed to protect and whether that right is infringed by a complete prohibition on the possession of handguns. This determination should rest on a textual interpretation of the amendment using well established tenets of statutory construction. The Constitution "must be interpreted according to its text." *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

II.

THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

The proper starting point in determining the scope of the right protected is to look to the text itself: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. Const. amend. II.

Unique among its fellow amendments contained in the Bill of Rights, the Second Amendment contains two clauses, "the first is prefatory, and the second is operative." *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007). Both the prefatory and the operative clauses of the amendment support the notion that the right protected therein is individual, not "collective" or otherwise limited to militia-related arms use.

A. Textual Analysis of the Operative and Prefatory Clauses, in Tandem, Supports The Adoption of the Individual Rights Model.

The D.C. Circuit properly addressed each clause in turn, but focused its analysis primarily on the language of the operative clause — *i.e.*, "the right of the people to keep and bear arms shall not be infringed." *Id.* Though the prefatory clause should not be unnecessarily ignored, a well-recognized canon of statutory construction requires that the operative language of this and any other legislative enactment be given precedence over introductory language where the operative language is not ambiguous. *E.g.*, *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 483 (2001) (inappropriate to look at title of section to create ambiguity if text is clear; the clear text "eliminates the interpretive role of the title, which may only shed light on some ambiguous word or phrase in the statute itself"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290-91 (2000) (rejecting language of preamble of local ordinance as definitive for First Amendment challenge); *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 158 n.13 (1982) (look to the preamble only for the administrative construction of the regulation, to which deference is due). *See generally* 2A Sutherland, Statutes & Statutory

Construction §47.04, at 146 (N. Singer 5th ed. 1992). The rationale for elevating the operative portion of the amendment over more specific purposes set forth in introductory language is sound. Prefatory language in legislative texts is, more often than not, underinclusive. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 505-06 (1999) (citation omitted). The D.C. Circuit's orderly analysis gave the appropriate emphasis to the language, which so unequivocally guarantees to "the people" that their "right to keep and bear arms" is safe from governmental encroachment.

1. The Operative Clause

Because there is no question that the Second Amendment guarantees "the right to keep and bear arms" to someone, the only question truly presented here is, to whom? That question is answered by reference to the phrase "the people," which this Court has uniformly recognized as indicative of an individual rather than a civic protection:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. Const., Amdt. 1 ("Congress shall make no law . . . abridg-

> ing . . . *the right of the people* peaceably to assemble") (emphasis added); Art. I, §2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States.*") (emphasis added). While *this textual exegesis* is by no means conclusive, it *suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom right and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.*

United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (additional emphasis added). In particular, *Verdugo-Uriquidez's* choice to compare the language of the First and Fourth Amendments with the Second (all of which protect the right of "the people") acknowledges that the three amendments should be construed consistently when determining what rights and whose rights they were enacted to protect. This is consistent with language in other cases referencing these amendments as identifying individual protections.[3] As properly recognized by the

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[3] *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (citation omitted) (emphasis added) ("[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*, the freedom from unreasonable searches and seizures; and so on."); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (same as above) (citation omitted); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406-07 (1856) (same as above); *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968)

[footnote continued]

D.C. Circuit, apart from the Second Amendment, "it has never been doubted these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation." *Parker*, 478 F.3d at 381. Put simply, if the phrase "the people" connotes an individual guarantee in the First and Fourth Amendments, it logically follows that the same term, used in the same document (the Bill of Rights), in the same series of amendments within that document, should also be construed as guaranteeing the preservation of an individual, not "collective" right.

The next portion of the operative clause necessary to the determination of whose right the Second Amendment protects is the sentence predicate — "shall not be infringed." This language indicates that "the right to keep and bear arms" was not *created* in the Amendment, but rather *preserved* by it. *Id.* at 382. The right to keep and bear arms was viewed at the founding as a natural right that preexisted the formation of the national government. Thus, the Second Amendment was guaranteeing its preservation by providing that it "shall not be infringed." Case law from the late-nineteenth century expounding on the purpose for the Bill of Rights supports this interpretation of its plain meaning. "The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the 'Bill of

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(Black, J., concurring) (emphasis added) ("[T]hese privileges and immunities, whatever they may be — for they are not and cannot be fully defined in their entire extent and precise nature — to these should be added *the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as* the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms.*").

Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). This simple interpretation also finds support in legal prose written during the founding era:

> This may be considered as the true palladium of liberty . . . . *The right of self defence is the first law of nature*: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. *Wherever* standing armies are kept up, and *the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.*

1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia, 300 (1803) (emphasis added).

Analysis of the Second Amendment's operative clause is complete (and completely supports the view that it provides for an individual guarantee) when one evaluates its use of the term "the right." As recognized by the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 228 & n.24 (5th Cir. 2001), "as used throughout the Constitution, 'the people' have 'rights' and 'powers,' but federal and state governments only have 'powers' or 'authority' never 'rights.' " *Emerson* correctly observes that if the Second Amendment is misinterpreted as providing for a "collective" or a "militia-related" right only, then it would stand in stark contrast to the meaning of the words "the right" as they are used in every other article or amendment to the Constitution. *Compare* U.S. Const. amend. I (emphasis added) ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or *the right of the people* to peaceably assemble . . ."); U.S. Const. amend. II (emphasis added) ("A well regulated Militia, being necessary to the security of a free State, *the right of the people* to keep and bear Arms shall not be infringed); U.S. Const. amend IV (emphasis added) ("*The right of the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."); U.S. Const. amend IX (emphasis added) ("The enumeration in the Constitution, of certain *rights*, shall not be construed to deny or disparage others retained by *the people*."); U.S. Const. amend. X (emphasis added) ("*The powers* not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Language employed by the Founders to convey an individual protection in other portions of the Constitution and its amendments should instruct the proper interpretation of that same language as employed in the Second Amendment. The words "the right" have consistently been construed as preserving individual guarantees.

2. The Prefatory Clause

While the Framers' inclusion of an introductory clause in the Second Amendment sets it apart from other amendments contained in the Bill of Rights, Petitioner and *amici* supporting the "collective rights" theory seek to extend the significance of that inclusion beyond its logical limits. As recognized by one commentator, the practice of including a preamble or "statement of purpose" was not unusual in the Founding Era. "Many contemporaneous state constitutional provisions are structured similarly." Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 794 (1998). More importantly, the phrase "a well regulated militia, being necessary to the security of a free state," read plainly, does not directly limit the breadth of the operative clause; it merely states a singular (but not exclusive) purpose, which the amendment was designed to serve. Additionally, as noted above, long-standing rules of statutory construction require that the prefatory language be treated as just that — a preface — which can be used to guide the construction of the operative provision if necessary, but which must yield to unambiguous operative language.

Moreover, even if one entertains the argument that the preamble to the Second Amendment could limit the effect of the operative clause, then resort to history is useful. The historical context supports an individual right.

B. Historically, and as Construed by this Court in *Miller*, the Term "Militia" as Used in the Second Amendment Presupposed that Militia Members Would Arm Themselves.

It is clear from a review of Second Amendment jurisprudence and scholarly musings as a whole that the individual/collective theory divide arises from a single word used in the prefatory clause. While some unpersuasive attempts are made at construing the term "bear arms" and "keep and bear arms" as being purely militaristic locutions,[4] the word "militia" as used in the prefatory clause of the Second Amendment seems to have carried the day for those cases where the collective rights theory has prevailed. *See, e.g., Silveira v. Lockyer*, 312 F.3d 1052, 1063 n.11 (9th Cir. 2003). This Court's decision in *United States v. Miller*, 307 U.S. 174 (1939) has been cited to support that position. *Miller*'s definition of the term "militia" as used in the Second Amendment, however, shows that the framers presupposed that the "well regulated militia" would be comprised of a *self* armed public:

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised *all males* physically capable of acting in concert for the common defense. . . . And further, that ordinarily when called for service these men *were expected to appear bearing arms supplied by themselves* and of the kind in common use at the time.

Id. at 179 (emphasis added). It defies common sense to argue that, although the militia consisted of all self-armed males in the United States at the time the Constitution was ratified, the term "militia," as used in the Second Amendment, was limited to a small subset of individuals formally affiliated with a governmental organization. The D.C. Circuit properly dismissed this argument as implausible given the analysis in *Miller* and the historical texts discussed and relied on therein. *See Parker* at 389.

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[4] The Petitioner argues that the term "bear arms" was historically understood as an exclusive militaristic phrase and argues that "keep and bear Arms" should be read together and construed to support the collective theory they propose overall. The D.C. Circuit properly labeled these arguments "outlandish." *See Parker*, 478 F.3d at 385-86 (applying dictionary meanings to context).

In short, the Second Amendment's operative clause is not ambiguous and does not waver in its support for the "individual right" interpretive model adopted by the D.C. Circuit. Resort to the prefatory clause and the strain needed to misconstrue its textual meaning and historical significance is nothing more than a poorly veiled attempt to force the legal means which satisfy a political end. By contrast, the D.C. Circuit's opinion is based on a sound and reasonable interpretation of the Constitutional text. To that end, its decision should be affirmed.

III.

NOT ONLY IS THE RIGHT INDIVIDUAL, IT IS FUNDAMENTAL; LAWS INFRINGING THE RIGHT SHOULD THEREFORE BE SUBJECT TO SCRICT SCRUTINY.

Assuming this Court recognizes the Second Amendment as protecting an individual right, the next necessary step in determining the outcome of this case is what level of scrutiny should be applied to laws affecting the individual right it protects.

A. The Right to Bear Arms is "Deeply Rooted in this Nation's History."

It is rather well established that the Due Process and Equal Protection clauses of the Fourteenth Amendment prohibit federal or state infringement on certain fundamental liberties. "[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997). It is equally well-recognized that to protect those fundamental liberties from undue infringement, governmental regulations seeking to limit or restrict their exercise are subject to "more searching judicial inquiry." *United States v. Carolene Prods.,* 304 U.S. 144, 152-53 n.4 (1938). The history behind the right to keep and bear arms demonstrates that the right is indeed "deeply rooted in this Nation's history," so much so that it has been ordained as "the true palladium of liberty." Blackstone's Commentaries, *supra; see also* Joseph Story, *Commentaries on the Constitution of the United States,* 708-09 (1833) (Carolina Academic Press 1987) ("The right of the citizens to keep and bear arms has justly been considered the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."). Commentary in the Federalist papers confirms that the protection of this right was indeed at the forefront of the Framers' concerns.

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

The Federalist, No. 46 (James Madison) (1788). Federalists like Madison and Hamilton used this right, which at the time they viewed as a uniquely "American" liberty, to placate Anti-Federalist concerns regarding the potential for tyranny and oppression by approving the formation of a strong national government. It was and continues to be "implicit in the concept of ordered liberty," that, the people themselves stand as a last resort to defending against a tyrannical government, self-armed against oppression:

> If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers, may be exerted with infinitely better prospect of success than against those of the rulers of an individual state. . . . The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair.

The Federalist Papers, No. 28 (Alexander Hamilton) (1787). A review of these founding texts does not leave open for serious debate the question of whether the "right to keep and bear arms" is deeply embedded in our national history. As noted by both the D.C. Circuit here and the Fifth Circuit in *Emerson*, the right to bear arms preexisted the formation of the national government and was believed to be derived from a natural right of self-preservation. "The premise that private arms would be used for self-defense accords with Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation." *Parker*, 478 F.3d at 383. "The history we have recounted largely speaks for itself." *See Emerson*, 270 F.3d at 259.

In this case, the Court finally may say what has been assumed but has gone without being said for the last two centuries — the Second Amendment right to keep and bear arms is among the fundamental freedoms on which there can be no government infringement without a compelling, narrowly tailored justification.

B. Its Inclusion Within the Bill of Rights is Also Significant.

The Second Amendment's placement in the original Bill of "fundamental" rights is also, itself, strong evidence that the right is deserving of heightened protection. Though a long-standing scholarly and juridical debate has developed regarding what liberties should be construed as "fundamental,"[5] it is agreed that at *least* those freedoms expressly enumerated by the Bill of Rights fall into the "fundamental rights" group. At the birth of the "strict scrutiny" standard of review, it is these first ten amendments that prompted Justice Harlan to opine in his famous footnote that they may be subject to a heightened standard of judicial review: "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, *such as those first ten Amendments.*" *Carolene Prods.*, 304 U.S. at 152-53 n.4 (emphasis added). The coupling of heightened scrutiny with the bill of enumerated rights has survived the evolution of "substantive" due process and the development of various levels of judicial scrutiny. "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights." *Casey*. 505 U.S. at 929. In addition to the long history and tradition of self-armament in America, the inclusion of the Second Amendment in the Bill of Rights, is itself proof that the right should be construed as "fundamental."

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[5] In addition to those rights expressly protected in the first ten amendments, the court has applied heightened scrutiny for other rights it construes as "implicitly" protected. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to have children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to direct the education and upbringing of one's children).

Because the Second Amendment invokes a fundamental, individual guarantee, it should be subject to heightened judicial review. "It is settled law that no government official in this Nation may violate these fundamental constitutional rights." *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 590 (1989). "In the face of an interest this powerful a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted." *Glucksberg*, 521 U.S. at 766. "[S]ubstantive due process" . . . forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (emphasis added).

IV.

RECOGNITION OF THE RIGHT AS INDIVIDUAL, FUNDAMENTAL, AND SUBJECT TO HEIGHTENED SCRUTINY DOES NOT THREATEN THE VALIDITY OF ALL GUN CONTROL REGULATIONS.

The primary argument against the application of strict scrutiny appears to be the surmise that strict scrutiny will prove to be "fatal in fact" to most if not all federal and state laws regulating the possession and use of firearms. This conjecture is unwarranted. Though the time honored epithet "strict in theory and fatal in fact" has "effectively defined the strict scrutiny standard in the minds of lawyers," the phrase has been subject to recent challenge and for good reason. Adam Winkle, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts*, 59 Vand. L. Rev. 793, 795 (2006). In his study, Professor Winkle surveyed application of strict scrutiny in several different contexts (due process, equal protection, "fundamental rights," and more). Winkle's "empirical" evidence showed that "strict scrutiny" is not necessarily fatal. "Contrary to the Gunther myth, laws can (and do) survive strict scrutiny with considerable frequency." *Id.* This Court has echoed these sentiments in recent years. "To say that restrictions on a right are subject to strict scrutiny is not to say that the right is absolute." *Casey*, 505 U.S. at 929. "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

In the context of gun control, the major concern appears to be that several state and federal statutes aimed at regulating the use and possession of firearms will be *ipso facto* invalid if strict scrutiny is adopted as the standard of review. A review of cases applying a strict or heightened standard of judicial scrutiny, however, undercuts the hypothesis that strict scrutiny will be fatal to gun control as we currently know it.

Arizona, for example, is one of the 42 states where the individual right to bear arms is protected by the state constitution. In Arizona, "[t]he right of the individual citizen to bear arms in defense of himself or the State shall not be impaired." Ariz. Const. art. 2 §26. Several Arizona cases have been called upon to construe certain local statutes and ordinances seeking to regulate firearms use and possession in light of the foregoing constitutional protection. In so doing, Arizona courts apply a heightened standard of review requiring that such laws be "narrowly drawn and . . regulate[ ] only the manner in which individuals may exercise their right to bear arms" to survive judicial scrutiny. *State v. Moerman.* 182 Ariz. 255, 259, 895 P.2d 1018, 1022 (Ct. App. 1994). Even under this heightened standard, every Arizona gun control statute challenged to date has survived judicial review. *See, e.g., State v. Rascon*, 110 Ariz. 338, 519 P.2d 37 (1974) (state statute prohibiting probationer from possessing firearm did not infringe state constitutional right to bear arms); *City of Tucson v. Rineer*, 193 Ariz. 160, 971 P.2d 207 (Ct. App. 1998) (ordinance prohibiting possession of handguns in public park held constitutional); *Moerman*, 182 Ariz. at 255, 895 P.2d at 1018 (misdemeanor statute prohibiting "misconduct involving weapons" held constitutional); *Dano v. Collins*, 166 Ariz. 322, 802 P.2d 1021 (Ct. App. 1990) (state law prohibiting the carrying of a concealed weapon did not violate state constitutional right to bear arms).

Several federal cases published after the Fifth Circuit's decision in *Emerson* similarly illustrate that pervasive forms of existing gun control will survive even the most rigorous standard of judicial review. For example, in *United States v. Henry*, 288 F.3d 657 (5th Cir. 2002), the Fifth Circuit reaffirmed its holding in *Emerson* by upholding Henry's conviction for violating 18 U.S.C. §922(g)(8), which prohibits a person subject to a restraining order from possessing a firearm. According to the Fifth Circuit in *Henry*, the law prohibiting firearms possession by those subject to restraining orders is narrowly tailored to serve a compelling government interest in protecting public safety. "Ultimately . . . the nexus between the firearm possession by the party so enjoined and the threat of lawless violence was sufficient . . . to support the deprivation of the enjoined party's Second Amendment right to keep and bear arms." *Id.* at 664. Thus, Henry's attempt to use the Second Amendment to avoid a criminal conviction was entirely unsuccessful. Other federal courts outside the Fifth Circuit have expressly approved of its analysis in this regard. *See, e.g.*, *United States v. Lippman*, 369 F.3d 1039, 1044 (8th Cir. 2004) (assuming Second Amendment protects individual right to bear arms, federal statute prohibiting possession by one subject to restraining order for domestic violence would survive strict scrutiny); *United States v. Miles*, 238 F. Supp. 2d 297 (D. Maine 2002) (statute prohibiting possession by persons subject to protective order "is a narrow and reasonable [restriction] and it passes constitutional muster even under a strict scrutiny test.").

Similarly, in *United States v. Everist*, 368 F.3d 517 (5th Cir. 2004), the Fifth Circuit again upheld a conviction over a defendant's Second Amendment challenge. There the court held that a federal statute prohibiting possession of firearms by convicted felons was constitutional notwithstanding its application of the strict scrutiny standard of review:

> *Irrespecive of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others.* He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens. *Accordingly, §922(g)(1) represents a limited and narrowly tailored exception to the freedom to possess firearms*, reasonable in its purposes and consistent with the right to bear arms protected under the Second Amendment. *Everist's constitutional challenge to §922(g)(1) fails.*

Id. at 519 (citations omitted) (emphasis added). *See also United States v. Darrington*, 351 F.3d 632 (5th Cir. 2003) (same). While possession-by-felon statutes may seem too obvious an example to truly placate the fear that strict scrutiny will be fatal in fact to more subtle forms of gun control, other examples may finally assuage other amici's stated concerns. For example, in *United States v. Patterson*, 431 F.3d 832 (5th Cir. 2005), the Fifth Circuit upheld a provision of 18 U.S.C. §922, which prohibits possession of a firearm by an unlawful user of a controlled substance. Just like defendants Emerson, Everist, and Henry, defendant Patterson challenged his conviction by arguing that the statute was unconstitutional under the Second Amendment. Just like Emerson, Everist, and Henry before him, however, Patterson's conviction was also upheld despite the Fifth Circuit's application of strict scrutiny:

> Prohibiting unlawful drug users from possessing firearms is not inconsistent with the right to bear arms guaranteed by the Second Amendment as construed in *Emerson* and *Everist.* Like the classes

> of criminals in *Emerson* and *Everist, unlawful users of controlled substances pose a risk to society if permitted to bear arms. Section 922(g)(3) survives Patterson's constitutional challenge.*

Id. at 836 (emphasis added). One other federal case bears further discussion. In *Dickerson v. City of Denton*, 298 F. Supp. 2d 537, 540 (E.D. Tex. 2004), the defendant filed a civil lawsuit arguing that police officers violated his Second Amendment rights when they confiscated weapons from his home pursuant to an allegedly unlawful search and seizure. The district court permitted Dickerson to proceed with his Fourth Amendment claim, but granted the government's motion to dismiss the Second Amendment claim for failing to state a claim upon which relief could be granted. In so doing the court reasoned that the Second Amendment gave way to a lawful search compliant with the Fourth Amendment:

> So long as the requirements of the Fourth Amendment are met, police officers may search a premises and confiscate guns that they believe have been used to commit a crime. Such a search and seizure is a reasonable, necessary restriction on an individual's Second Amendment right to bear arms.

Id. at 540-41.

Thus, whether in the context of lawful searches and seizures or in the context of criminal prosecutions for unlawful firearms possession, these cases illustrate that strict scrutiny of Second Amendment impacts will not serve as a barrier to the orderly prosecution of criminal conduct. In a variety of different contexts, convictions have been consistently upheld despite a series of Second Amendment challenges post-*Emerson* and despite the Fifth Circuit's proper application of the strict scrutiny standard of review. This is because, of course, existing criminal and regulatory laws restricting private arms use are often justified by perhaps the most significant of all "compelling interests" — the protection of public safety and welfare. "It is axiomatic that a government has a compelling interest in providing for the safety of its citizens." *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1267 (11th Cir. 2004). Indeed, narrowly tailored regulations affecting other constitutional rights have consistently been upheld when the public's safety is at issue. This is so even though those restrictions are not nearly tied so directly to public safety as current gun control regulations assuredly are.[6]

Accordingly, criminal and regulatory statutes aimed at regulating the time, manner, and place for the possession and use of firearms are not in danger of invalidation merely by recognizing that a heightened standard of scrutiny applies under the Second Amendment. Countless criminal and civil cases testing their sufficiency show that such laws can and will survive even the strictest scrutiny. Only those laws (like the D.C. Code provisions at issue here) amounting to an outright prohibition rather than a narrowly tailored regulation, can and should be struck down under the heightened standard.

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[6] *See, e.g., Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971) ("The state may restrict religious acts if it can be shown that they pose 'some substantial threat to public safety, peace or order.' "); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994) ("The State also has a strong interest in ensuring the public safety."); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) ("In sum, we believe the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm. We hold that the testing of these employees is reasonable under the Fourth Amendment."); *Houston Chronicle Pub. Co. v. City of League City*, 488 F.3d 613, 622 (5th Cir. 2007) (upholding statute because it "serves a compelling interest at the heart of government's function: public safety.").

V.

D.C. CODE § §7-2502.02(a)(4), 22-4504(a) and 7-2507.02 DO NOT PASS CONSTITUTIONAL MUSTER.

As set forth above, not all governmental restrictions on the right to bear arms are invalid under the strict scrutiny test. This Court has long recognized that certain narrowly tailored restrictions premised on compelling governmental interests (*i.e.*, public safety) will survive judicial review:

> In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons.

Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897). Nevertheless, when a law amounts to an outright prohibition on the free exercise of a fundamental right, the judiciary must intervene. "[T]he Fifth and Fourteenth Amendments' guarantee of 'due process of law' . . . forbid[ ] the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

The D.C. Code provisions at issue here all amount to an essentially absolute prohibition on the use and possession of handguns within the District. The D.C. Circuit properly concluded that they were, therefore, unconstitutional.

A. D.C. Code §7-2502.02

This provision prohibits the registration of a pistol not already registered prior to 1976. In other words, apart from the limited number of owners who registered this type of weapon over thirty years ago, all others wishing to lawfully register a handgun are prohibited from doing so. The District's sole argument in support of this complete ban on handguns is that they only ban one type of firearm — handguns — so many other types of weapons are still available for registration. As noted by the D.C. Circuit, however, the presence of available alternatives does not render the restriction on one type of weapon "narrowly tailored" to achieving a governmental interest. *See Parker*, 478 F.3d at 401. If anything, the prohibition on one, but not all weapons demonstrates the arbitrary effect of the law. As the D.C. Circuit properly recognized here, "[o]nce it is determined . . . that handguns are "Arms" referred to in the Second Amendment, it is not open to the District to ban them." *Id.*

B. D.C. Code §22-4504

Similarly, §22-4504 restricts separately the carrying of a pistol. Because the provision contains no narrowing exceptions, it must be construed as broadly as it reads. Thus, this provision, if left intact, would ban an individual from moving his or her handgun from one room to another in his or her own house. The net effect of this law is to prohibit any private individual from possessing a handgun altogether even within the confines of one's own home. The restriction bears no rational relationship (much less a narrowly tailored relationship) to the District's goal of reducing violent crime. Indeed, "[s]uch a restriction would negate the lawful use upon which the right was premised — *i.e.*, self-defense." *Parker*, 478 F.3d at 401.

C. D.C. Code §7-2507.02

Lastly, §7-2507.02 requires that a registered firearm be kept "unloaded and disassembled or bound by a trigger lock or similar device, unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes within the District of Columbia." This provision bars private District citizens from lawfully using a handgun for self protection in the home. If handguns kept in the home must remain disassembled at all times, they can be of absolutely no use in defending one's self on short notice from physical attack. Thus, by virtue of this enactment, even weapons not prohibited by the registration or carrying requirements of the first two provisions at issue, would still be rendered wholly useless to their lawful owners. As such, this provision was also properly struck down. *See Parker*, 478 F.3d at 401.

CONCLUSION

For these reasons, the Maricopa County Attorney's Office and the other amici prosecutor agencies request that this Court affirm the decision of the D.C. Circuit below.

Respectfully submitted,

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February 11, 2008

AMICUS
CURIAE
BRIEF

No. 07-290

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,
Petitioners

v.

DICK ANTHONY HELLER,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE 55 MEMBERS OF UNITED STATES SENATE, THE PRESIDENT OF THE UNITED STATES SENATE, AND 250 MEMBERS OF UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions — D.C. Code secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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STATEMENT OF INTEREST OF AMICI CURIAE

The Amici Curiae include Senator Kay Bailey Hutchison, the lead member, and 54 other members of the United States Senate; the President of the United States Senate; and 250 members of the United States House of Representatives. See Appendix herein. As Federal officials, we have a fundamental interest in protecting the constitutional rights of our constituents and the American people in general.[1]

The Congress has a long history of protecting the right of the people to keep and bear arms. Like the rest of the Bill of Rights, the Second Amendment was proposed to the States by the Congress in 1789. On several occasions, in different epochs of American history, the Congress enacted statutory texts which explicitly declared its understanding of the Second Amendment as guaranteeing fundamental, individual rights.

Congress interprets the Constitution in deciding what laws to pass. As on other issues, this has historically been the case regarding the Second Amendment and the District of Columbia. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *Nixon v. Administrator of General Services*, 433 U.S. 425, 703 (1977).

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[1] No counsel for any party to this case authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity other than the *Amici Curiae* or their counsel made such a monetary contribution. This brief is filed with the written consent of all parties, seven-days notice having been provided to them of this filing.

The Amici Curiae wish to bring their unique perspective to this Court's attention to explain to the Court the historical meaning of the Second Amendment as understood by the Congress, and why the District's firearms prohibitions at issue infringe on the rights of the law-abiding citizens of the District of Columbia as guaranteed by the Second Amendment.

SUMMARY OF ARGUMENT

The Second Amendment provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Congress adopted that wording and proposed it to the States in 1789. It became part of the Bill of Rights which the States ratified in 1791. As the text and the drafting history demonstrate, the Amendment was intended to guarantee the right of individuals to possess and keep ordinary firearms.

Following the abolition of slavery, Congress sought to end the incidents of slavery, including prohibitions on possession of firearms by African Americans. In 1866, over two-thirds of Congress passed the Freedmen's Bureau Act, which declared protection for the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . ., including the constitutional right to bear arms . . . ."

In passing firearms regulations for the District, Congress has been sensitive to Second Amendment concerns. An 1892 enactment prohibiting the carrying of concealed weapons exempted one's place of business and dwelling house. In 1906, Congress empowered the District to pass "such usual and reasonable police regulations" deemed necessary to regulate firearms, which today remains the District's only delegation to regulate firearms. A ban on handguns is both unusual and unreasonable. In 1932 Congress passed a comprehensive firearms act which remains largely in place. As the Senate report for that act stated, "the right of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill."

In 1941, Congress enacted the Property Requisition Act, which authorized the President to requisition certain types of property. The Act declared that it must not be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport" unless prohibited or already required to be registered, or "to impair or infringe in any manner the right of any individual to keep and bear arms . . . ."

The Gun Control Act of 1968 declared that "this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." And in the Firearms Owners' Protection Act of 1986, over two-thirds of Congress found that the rights of citizens "to keep and bear arms under the second amendment to the United States Constitution" as well as other constitutional rights "require additional legislation to correct existing firearms statutes and enforcement policies."

Attempts to ban handguns through litigation led Congress to enact the Protection of Lawful Commerce in Arms Act in 2005. Approximately two-thirds of Congress found that the Second Amendment "protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms." The Act precludes lawsuits against the lawful industry "to preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes . . . ."

Confiscations of firearms in the wake of Hurricane Katrina led Congress in 2006 to amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act to forbid seizures of lawful firearms in disasters. Over two-thirds of the House enacted Findings that the seizures violated citizens' Second Amendment rights to have firearms for protection in the home and elsewhere. The Findings were deleted when the bill was added to an appropriations bill in the Senate, but its underlying basis in the Second Amendment remained understood.

The "District of Columbia Personal Protection Act," a bill which passed the House in 2004 and is currently pending, includes the Finding that: "Legislation is required to correct the District of Columbia's law in order to restore the fundamental rights of its citizens under the Second Amendment . . . ."

In sum, historically Congress has interpreted the Second Amendment as recognizing the right of law-abiding individuals to keep and bear arms. This Court should give due deference to the repeated findings over different historical epochs by Congress, a co-equal branch of government, that the Amendment guarantees the personal right to possess firearms.

The District's prohibitions on mere possession by law-abiding persons of handguns in the home and having usable firearms there are unreasonable per se. No purpose would be served by remanding this case for further fact finding or other proceedings. This Court should affirm the decision below, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

ARGUMENT

I. ORIGINAL INTENT AND EARLY INTERPRETATION

A. The Text: Rights of the People vs. State Powers

The Second Amendment provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." This declares a political principle and then guarantees a substantive right. The term "the people" is in juxtaposition to the government, federal or State. Only individuals have "rights," while the United States and the States have "powers."

The phrase "the right of the people" also appears in the First Amendment – "Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble, and to petition the government for a redress of grievances." The Fourth Amendment guarantees: "*The right of the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

The Ninth Amendment uses the same phraseology: "The enumeration in the Constitution, of certain *rights*, shall not be construed to deny or disparage others retained by *the people*."[2] These guarantees protect individuals from government action, and do not delegate or reserve powers to governmental bodies.[3]

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[2] *See also* U.S. Const., Amend. VI ("the accused shall enjoy *the right* to a speedy and public trial"); Amend. VII ("*the right* of trial by jury shall be preserved").

[3] It violates ordinary word usage to say that "the people" means only such persons as the government selects, and that one has a "right" to do something only if commanded by the government. Yet these are the premises of the "collective rights" view.

The constitutional text distinguishes between "the people," "the militia," and the "States." The Second Amendment refers to "a well regulated militia," but the right to keep and bear arms is guaranteed to "the people." The Fifth Amendment requires indictment by a grand jury except "in the Militia, when in actual service in time of War or public danger," a class that contrasts with "the people" who may bear arms under the Second Amendment. The Tenth Amendment refers to powers "reserved to the states respectively, or to the people."

The Second Amendment refers to the right to "keep" arms (such as at home) as well as to "bear" arms (meaning to carry them). Protected arms include commonly-kept firearms that one can keep and carry for lawful purposes, such as ordinary rifles, handguns, and shotguns, and not crew-served or heavy weapons.

The Amendment declares a well regulated militia to be necessary to the security of a "free State," which means a free country, and is not restricted to a State government.[4]

Article I, § 8, declares the "powers" of Congress, including its sharing of power over the militia with the

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[4] The First Amendment too has "free State" aims. "The liberty of the press is indeed essential to the nature of a free state . . . ." 4 WILLIAM BLACKSTONE, COMMENTARIES *151-152. "Faithful members of a free State" signed the Memorial and Remonstrance Against Religious Assessments. 8 PAPERS OF JAMES MADISON 298-99 (1973).

States,[5] and the Tenth Amendment declares undelegated "powers" to be reserved to the States or to the people. No "rights" are delegated to the United States or reserved to the States. Only "the people" – individuals – have "rights."

Where a State power is reserved or restricted, the Constitution names the State as the subject entity. It does not name the people the State may employ or conscript as the subject entity, other than in describing the State power. For instance, Congress has power to provide for organizing the militia, "reserving to the States respectively, the Appointment of the Officers . . . ." U.S. Const., Art. I, § 8, cl. 16. It is not declared that "the right of the Officers of the militia to be appointed by the States shall not be infringed." Similarly, the Second Amendment does not declare that "the right of the persons in the militia to be armed as required by the States shall not be infringed." Instead, it recognizes that "the right of the people to keep and bear arms, shall not be infringed."[6]

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[5] U.S. Const., Article I, § 8, clause 16 provides that "Congress shall have power":

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

[6] The lone militiaman compelled by law to render service would have little or no incentive or means to take political or

In sum, the Second Amendment guarantees an individual right to keep and bear arms. Recognition of that right promotes the well regulated militia necessary for a free State's security.

B. Drafting the Amendment in 1789

On June 8, 1789, Rep. James Madison introduced what would become the Bill of Rights in the House of Representatives, stating that it would "expressly declare the great rights of mankind secured under this constitution."[7] In a draft of his speech, Madison referred to the rights of "freedom of press – Conscience . . . arms" as "private rights."[8] His draft of the arms guarantee stated: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously

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legal action to protect any such State power. If the States are the beneficiaries of constitutional protection, they would have the incentive and the means to guard their prerogatives. When analyzed closely, the "collective rights" reading of the Second Amendment is simply implausible.

[7] 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 820 (1992).

[8] 12 PAPERS OF JAMES MADISON 193-94 (1979).

scrupulous of bearing arms shall be compelled to render military service in person."[9]

Ten days later, Federalist Tench Coxe explained: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms."[10] Madison endorsed Coxe's analysis.[11]

Madison's draft was referred to a House Select Committee. Roger Sherman, a committee member, drafted his own amendments, including that "The militia shall be under the government of the laws of the respective states, when not in the actual service of the United States . . . ."[12] The Committee reported a revised version of Madison's draft: "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."[13]

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[9] 4 Documentary History of the First Federal Congress 10 (1986).

[10] Federal Gazette, June 18, 1789, at 2, col. 1.

[11] 12 Papers of James Madison 239-40, 257 (1978).

[12] 18 James C. Hutson, *The Bill of Rights: The Roger Sherman Draft*, *in* This Constitution 36 (1988). Even so, in debate on the militia bill the following year, Sherman "conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made. The particular states, like private citizens, have a right to be armed . . . ." 14 Documentary History of the First Federal Congress 92-3 (1995).

While "a free country" was changed to "a free state," the adjective "free" was retained, thus differentiating other textual uses of "State" to denote the State governments.

In House debate, disagreement was expressed to the wording of the militia declaration.[14] The final clause was amended to provide that the religiously scrupulous would not be compelled to bear arms "in person."[15] No objection was expressed to the phrase

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[13] 4 Documentary History of the First Federal Congress 28 (1986). One writer saw the Committee amendments as reflecting the proposals by Samuel Adams in the Massachusetts ratification convention, which included "that the said constitution be never construed to authorize Congress . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms . . . ." 6 Documentary History of the Ratification of the Constitution 1453 (2000).

[14] Elbridge Gerry argued: "A well regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one." 11 Documentary History of the First Federal Congress 1287-88 (1992).

[15] *Id.* at 1309. *See also id.* at 1285-86.

"the right of the people to keep and bear arms."[16]

The Senate revised the House language to render the militia clause more concise and delete the objector clause: "A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed."[17] The Senate rejected a proposal to add "for the common defence" after "bear arms,"[18] making clear that the right was not limited to that purpose. The Senate changed "the best security of a free state" to "necessary to the security of a free state."[19] The Amendment had reached its final form.

Separately from the bill of rights, the Senate considered structural amendments that affected the federal-state balance. It rejected the following: "That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same . . . ."[20] This highlights the distinction between the right of the people to have arms and the state militia power.

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[16] House Speaker Frederick A. Muhlenberg wrote that the House version "takes in the principal Amendments which our Minority had so much at Heart." CREATING THE BILL OF RIGHTS 280 (1991). The Minority in the Pennsylvania convention proposed in part: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . ." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (1976).

[17] JOURNAL OF THE FIRST SESSION OF THE SENATE 71 (1820).

[18] *Id.* at 77.

[19] *Id.*

In sum, the Second Amendment guarantees "the right of the people," which includes residents of the seat of government, to keep and bear arms. This in turn promotes a well regulated militia, seen as necessary for a free state's security.

C. The Freedmen's Bureau Act of 1866

Abolition of slavery nationwide by the Thirteenth Amendment in 1865 did not end the incidents of slavery, which Congress sought to eradicate in 1866 with passage of the Civil Rights Act and the Freedmen's Bureau Act. The latter declared protection for the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . ., including the constitutional right to bear arms . . . ."[21] That text and the debates on both are key to understanding how Congress interpreted the Second Amendment only 75 years after it became part of the Constitution in 1791.[22]

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[20] *Id.* at 75.

[21] 14 Stat. 173, 176 (1866).

On January 5, 1866, Senator Lyman Trumbull introduced S. 60, the Freedmen's Bureau Bill, and S. 61, the Civil Rights Bill.[23] Both included among "civil rights or immunities" the right "to have full and equal benefit of all laws and proceedings for the security of person and estate."[24]

To exemplify their concerns, Rep. Zachariah Chandler endorsed the view that freedom for the slaves required, among other things: "'The right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term 'people.'"[25] Senator Charles Sumner noted a petition of black South Carolinians "that they should have the constitutional protection in keeping arms . . . and in complete liberty of speech and of the press."[26]

After the Senate passed S. 60, the House amended it to protect the civil right to "the security of person and estate, including the constitutional right to bear arms."[27] Senator Trumbull recommended that the Senate concur, noting that the reference to the right to bear arms "does not alter the meaning."[28]

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[22] *See* A. Amar, *The Bill of Rights & the Fourteenth Amendment*, 101 Yale L.J. 1193, 1245 n.228 (Apr. 1992); Stephen P. Halbrook, Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876, 1-55 (1998).

[23] Cong. Globe, 39th Cong., 1st Sess. 129 (Jan. 5, 1866).

[24] *Id.* at 209, 211 (Jan. 12, 1866).

[25] *Id.* at 217 (Jan. 12, 1866).

[26] *Id.* at 337 (Jan. 22, 1866).

As passed by both Houses, the Freedmen's Bureau Bill provided that where judicial proceedings were interrupted, military protection would be extended to protect all person's "civil rights or immunities," including "the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms . . . ."[29]

President Andrew Johnson vetoed the Freedmen's Bureau Bill, although his objections were irrelevant to the right to bear arms.[30] An override vote barely failed.[31]

Meanwhile, the Fourteenth Amendment was working its way through Congress. Senator Samuel Pomeroy noted "safeguards of liberty," including: "He should have the right to bear arms for the defense of himself and family and his homestead."[32]

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[27] *Id.* at 654 (Feb. 5, 1866), 688 (Feb. 6, 1866).

[28] *Id.* at 743 (Feb. 8, 1866).

[29] *Id.* at 748 (Feb. 8, 1866), 775 (Feb. 9, 1866) (passage); 1292 (Mar. 9, 1866) (text). Rep. William Lawrence quoted a military order that "civil rights and immunities" included: "The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed . . . ." *Id.* at 908-09 (Feb. 17, 1866).

[30] *Id.* at 916 (Feb. 19, 1866).

[31] *Id.* at 943 (Feb. 20, 1866).

In debate on the Civil Rights Bill, Rep. Bingham explained that the provisions of the Freedmen's Bureau Bill "enumerate the same rights and all the rights and privileges that are enumerated in the first section of this bill . . . ."[33] As passed, the Civil Rights Act recognized the right of each "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ."[34]

On May 23, Senator Jacob Howard introduced the Fourteenth Amendment, referring to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[35]

Also on May 23, the second Freedmen's Bureau

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[32] *Id.* at 1182 (Mar. 5, 1866).

[33] *Id.* at 1291-92 (Mar. 9, 1866).

[34] 14 Stat. 27 (1866). This remains the law today. *See* 42 U.S.C. § 1981.

[35] CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (May 23, 1866).

Bill, H.R. 613, was debated.[36] Rep. Eliot observed that § 8 – which recognized "the constitutional right to bear arms"[37] – "simply embodies the provisions of the civil rights bill."[38] He recited a report about black soldiers returning home to Kentucky: "Their arms are taken from them by the civil authorities . . . . Thus the right of the people to keep and bear arms as provided in the Constitution is infringed . . . ."[39] This rendered the freedmen "defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders."[40]

On May 29, the House passed the Freedmen's Bureau Bill and then took up the Fourteenth Amendment.[41] As explained by Rep. George W. Julian, the constitutional amendment was needed to uphold the Civil Rights Act, which

> is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry

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[36] *Id.* at 2773 (May 23, 1866). The bill had been reported by Rep. Eliot on behalf of the Select Committee on Freedmen's Affairs. *Id.* at 2743 (May 22, 1866).

[37] *Id.* at 3412 (June 26, 1866).

[38] *Id.* at 2773 (May 23, 1866).

[39] *Id.* at 2774.

[40] *Id.* at 2775.

[41] *Id.* at 2878 (May 29, 1866).

> weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.[42]

Both Houses passed the second Freedmen's Bureau Bill, which was again vetoed. The House overrode the veto by 104 to 33, or 76%,[43] and the Senate did so by 33 to 12, or 73%.[44] As finally passed into law, § 14 of the Freedmen's Bureau Act provided that in States where judicial proceedings were interrupted or which had not been restored to the Union:

> the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.[45]

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[42] *Id.* at 3210 (June 17, 1866).

[43] *Id.* at 3850 (July 16, 1866).

[44] *Id.* at 3842.

[45] 14 Stat. 173, 176-77 (1866).

The same section extended military jurisdiction to all cases "concerning the free enjoyment of such immunities and rights."

The same more than two-thirds of Congress which enacted this language also approved the more general language of the Civil Rights Act and the Fourteenth Amendment. Congress viewed the Second Amendment as recognizing individual rights to all, including freed slaves, and as not being limited to militias, some of which violated such rights.

II. CONTINUATION OF A CONSISTENT READING

A. Regulation in the District of Columbia

In legislating for the District of Columbia, Congress has been sensitive to Second Amendment rights.[46] In 1892, Congress made it an offense in the District to carry a pistol concealed about one's person, with exemptions for one's place of business and dwelling house, and a concealed carry permit available on showing the "necessity" thereof.[47]

Quoting the Second Amendment, Senator Roger

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[46] *See generally* Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEORGE MASON UNIVERSITY CIVIL RIGHTS LAW JOURNAL, Nos. 1 & 2, 105 (1995).

[47] 27 Stat. 116 (1892). "Necessity" would be changed to "necessary self-defense." 31 Stat. 1328 (1901).

Q. Mills objected: "You render the citizens of the country more defenseless by depriving them of the natural right to carry the arms which are necessary to secure their persons and their lives."[48] Senator Edward O. Wolcott responded that "this bill is intended to apply to the criminal classes. . . . It is not intended to affect the constitutional right of any citizen who desires to obey the law."[49]

In 1906, Congress authorized the District to pass "all such usual and reasonable police regulations . . . as they may deem necessary for the regulation of firearms," which remains the sole enabling legislation empowering it to regulate firearms.[50] Yet the District's prohibitions at issue are highly unusual and unreasonable.[51]

Congress passed a comprehensive firearms act for the District in 1932.[52] It prohibited carrying a concealed pistol on or about one's person without a license, which would be issued to a person with good reason to fear injury to his person or property or other proper reason.[53] A person who was convicted of a crime of violence could not possess a pistol.[54]

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[48] CONG. REC. 5788 (July 6, 1892).

[49] *Id.* at 5789.

[50] 34 Stat. 808, 809 (1906). Codified at D.C. Code § 1-303.43.

[51] Other than the District, Chicago is the only other city nationwide which bans handguns. In addition, not a single State bans handguns.

[52] 47 Stat. 650 (1932).

The Senate report noted that "the right of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill."[55] The House report stated that it would "meet the legitimate needs of all who are charged with the duty of protecting and defending life and property as well as those citizens who require firearms for protection or for sport . . . ."[56]

The 1932 act has remained in place with various amendments. In 1943, Congress made it unlawful for a person to "carry either openly or concealed on or about his person" a pistol, with exceptions for one's home and business or under a permit.[57] In 1953, Congress extended the prohibition on possession of pistols to all felons and to drug addicts.[58]

Elements of the above provisions passed by Congress remain in Chapter 45 of the D.C. Code. The provisions at issue were enacted by the District, and they upset the balance enacted by Congress.

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[53] *Id.* at 651.

[54] *Id.*

[55] Senate Report 575, 72d Cong., 1st Sess., 3 (1932).

[56] House Report 767, 72d Cong., 1st Sess., at 2 (1932).

[57] 57 Stat. 586 (1943).

[58] 67 Stat. 93, 94 (1953).

B. The Property Requisition Act of 1941

The Property Requisition Act of 1941, passed just weeks before the attack on Pearl Harbor, authorized the President to requisition property for national defense. The Act declared that it must not be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law)," or "to impair or infringe in any manner the right of any individual to keep and bear arms . . . ."[59] The Report of the House Committee on Military Affairs included this explanation:

> It is not contemplated or even inferred that the President, or any executive board, agency, or officer, would trespass upon the right of the people in this respect. There appears to be no occasion for the requisition of firearms owned and maintained by the people for sport and recreation, nor is there any desire or intention on the part of the Congress or

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[59] P.L. 274, 55 Stat. 742 (Oct. 16, 1941). *See generally* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENNESSEE LAW REVIEW 597, 618-31 (Spring 1995).

> the President to impair or infringe the right of the people under section 2 [*sic*] of the Constitution of the United States, which reads, in part as follows: 'the right of the people to keep and bear arms shall not be infringed.' However, in view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties, our committee deem it appropriate for the Congress to expressly state that the proposed legislation shall not be construed to impair or infringe the constitutional right of the people to bear arms. . . . [T]here is no disposition on the part of this Government to depart from the concepts and principles of personal rights and liberties expressed in our Constitution.[60]

In debate, Rep. Edwin Arthur Hall of New York noted: "Before the advent of Hitler or Stalin, who took power from the German and Russian people, measures were thrust upon the free legislatures of those countries to deprive the people of the possession and use of firearms, so that they could not resist the encroachments of such diabolical and vitriolic state police organizations as the Gestapo, the Ogpu, and the

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[60] Rpt. No. 1120 [to accompany S. 1579], House Committee on Military Affairs, 77th Cong., 1st Sess., at 2 (Aug. 4, 1941).

Cheka." He opposed taking away "the individual rights and liberties of citizens of this Nation by depriving the individual of the private ownership of firearms and the right to use weapons in the protection of his home, and thereby his country."[61] Senator Tom Connally of Texas favored "safeguarding the right of individuals to possess arms."[62]

The conference committee deleted the ban on registration, but kept the declaration against infringing the right to bear arms.[63] Rep. Paul Kilday of Texas warned that "registration of firearms is only the first step. It will be followed by other infringements of the right to keep and bear arms until finally the right is gone."[64] The Second Amendment protects "our right to bear arms as private citizens," Rep. Lyle H. Boren of Oklahoma stated.[65]

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[61] 87 CONG. REC., 77th Cong., 1st Sess., 6778 (Aug. 5, 1941).

[62] *Id.* at 6811 (Aug. 6, 1941).

[63] *Id.* at 7097 (Aug. 13, 1941). Even so, Rep. A.J. May of Kentucky explained that "the right to keep means that a man can keep a gun in his house and can carry it with him . . . and the right to bear arms means that he can go hunting . . . ." *Id.* at 7098.

[64] *Id.* at 7101.

[65] *Id.* *See also id.* at 7102 (Rep. John W. Patman of Texas) ("The people have a right to keep arms; therefore . . . they can properly protect themselves."); *id.* at 7103 (Rep. John J. Sparkman of Alabama) ("The Constitution guarantees to every

A motion to recommit the bill to committee passed by 154 to 24,[66] and the committee restored the prohibition on firearm registration.[67] As enacted into law, the Property Requisition Act conditioned the President's power to requisition property with military uses as follows:

> Nothing contained in this Act shall be construed –
>
> (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), [or]
>
> (2) to impair or infringe in any manner the right of any individual to keep and bear arms . . . .[68]

Once again, at a critical time in American history, the Congress clarified its understanding that the Second Amendment guarantees individual rights.

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citizen the right to keep and bears arms").

[66] *Id.* at 7164 (Aug. 13, 1941).

[67] Rpt. No. 1214, Conference Report [to accompany S. 1579], 77th Cong., 1st Sess., at 2 (Sept. 25, 1941).

[68] P.L. 274, 55 Stat. 742 (1941).

C. The Firearms Owners' Protection Act of 1986

In enacting the Gun Control Act of 1968, Congress provided comprehensive regulations, but rejected bills to prohibit or to require registration of firearms.[69] The Act declared:

> it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.[70]

When experience proved the need for reform, Congress enacted the Firearms Owners' Protection Act of 1986 (FOPA). In doing so, Congress again declared by law the individual character of the rights protected by the Second Amendment:

> The Congress finds that--

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[69] *E.g.*, 114 CONG. REC. 22248-49 (July 19, 1968) (rejection by House of bill to require registration of handguns); 27427 (Sept. 18, 1968) (rejection by Senate of bill to require registration of firearms).

[70] § 101, P.L. 90-618, 82 Stat. 1213 (1968).

> (1) the rights of citizens--
>
> (A) to keep and bear arms under the second amendment to the United States Constitution; [(B)-(D) deleted] . . . require additional legislation to correct existing firearms statutes and enforcement policies . . . .[71]

The finding that the Second Amendment guarantees "the rights of citizens" to keep and bear arms was supported by a scholarly report by the Senate's Subcommittee on the Constitution, which concluded that "the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner."[72]

The legislative record is replete with expressed intentions to protect the Second Amendment rights of individuals. As an example, FOPA preempted state laws which prohibit interstate travel with lawful firearms.[73] Senator Steve Symms of Idaho explained: "The intent of this amendment . . . is to protect the second amendment rights of law-abiding citizens wishing to transport firearms through States which otherwise prohibit the possession of such weapons."[74] Similarly, Rep. Tommy Robinson of Arkansas stated that "our citizens have a constitutional right to bear arms . . . and to travel interstate with those weapons."[75]

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[71] §1(b), P.L. 99-308, 100 Stat. 449 (1986). It also reaffirmed the above 1968 declaration.

[72] *The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution*, Senate Judiciary Committee, 97th Cong., 2d Sess., 12 (1982). See also David Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URBAN L.J. 31 (1976), reprinted in 131 CONG. REC. S8692 (June 24, 1985); Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N.KY.L.REV. 13 (1982), reprinted in 131 CONG. REC. S9105 (July 9, 1985).

The Firearms Owners' Protection Act passed the Senate by a vote of 79 to 15, or 84%.[76] The bill passed the House by a vote of 292 to 130, or 69%.[77]

III. LEGISLATION IN THE 21ST CENTURY

A. Protection of Lawful Commerce in Arms Act

In the Protection of Lawful Commerce in Arms Act of 2005 ("PLCAA"), Congress once again declared the individual character of Second Amendment rights and sought to preclude firearms, particularly handguns, from being banned through litigation.[78] Municipalities sued the firearms industry claiming that the *lawful* manufacture and distribution of firearms is a public nuisance. PLCAA begins with the following Findings:

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[73] 18 U.S.C. § 926A.

[74] 131 CONG. REC. S9114 (July 9, 1985).

[75] 132 CONG. REC. H1695 (Apr. 9, 1986).

[76] 131 CONG. REC. S9175 (July 9, 1985).

[77] 132 CONG. REC. H1753 (Apr. 10, 1986).

> (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.
>
> (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.[79]

The lawsuits sought damages and injunctive relief against the firearms industry for injuries caused by criminals and other third parties who misuse firearms.[80] Yet the manufacture, possession, sale, and use of firearms is strictly regulated by law.[81] Besides unreasonably burdening interstate and foreign commerce, imposition of liability "threatens the diminution of a basic constitutional right and civil liberty."[82]

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[78] P.L. 109-92, 119 Stat. 2095 (2005).

[79] *Id.*, § 2(a).

[80] *Id.*, § 2(a)(3).

[81] *Id.*, § 2(a)(4).

Purposes of PLCAA include "to preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting."[83]

Senator John Thune of South Dakota noted that the bill protected law-abiding gun owners, dealers, and manufacturers "who are having that second amendment right infringed upon by those who are trying to destroy an industry that, for a couple of centuries now, has provided quality workmanship in accordance with Federal and State laws."[84] The bill passed the Senate by a vote of 65 to 31, or just under 68%.[85]

Rep. Sam Graves of Missouri noted: "This law is necessary to prevent a few state courts from undermining our Second Amendment rights guaranteed by the Constitution."[86] Rep. Joe Schwarz of Michigan averred that the Second Amendment's purposes are: "First, to ensure that citizens would have the tools to protect their families and their homes and, second, to ensure that an armed militia could be called up to defend the country in emergencies."[87] The bill passed the House by a vote of 283 to 144, or just over 66%.[88]

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[82] *Id.*, § 2(a)(6).

[83] *Id.*, § 2(b)(2).

[84] 151 Cong. Rec. S9378 (July 29, 2005).

[85] *Id.* at S9396.

[86] 151 Cong. Rec. H9006-07 (Oct. 20, 2005).

B. Disaster Relief & Emergency Assistance Act Amendment

In 2006, Congress amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act to forbid confiscation of lawful firearms in disasters.[89] The enactment prohibits any federal agent or person receiving federal funds from seizing "any firearm the possession of which is not prohibited under Federal, State, or local law," from requiring "registration of any firearm for which registration is not required by Federal, State, or local law"; and from prohibiting a firearm "in any place or by any person where such possession is not otherwise prohibited by Federal, State, or local law."[90] An exception exists for the temporary surrender of a firearm for entry in transportation for rescue or evacuation.[91] An individual aggrieved by a violation of this provision has a private right of action against a person who subjects the individual "to the deprivation of any of the rights, privileges, or immunities secured by this section."[92]

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[87] *Id.* at H9009.

[88] *Id.* at H9010.

[89] Department of Homeland Security Appropriations Act, 2007, Title IV, § 557, P.L. 109-295, 120 Stat 1355, 1391, 1392 (2006), codified at 42 U.S.C. § 5207.

[90] 42 U.S.C. § 5207(a).

[91] 42 U.S.C. § 5207(b).

The bill passed the House as H.R. 5013, the Disaster Recovery Personal Protection Act, by a vote of 322 yeas and 99 nays,[93] or 76%. As passed, the bill included Findings recounting that in the wake of Hurricane Katrina, law enforcement was overwhelmed and citizens were threatened by criminal violence, adding:

> (4) Many of these citizens lawfully kept firearms for the safety of themselves, their loved ones, their businesses, and their property, as guaranteed by the Second Amendment, and used their firearms, individually or in concert with their neighbors, for protection against crime.
>
> (5) In the wake of Hurricane Katrina, certain agencies confiscated the firearms of these citizens in contravention of the Second Amendment, depriving these citizens of the right to keep and bear arms and rendering them helpless against criminal activity.

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[92] 42 U.S.C. § 5207(c).

[93] 152 Cong. Rec. H5755, H5814 (July 25, 2006).

> (6) These confiscations were carried out at gunpoint by nonconsensual entries into private homes, by traffic checkpoints, by stoppage of boats, and otherwise by force. . . .
>
> (11) These confiscations and prohibitions, and the means by which they were carried out, deprived the citizens of Louisiana not only of their right to keep and bear arms, but also of their rights to personal security, personal liberty, and private property, all in violation of the Constitution and laws of the United States.[94]

H.R. 5013 was referred to the Senate and was then inserted as an amendment to an appropriations bill.[95] As a drafting practice, appropriations bills do not include findings, and the Findings in this bill were thus deleted. But the bill remained grounded in the Second Amendment. As explained by chief sponsor Senator David Vitter (La.), "the language we do have on the Senate floor . . . protects fundamental second amendment rights."[96]

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[94] *Id.*

[95] 152 Cong. Rec. S7455, S7489 (July 13, 2006) (amendment No. 4615 to H.R. 5441, which passed as the Department of Homeland Security Appropriations Act, 2007, *supra*).

In sum, this is yet another instance in which the Congress enacted legislation to protect the fundamental, individual right of law-abiding citizens to keep and bear arms.

C. The D.C. Personal Protection Act Bill

Bills have been pending in Congress that would repeal the provisions at issue here. The "District of Columbia Personal Protection Act," a bill to restore Second Amendment rights in the District of Columbia, passed the House by a vote of 250 to 171 in 2004.[97] In the current session of Congress, similar pending bills include S. 1001, sponsored by Senator Kay Bailey Hutchison (R-Tex.), and H.R. 1399, sponsored by Reps. Mike Ross (D-Ark.) and Mark Souder (R-Ind.).[98]

The Findings set forth in § 2 of each version of the above bills include: "The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms." The District's law-abiding citizens are deprived of handguns that are commonly kept by law-abiding persons throughout the United States for lawful defense, which exacerbates the District's high murder rate. The Federal Gun Control Act and the District's criminal laws currently punish possession and use of firearms by felons. The Findings conclude: "Legislation is required to correct the District of Columbia's law in order to restore the fundamental rights of its citizens under the Second Amendment to the United States Constitution and thereby enhance public safety."

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[96] *Id.* at S7494. He added: "It [the Katrina emergency] is exactly that very reason that this second amendment right to bear arms and use legally possessed firearms in defense of yourself, your life, and your property is so crucial . . . ." *Id.*

[97] 150 Cong. Rec. H7758, H7777 (Sept. 29, 2004).

[98] S. 1001 currently has 44 bipartisan cosponsors, and H.R. 1399 currently has 242 bipartisan cosponsors

Although the above bills have not been enacted into law, the Findings represent yet another instance in which a House of Congress expressed the view that the Second Amendment protects individual rights.

IV. A HANDGUN BAN IS UNREASONABLE ON ITS FACE, RENDERING A REMAND FOR FURTHER PROCEEDINGS UNNECESSARY

Congress has historically viewed the Second Amendment as protecting from infringement the right of the people at large to keep and bear arms. It has further regarded ordinary, commonly-possessed rifles, handguns, and shotguns to be constitutionally-protected arms. It has also passed regulations for engaging in firearms businesses and to require background checks on firearm transferees, and has restricted certain dangerous categories of persons from possession of firearms.[99] None of these laws is called into question by the lower court's limited holding.

The standard for whether a right is "fundamental" is whether it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). The right of the people to keep arms is obviously such a right. Yet even if this Court applied a lower "reasonableness" test as the standard of review, the District's handgun ban is unreasonable on its face. The lower court's categorical approach in holding a prohibition on handguns to be unconstitutional per se was correct.

Where Congress has sought to restrict certain firearms, some of which may have other characteristics which overlap with handguns, it has defined them in terms of specific categories.[100] A holding by this Court that the District's pistol ban violates the Second Amendment would not apply to such firearms which are restricted under other categories.

This case involves nothing more than the right of law-abiding persons to keep common handguns and usable firearms for lawful self-defense in the home. Accordingly, no purpose would be served by remanding this case for further fact finding or other proceedings.

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[99] 18 U.S.C. § 923 (licencing), § 922(t) (background checks), and § 922(g) (prohibited persons).

[100] *E.g.*, 18 U.S.C. § 922(o) (non-grandfathered machineguns), § 922(p) (firearms not detectable by X-ray).

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

55 MEMBERS OF THE UNITED STATES SENATE, THE PRESIDENT OF THE UNITED STATES SENATE, AND 250 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES
AMICI CURIAE

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APPENDIX:

THOSE JOINING IN AMICI CURIAE BRIEF

The following members of the United States Congress, and President of the United States Senate Richard B. Cheney, join in this amici curiae brief:

Senate

Senator A. Lamar Alexander (TN, R)
Senator A. Wayne Allard (CO, R)
Senator John A. Barrasso (WY, R)
Senator Max S. Baucus (MT, D)
Senator Robert F. Bennett (UT, R)
Senator Christopher S. Bond (MO, R)
Senator Samuel D. Brownback (KS, R)
Senator James P. D. Bunning (KY, R)
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AMICUS
CURIAE
BRIEF

No.07-290

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, et. al.,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICI[1]

This brief is respectfully jointly submitted by Jeanette Moll on behalf of similarly situated Ohio Concealed Carry Permitholders and the U.S. Bill of

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[1] Party attorneys were duly notified of the filing in writing seven days in advance pursuant to the requirement. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission.

Rights Foundation. Amicus curiae U. S. Bill of Rights Foundation is a non-partisan public interest law policy development organization seeking remedies at law on targeted legal issues that contravene the Bill of Rights and related constitutional law.

SUMMARY OF ARGUMENT

In the law, it is the slippery slope that we must be careful not to start down without an understanding of where that slope will lead. The founders of our nation crafted the Bill of Rights and Constitution with an eye to the tyranny they had experienced in their native England. The rights they sought to ensure had been trampled in their homeland. These rights included privacy rights, freedom of speech and the freedom of religion. Natives of a land with a government sponsored church, they were well aware of the need to keep government out of church so that they could freely worship. It was this overreaching governmental intrusion that formed the basis of the laws that formed our nation.

The right to keep and bear arms was fundamental among these. Our founders deemed it so important that this right was placed at number two in the Bill of Rights. How can an individual be free if he is unable to secure his own home? Never did the founding fathers intend our citizenry to be reliant on an overreaching, all inclusive government to protect our individual rights. Rather, the powers of the government were to be limited so that the government served the people, not that the people served the government.

Should we choose to undercut any of these rights which were reserved to the people, we start down a path that will lead to the tyranny of colonial England where our rights and freedoms are infringed upon.

The well reasoned Court of Appeals decision in *Parker v. District of Columbia*, 478 F.3d 370, 381-382 (D.C. Cir. 2007) focuses on the meaning of "the people" but an equally relevant point to be considered in the instant case is the intent of our founders to ensure that we, the people, are secure in our own homes. The right to keep and bear arms is but one example of this. The Third Amendment states that "[n]o soldier shall, in the time of peace be quartered in any house, without the consent of the owner." U.S. Const. amend. III. Moreover, the Fourth Amendment provides for "[t]he right of the people to be secure in their persons, [and] houses...against unreasonable searches and seizures." U.S. Const. amend IV.

The Bill of Rights as contained within the United States Constitution laid out individual rights. These rights recognize our right to control our homes and the governmental activity that occurs there in. The law at issue in this case is an egregious infringement upon those rights. Law abiding citizens are restricted from moving their own belongings within their own homes and are controlled in the manner in which they keep their personal belongings in their homes. The District of Columbia has clearly overstepped its authority by trampling on the rights that we have held inviolate since our nation's inception.

ARGUMENT

I. THE SECOND AMENDMENT IS AN INDIVIDUAL RIGHT

A. Only "People" Have Rights, Government Has Authority

The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Court held that the "Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons..." *Id.* at 264. The analysis was thorough and steeped in the historical logic and tradition that makes this country great.

The Court outlines the three most popular interpretive models of the Second Amendment: collective right, a hybrid of individual and collective rights and an individual right. *Id.* 218-220. Admittedly, the Court states that none of their "sister circuits" adhere to the individual right model as they do. The individual right model recognizes that the Second Amendment directs the right to keep and bear arms to the individual.

There is no special meaning attached to the word "people" according to the individual right model. *Emerson* at 227. The Court determines that there is no evidence to support that this word in the Second Amendment has a different connotation than it does elsewhere in the Constitution. When taken as a whole, the text of the Constitution highly proposes that "the people" has the exact same meaning in the Second Amendment as the other places in the Constitution. All through the Constitution in fact, "people" have "rights" and also "powers" while state and federal governments have "authority" or "powers" but never "rights." *Id.* at 228. Therefore, rights are reserved for individuals.

The phrase "bear arms" has been used in conjunction with civilians on numerous occasions, which include the declarations of rights and initial constitutional provisions of a minimum of ten states. This illustrates that the common usage of these words were not exclusive to bearing arms during military service; they could refer either to civilian or military situations. *Id*. at 229-231.

To "keep...arms" continues the Court, is an individual right reflecting the plain meaning of those words. *Id*. at 232.

The Court deems that the Second Amendment's preamble: "A well regulated Militia, being necessary to the security of a free State..." is clearly an individual right since it would be inconsistent with the "substantive guarantee's text, its placement within the Bill of Rights and the wording of the other articles thereof and of the original Constitution as a whole" to consider this phrase under any other model. *Id*. at 233.

From the unambiguous logic and analysis of the Court, there can be no uncertainty that the right conveyed by the Second Amendment is an individual one.

B. The Second Amendment as a Collective Right Results in the Loss of an Amendment in the Bill of Rights

Justice Kleinfeld's analysis of the Second Amendment as an individual right in *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) (dissenting from denial of rehearing en banc) is unequivocal and influential. He states that the panel's collective right interpretation is "an odd deviation from the individualist philosophy of our Founders." *Id.* at 571. The opinion of the panel does not address whom the states would sue or even what a claim could be should they try to enforce their collective right. *Id.* He stresses that the 9th Circuit has in effect, repealed the Second Amendment "without the democratic protection of the amendment process, which Article V requires." *Id.* at 571. This results in the loss of one of the amendments in the Bill of Rights and threatens the remainder of the Constitution for all those who live within the Circuit's jurisdiction. *Id.* at 571, 572.

The panel's collective interpretation of "the people" in the Second Amendment has no "logical boundary" and thus threatens all rights guaranteed to "the people" in the Constitution. *Id.* at 572. The collective right applied to "the people" by the panel is inconsistent with the Supreme Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). There, the Court stated that "the people" was a term of art that is used in the Constitution's Preamble, Article I § 2, the First, Second, Fourth, Ninth, and Tenth Amendments and had the same meaning every place it is used. *Silveira* at 576. It is unimaginable that the panel would similarly repeal the First Amendment's right of "the people" to the freedom of assembly, or the Fourth Amendment's protection of "the people's" right to be secure against an unreasonable search and seizure. *Id.* Accordingly, if logic dictates, there can be no other conclusion than to read the phrase "the people" consistently throughout *all* of the amendments in which it appears with the full understanding that these rights are possessed by the individual.

II. A MAN'S HOME IS HIS CASTLE

This notion transcends the actual physical invasion into one's private home by the government. The District of Columbia's gun control laws infringe on the liberties of law abiding citizens only, those who desire to be safe in their home and be able to defend themselves and their family against an intruder. These citizens are not criminals attempting to conceal contraband. The Fourth Amendment sets forth the boundaries of the government while allowing law enforcement to conduct their business of properly apprehending criminals and their contraband from a private home. It states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. amendment IV. The Founders were all too aware that government will invade into all areas of the individual's life unless it is given firm, unyielding limitations. We, as citizens of the United States, must at some point stop the slow and ultimately painful loss of our freedoms. There is a long history of landmark Fourth Amendment cases decided on by this Court. Government needs to be kept in check constantly because of its propensity to ooze into our private lives.

In more recent history, the Court settled the issue that a Fourth Amendment search actually occurs when the government violates society's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 361 (1967). The importance of the home, the sanctity of a residence, whether one owns the property, rents or is a mere overnight guest is illustrated repeatedly in the Fourth Amendment cases the Supreme Court hears.

A. Governmental Presence, Whether Tangible or Intangible, Has No Place In Our Homes

In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court stated at the crux of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id*. (quoting

Silverman v. United States, 365 U. S. 505, 511 (1961)). Fourth Amendment protections come into play when the government violates a person's expectation of privacy that society deems reasonable *Id.* at 33. When we return to our home, we shelter ourselves from the outside world and expect to be safe, to know our government must respect our privacy there and that we will be free from governmental infringement.

Illustrating again the inviolability of one's home, the Court states that governmental intrusion into the interior of a home is the "most commonly litigated area of protected privacy" and the measure of the minimal expectation of privacy that is acknowledged to be reasonable has deep roots from the common law. *Id.* at 34. If that minimal protection is extracted from our expectation, then our protected privacy the Fourth Amendment assures would be eroded. The interior of a home is a constitutionally protected area. *Id.*

The government claimed the thermal scan of the home in *Kyllo* did not detect any private actions happening in private places. The Court stated, "In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." *Id.* at 37. This should hold true for an intangible government presence in our homes as well, such as the government dictating to us, as law abiding citizens, what we can keep in our homes. The Fourth Amendment delineates "a firm line at the entrance to the house." *Id.* at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

Understandably, there is a balance that needs to be struck between an individual's rights and privacy with protecting public concerns. The Court writes, ""The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."" *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

B. English Origins of the Fourth Amendment and the Sanctity of One's Home

In the Fourth Amendment case of *Wilson v. Layne*, 526 U.S. 603 (1999), the Court discusses the often quoted origins of our Fourth Amendment by noting that an English court in 1604 observed that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Id.* at 609-610 (quoting Semayne's Case, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.)). This illustrates that for centuries, the home has been revered, deemed exceptional and needing protection against government infringement. Additionally, William Blackstone stated in his Commentaries on the Laws of England, that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome." *Id.* at 610 (quoting William Blackstone, 4 Commentaries on the Laws of England 223 (1765-1769)). He also wrote that he thought it was the right of every Englishman to have "arms for their defence" and that right stemmed from one's "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Silveira v.Lockyer,* 328 F.3d 567, 576 (quoting 1 William Blackstone, Commentaries on the Laws of England 139 (Legal Classics Library 1983) (1765)). The arms were not only for self defense but for the resistance to tyranny as well. *Id.* at 576. Accordingly, respondent Heller desires to avail himself of the right to defend himself in his home. The Founders exemplified this "centuries-old principle of respect for the privacy of the home" when penning the Fourth Amendment. *Wilson* at 610. Additionally, the *Wilson* Court reminds us that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). Continuing on, the Court points out the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic..." *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 602 (1980)). The government's claims of the *Wilson* case ignore the importance of the "right of residential privacy at the core of the Fourth Amendment." *Wilson* at 612.

We must be cognizant of the fact that the government can invade a home in other ways rather than physical entry. Step by step they erode the sanctity. We as a country must operate in concert to be ever vigilant in protecting our homes from government encroachment whether as individuals, community or through the judiciary. We must also remember our roots, the origins of our protections we possess as documented in our Constitution.

CONCLUSION

For the reasons set forth above, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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AMICUS
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BRIEF

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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

◆

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Respondent.[1]

◆

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include individuals who live and work in every State of the Nation, with a majority residing in the American West. These men and women, many direct descendants of colonists, hold first, foremost, and fundamental, their individual right "to keep and bear arms" to defend themselves, their loved ones, and their property and to defend their country against tyranny. For them, that right is neither an antiquated anachronism nor an historical artifact; instead, it is a critical component of the Constitution's Bill of Rights and a deeply imbued ingredient of the cultural heritage of the American West.

---

[1] In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37(2)(a), the parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

◆

SUMMARY OF THE ARGUMENT

The Court of Appeals for the District of Columbia Circuit held that the Second Amendment protects an individual's right to keep and bear arms, irrespective of a person's participation in a militia. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007). This holding is in accord with the Framers' two primary motivations for inclusion of the Amendment: self-defense and protection from government tyranny. These motivations become obvious upon review of the Framers' ideological predecessors, their personal views on an armed populace, and the political movements of the day.

Furthermore, these motivations can be realized only by a Second Amendment that protects an individual right to keep and bear arms. Logically, in present times, arms can be used for self-defense only if a person, who does not belong to a militia, is guaranteed the individual right to keep and bear arms. Moreover, an armed populace cannot possibly protect against government tyranny if arms are restricted to militia members only, and the organization, arming, and discipline of the militia is reserved solely to the federal government. U.S. Const. art. I, § 8, cl. 16. Should this Court adopt a collective rights construction of the Second Amendment, the decision would be grossly out of step with the history, culture, and jurisprudence of the American West, the people of which dearly value their right to self-defense and protection against government tyranny. Therefore, this Court risks the loss of the high regard that Westerners have for its jurisprudence, should the Court so restrict that right.

◆

ARGUMENT

Petitioners insisted that this Court grant *certiorari* because the decision of the D.C. Circuit Court, in holding that the Second Amendment protects individual rights, "drastically departs from the mainstream of American jurisprudence." Pet. at 8. In actuality, that decision is in complete accord with the jurisprudence, as well as the history and culture, of the States that constitute the American West.[2] An analysis of "Western" history, culture, and jurisprudence, however, must begin with a discussion of the philosophical underpinnings of the Second Amendment.[3] These philosophical underpinnings, which have been embraced by and have endured as essential components of "Western" culture, can be satisfied only if the right "to keep and bear arms" is an individual right.

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[2] For purposes of this Brief, the Western United States, or American West, consists of States and portions of States west of the 100th meridian, but excludes Hawaii and the coastal regions of California, Oregon, and Washington. Though it is acknowledged that the West is culturally, historically, and geographically diverse, this Brief makes generalizations regarding a uniquely Western culture that unquestionably exists.

I. THE PHILOSOPHICAL UNDERPINNINGS OF THE SECOND AMENDMENT INCLUDE THE RIGHT TO SELF-DEFENSE AND THE ABILITY TO GUARD AGAINST GOVERNMENT TYRANNY.

As has been noted frequently, the philosophical underpinnings of the Second Amendment were derived primarily from English values. *See, e.g., Silveira v. Lockyer*, 328 F.3d 567, 582 (9th Cir. 2003) (Kleinfeld, J., dissenting) ("The history that led to the drafting of the Second Amendment evolved for centuries in England, leading to its immediate predecessor in the English Declaration of Rights."); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. 285, 287 (1983) ("[T]he key to [the] construction

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[3] The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

[of the Second Amendment] is the English tradition the colonists inherited, and the English Bill of Rights from which much of the American Bill of Rights was drawn."). In medieval England, organized police forces were non-existent and individuals bearing arms were solely responsible for their own security and self-defense. Joyce Lee Malcolm, *To Keep and Bear Arms* 2 (Harvard University Press 1994). During the reigns of King Charles II, and his brother, King James II, many attempts were made to disarm a heavily armed populace to protect the Crown from a popular revolt. Malcolm, 10 Hastings Const. L.Q., at 295-305. In 1689, after William of Orange conquered England in the Glorious Revolution, Parliament declared that the throne was "vacant." Malcolm, *To Keep and Bear Arms* 113. Parliament then offered William and his wife Mary the throne only on condition that they accept the terms of the newly formed Bill of Rights, amongst which was a proviso that: "the Subjects [of England] which are Protestants [could] have Arms for the Defence suitable to their Conditions and as allowed by Law." *Silveira*, 328 F.3d at 583 (Kleinfeld, J., dissenting); English Declaration of Rights, 1 W. & M., sess. 2, ch. 2 (1689).

Two of the primary motivations for granting this right included: (1) defense of one's property and family against criminals, and (2) protection of individual rights through a check on royal power. Malcolm, *To Keep and Bear Arms* 115-21. These same principles also motivated the Framers of the United

States Constitution. As Judge Kleinfeld, joined by Judges Kozinski, O'Scannlain, and Nelson, explained:

> The English Bill of Rights and the Constitution's predecessor state constitutions based on it protected a private and individual right to bear arms both for self defense and for the defense against oppression. . . . The Second Amendment was not novel, but rather codified and expanded upon [these] long established principles.

Silveira, 328 F.3d at 584 (Kleinfeld, J., dissenting).

The first of these motivations – defense of family and property – was viewed by the Framers, and their philosophical predecessors, as a primary justification for the right to keep and bear arms. Christopher J. Schmidt, *An International Human Right To Keep And Bear Arms*, 15 Wm. & Mary Bill Rts. J. 983, 993-94 (2007) (citing Andrew P. Napolitano, *Constitutional Chaos* 56 (2004)); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 43 (1997) (the Framers "thought the right of self-defense to be absolutely fundamental . . . "). Famed British jurist William Blackstone, upon whose scholarship many of the Framers relied, wrote that "Self-Defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society." 3 William Blackstone, *Commentaries on the Laws of England* 4 (1765-1769). Thus, "having arms for [the people's] defence . . . is, indeed, a publick allowance under due restrictions, of the natural right of resistance and self-preservations, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 William Blackstone, *Commentaries on the Laws of England* 136, 139 (1765-1769).

Likewise, in 1764, Italian author and philosopher Cesare Beccaria explained the importance of this right in his book, *On Crimes and Punishments*, which influenced many of the Framers.[4] Beccaria explained:

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of

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[4] Thomas Jefferson copied the cited excerpt from Beccaria's book into his compilation of favorite quotations. *See* Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comm. 87, 90-91 (1992); Ronald S. Resnick, *Private Arms As The Palladium Of Liberty: The Meaning Of The Second Amendment*, 77 U. Det. Mercy L. Rev. 1 n.142 (1999) (citing Thomas Jefferson, *The Commonplace Book of Thomas Jefferson* 314 (G. Chinard ed., 1926)). In addition, John Adams quoted Beccaria's book to open the Boston Massacre trial. Don B. Kates, Jr., *Handgun Prohibition And The Original Meaning Of The Second Amendment*, 82 Mich. L. Rev. 204 n.132 (1983) (citing 3 *Legal Papers of John Adams* 28 (1965)).

> the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty – so dear to men, so dear to the enlightened legislator – and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.

Kates, 82 Mich. L. Rev. at 234 (citing C. Beccaria, *On Crimes And Punishments* 145 (1819) (originally published in 1764)).

Likewise, as Robert E. Shalhope explained in his oft-cited discussion of the Second Amendment, George Washington and James Madison, among other Framers, "firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society." Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599, 614 (1982). John Adams similarly believed the individual possession of firearms was necessary for private self-defense. Kates, 82 Mich. L.

Rev. at 228 (citing 3 J. Adams, *A Defense of the Constitutions of the Government of the United States of America* 475 (1787-88)). The personal possession of firearms was particularly essential because a professional police force did not exist, even in metropolitan areas, for almost fifty years after the ratification of the Constitution. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 646, n.46 (1989). Thus, preservation of the individual right of self-defense was unquestionably one of the primary motivations behind the Second Amendment. Kates, 9 Const. Comm. at 93.

Regarding the second motivation, "a core value protected by the Second Amendment for 'the people' was 'the Right of the people to alter or abolish' tyrannical government as they had done a decade before." *Silveira*, 328 F.3d at 576 (Kleinfeld, J., dissenting) (quoting The Declaration of Independence para. 2 (U.S. 1776)). The Framers were keenly aware of the success enjoyed by a haphazard bunch of armed colonists who, in their rejection of British tyranny, had just defeated the world's most powerful army. *See, e.g.*, David Harmer, *Securing A Free State: Why The Second Amendment Matters*, 1998 B.Y.U. L. Rev. 55, 82-84 (1998) (citing The Federalist No. 46, at 321 (James Madison) (Jacob E. Cooke ed., 1961)).

Thus, many of the Framers preferred an armed populace to standing armies to protect against tyranny and to preserve liberty. *See, e.g., id.* para. 13 (1776) (Among the Framers' grievances against the King of England was that he had "kept among us, in times of peace, standing armies without the consent of our legislature."). Thomas Jefferson proclaimed, "[t]he strongest reason for the people to retain the right to keep and bear arms is, as a last resort, to protect themselves against tyranny in government." Michael Busch, *Is The Second Amendment an Individual or a Collective Right: United States v. Emerson's Revolutionary Interpretation of the Right to Bear Arms*, 77 St. John's L. Rev. 345, 369 n.144 (2003) (quoting 1 Thomas Jefferson, *Thomas Jefferson Papers* 334 (C.J. Body ed., 1950)). James Madison believed that an armed populace, in conjunction with principles of federalism, was necessary to protect against federal tyranny. The Federalist No. 46, at 335 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."). Likewise, Alexander Hamilton wrote: "If representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self defense, which is paramount to all positive forms of government . . . " The Federalist No. 28, at 224 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Hamilton explained, "if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights, and those of their fellow citizens." The Federalist No. 29, at 229 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

The Bill of Rights, including the Second Amendment, was written in large part to satisfy the concerns of the Anti-Federalists, who believed that "to preserve liberty, it is essential that the whole body of the people always possess arms . . . " *U.S. v. Emerson*, 270 F.3d 203, 244-45, 264 (5th Cir. 2005) ("[T]he Second Amendment protects the right of individuals to privately keep and bear their own firearms . . . "); *Letters From the Federal Farmer to the Republican* 18 (1788). The Framers believed that the "pragmatic value [of the Second Amendment] lay less in repelling usurpation than in deterring it before it occurred." Kates, 9 Const. Comm. at 89. To this end, Justice Joseph Story, in his famed Commentaries on the Constitution, explained that the Second Amendment broadly protects the most fundamental individual liberties: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers." 3 Joseph Story, *Commentaries on the Constitution* § 1890 (1833). Thus, it is clear that protection against tyranny and the corresponding protection of individual liberty was the second philosophical underpinning of the Second Amendment.

II. THESE PHILOSOPHICAL UNDERPINNINGS OF THE SECOND AMENDMENT ARE SATISFIED ONLY IF THE RIGHT TO KEEP AND BEAR ARMS IS AN INDIVIDUAL RIGHT.

Petitioners claim that the right protected by the Second Amendment includes only "the right to keep and bear arms as part of a well-regulated militia, not to possess guns for private purposes." Pet. Br. at 11-12. To determine the validity of this hypothesis, the place to begin is, naturally, the text of the Amendment. As the dissenting judges in *Silveira* explain, "[t]hough the stated justification and purpose of the Amendment relates to the militia, the language is carefully drafted to avoid abridging the traditional English Bill of Rights entitlement of individuals to possess arms for self defense." *Silveira*, 328 F.3d at 588 (Kleinfeld, J., dissenting). Indeed, if Petitioners' hypothesis were valid, neither of the Framers' two primary motivations for the Second Amendment would have been satisfied by the Amendment.

For the Second Amendment to protect an individual's ability to engage in self-defense, the right embodied in the Second Amendment must be individual in nature. This statement is so obvious that it requires little explanation; for an individual to defend himself with arms, he must, personally, possess those arms, regardless of his association with any militia. Moreover, in spite of the development of modern police forces, the use of arms for self-defense purposes remains relevant today. For example, after September 11, 2001, many Americans recognize an increased need to bear arms to protect themselves and their families. *See, e.g.*, Tom Curry, *Gun Arrest Gives Webb Political Opening*, available at http://www.msnbc.msn.com/id/17819572/ (Jan. 25, 2008) (U.S. Sen. James Webb explains that, post-9/11, it is increasingly important to exercise the individual right to bear arms in self-defense, a right he exercises).

Furthermore, this Court's recent decision in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), illuminates the importance of the Second Amendment right of an individual to keep and bear arms for self-defense. There, this Court held that, under ordinary circumstances, an individual has no right to police protection, even in instances when the police are aware of danger to that individual.[5] Indeed, if individuals want to ensure that they are safe from dangers posed by those who would do them harm, they have no choice but to exercise their individual right to "keep and bear arms."

Likewise, the purported requirement of membership in a state-regulated militia would undermine the people's ability, as individuals, to serve as a check against tyranny, thereby directly compromising the people's independence and liberty. The Framers expressly granted the federal government the power to organize, arm, and discipline the militia. U.S. Const. art. I, § 8, cl. 16. It would be impossible for the people to use arms to defend against "usurpation and arbitrary power of rulers" if those rulers were solely responsible for regulating and controlling the distribution, possession, and use of those arms. *See, e.g.*, Schmidt, 15 Wm. & Mary Bill Rts. J. at 993. Thus, the Framers could not possibly have intended for arms to be kept and borne exclusively for use in a militia.

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[5] A mother did not, "for purposes of the Due Process Clause, have a property interest in police enforcement" of a restraining order protecting her children, even when she made repeated requests to the police to enforce that order. *Town of Castle Rock*, 545 U.S. at 768. Ultimately, the subject of that restraining order – the father – murdered his three children. *Id.* at 753-54.

Though the notion of a successful popular uprising may seem obsolete, armed citizenry employing guerilla warfare can achieve success even against a modern, organized military with the most technologically advanced weaponry. *See, e.g.*, Kates, 82 Mich. L. Rev. at 269. In April 1943, for example, a few hundred Jewish Resistance fighters, with only pistols, rifles, and Molotov cocktails, resisted heavily-armed and highly-trained Nazi soldiers for nearly a month. *The Warsaw Ghetto Uprising*, available at http://www.ushmm.org/outreach/wgupris.htm (Jan. 26, 2008). More recently, Afghan rebels, with the approval of the United States, defeated the militarily-superior Soviet Union and drove it from their country. *See, e.g.*, Paul Kengor, *The Crusader: Ronald Reagan and the Fall of Communism* 250-62 (2006).

Moreover, "[t]he great value of the [individual] right [to bear arms] is political, not military. This value lies, not in the fact that the Amendment enables armed resistance, but that by enabling armed resistance it should make the conditions which would justify such resistance less likely to occur." Harmer, 1998 B.Y.U. L. Rev. at 92. Thus, although the likelihood of a popular uprising overthrowing a tyrannical government regime was far greater in the eighteenth century than it is today, the presence of an armed populace and the corresponding threat of armed resistance continue to restrain government. *See, e.g.*, Note, *The Impact of State Constitutional Right To Bear Arms Provisions on State Gun Control Legislation*, 38 U. Chi. L. Rev. 185, 192 (1970). This threat of armed conflict only exists, however, when individuals, irrespective of their participation in a militia, have the right to "keep and bear arms."

III. THE VALUES UNDERLYING THE SECOND AMENDMENT ARE PRESENT IN THE HISTORY, CULTURE, AND JURISPRUDENCE OF THE AMERICAN WEST.

Though the original understanding of constitutional text is the most intrinsically sound method of construction, *see*, *e.g.*, *South Carolina v. U.S.*, 199

U.S. 437, 448 (1905), this Court has engaged occasionally in a more far-reaching cultural and historical examination in its analysis of constitutional text. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (examining "our Nation's history, legal traditions, and practices"). Such an examination of the American West, the Nation's heartland, reveals that the right of individuals to "keep and bear arms" for self-defense and for protection against tyranny, which were the primary philosophical underpinnings of the Second Amendment, remain fundamental elements of the history, culture, and jurisprudence of the American West.

A. The Possession And Use Of Arms For Self-Defense Is Of Fundamental Importance In The History And Culture Of The West.

Prior to 1754, Indian tribes used guns, acquired through trade with French fur traders, for defense against attacking tribes. David B. Kopel, *The Samurai, The Mountie, And The Cowboy* 307-08 (Prometheus Books 1992). After the French defeat in the French and Indian War, Indians acquired guns from British traders. *Id.* In part because of the presence of armed Indians, "life itself would have been impossible for the new people who would be called 'Americans,'" as the new settlers frequently had to defend themselves with their own guns. *Id.* at 309. Because Western expansion was inevitably met with resistance, arms were essential for self-defense from the seventeenth through the twentieth centuries. *Id.*

Likewise, the rapid westward expansion surpassed the government's ability to enforce the law. *Id.* at 323. Even in frontier towns that employed some form of official police, the law enforcement officers that did exist often lacked the resources to pursue criminals beyond the town border, or were too corrupt themselves to do so. *Id.* at 323, 326. Thus, settlers were left to defend themselves, often with firearms that they owned and kept in their homes. *Id.*

To this day, the right to "keep and bear arms" for self-defense remains a core value amongst citizens of the American West. In December 2007, when an attacker opened fire inside a mega-church in Colorado Springs, one of the church members, who volunteered as an armed security guard, saved hundreds of lives when she shot and wounded the attacker. Judith Kohler, *Police: Gunman Had Been Thrown Out Of Missionary School*, Denver Post, Dec. 10, 2007, available at http://www.denverpost.com/search/ci_7681300 (Feb. 2, 2008). Similar examples of the use, by private citizens, of their guns to defend themselves and others are legion. John R. Lott, Jr., *More Guns, Less Crime* (University of Chicago Press 1990).

B. The Possession And Use Of Arms As A Defense Against Tyranny To Preserve Individual Liberty Is A Fundamental Value In Western History And Culture.

Defense of individual liberty from tyranny through the right to "keep and bear arms" is as fundamental to Westerners as it was to the Framers. The American West is one of the most sparsely settled, rural areas in the United States. Of the 16 States with the lowest population density, 15 are located in the West. U.S. Census Bureau, *Population, Housing Units, Area, and Density: 2000*, available at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-ds_name=DEC_2000_SF1_U&-CONTEXT=gct&-mt_name=DEC_2000_SF1_U_GCTPH1_US9&-redoLog=false&-_caller=geoselect&-geo_id=&-format=US-9|US-9S&-_lang=en (Jan. 15, 2008). Not surprisingly, therefore, Western culture is primarily a "land-based culture" closely associated with ranching and farming activities. Erin Morrow, *The Environmental Front: Cultural Warfare In The West*, 25 J. Land Resources & Envtl. L. 183, 208 (2005); H.R. Res. 411, 109th Cong. (2005) ("Ranching is an important part of the culture and economy of many rural communities throughout the American West, and the rural West depends on a healthy and thriving ranching industry."). Much like the "individualist philosophy of our Founders," *Silveira*, 328 F.3d at 571 (Kleinfeld, J., dissenting), this rural Western culture emphasizes individualism, independence, self-sufficiency, and self-governance, resulting in a strong distrust of government.[6] Morrow, 25 J. Land Resources & Envtl. L. at 209-216.

A report by the National Institute of Justice reveals that these characteristics also typify the modern gun culture. Specifically, the Institute concluded that the modern gun culture is "best typed as rural rather than urban: . . . emphasiz[ing] independence, self-sufficiency, mastery over nature, [and] closeness to the land. . . ." Kopel, at 305 (citing James Wright, Peter Rossi, and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* 113 (Aldine 1983)). Additionally, to this day, the gun culture generally distrusts government and is skeptical towards the government's true intentions. Erik Luna, *The .22 Caliber Rorschach Test*, 39 Hous. L. Rev. 53, 77 (2002). "To many gun owners, firearms [and the threat of their use] represent the last line of defense against official tyranny . . . " although actual armed conflicts with the government are rare. *Id.* Indeed, in most instances, the individual right to "keep and bear arms" restrains federal employees and provides an incentive for them to act appropriately, without actually placing their safety in jeopardy.

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[6] The Libertarian Party, which advocates limited government – including a right to keep and bear arms for self-defense and for protection against government tyranny – was founded in a Western State (Colorado) in 1971. John Hospers, *The Founding of the Party*, available at http://libertyunbound.com/archive/2007_06/hospers-party.html (Jan. 28, 2008); *Why Libertarians Support Equal Rights for America's Gun Owners*, available at http://www.lp.org/issues/gun-rights.shtml (Jan. 28, 2008).

Nonetheless, although widespread possession of guns amongst the populace serves primarily to deter government tyranny without resorting to actual violence, Harmer, 1998 B.Y.U. L. Rev. at 92, one example of an armed conflict occurred in 1992 at Ruby Ridge, Idaho. There, private citizens exercised their right to bear arms in an attempt to defend themselves against an overzealous and unconstitutional government siege. *Harris v. Roderick*, 126 F.3d 1189, 1192-94 (9th Cir. 1997).

C. The Possession And Use Of Arms For Self-Defense And Defense Against Tyranny To Preserve Individual Liberty Is Viewed As A Fundamental Right In Western Culture, As Evidenced By Arms Jurisprudence.

Contrary to Petitioners' allegation that an individual rights construction of the Second Amendment "drastically departs from the mainstream of American jurisprudence," an analysis of the jurisprudence in the American West reveals that Westerners share the same individual rights views as the Framers of the Amendment. Pet. at 8. Of the 18 States comprising the American West, only California lacks some explicit constitutional protection for the right to keep and bear arms. Robert A. Creamer, *History Is Not Enough: Using Contemporary Justifications For The Right To Keep And Bear Arms In Interpreting The Second Amendment*, 45 B.C. L. Rev. 905, 920-25 (2004). Of the remaining 17 States, Kansas has constitutional provisions similar to the Second Amendment, Idaho grants the right to bear arms to "the people," and the Alaska constitution grants an "individual right to keep and bear arms." Kan. Const. Bill of Rights, § 4; Idaho Const. art. I, § 11; Alaska Const. art. I, § 19. The remaining 14 Western States go much farther in defining the right. Arizona, Colorado, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming all explicitly protect the individual's right to bear arms for use in self-defense. Ariz. Const. art. 2, § 26; Colo. Const. art. II, § 13; Mo. Const. art. 1, § 23; Mont. Const. art. 2, § 12; Neb. Const. art. I, § 1; Nev. Const. art. 1, § 11; N.M. Const. art. II, § 6; N.D. Const. art. I, § 1; Okla. Const. art. 2, § 26; Or. Const. art. I, § 27; S.D. Const. art. VI, § 24; Texas Const. art. I, § 23; Utah Const. art. I, § 6; Wash. Const. art. 1, § 24; Wyo. Const. art. 1, § 24. Both the prevalence of such constitutional provisions and the degree to which they explicitly protect an individual's right to bear arms provide compelling evidence that the people of the American West view the right to keep and bear arms for self-defense as a fundamental right.

Moreover, these Western values are not some sort of cultural relic. Since 1978, seven Western States have added or amended constitutional provisions related to the right to bear arms, and in so doing, each State either strengthened the individual's right to bear arms or preserved an already existing individual right to bear arms. Prof. Eugene Volokh, *State*

Constitutional Right To Keep And Bear Arms Provisions, available at http://www.law.ucla.edu/volokh/bearams/statecon.htm (Jan. 28, 2008); Creamer, 45 B.C. L. Rev. at 918. Thus, the right to keep and bear arms for the purposes of self-defense remains an important value in the West. For Westerners there are few other rights as important as the right, as individuals, to keep and bear arms.

Likewise, Western courts have not hesitated to protect an individual's right to keep and bear arms for self-defense or as protection against government tyranny in support of individual liberty. For example, Article I, § 27 of the Oregon Constitution provides: "The people shall have the right to bear arms for the defence of themselves and the State, but the Military shall be kept in strict subordination to the civil power." In *Oregon v. Hirsch*, 114 P.3d 1104, 1114 (Or. 2005), the Oregon Supreme Court explained that the likely purpose for this constitutional provision was to enable the people to engage in self-defense and as a check on government power. (Citing *Oregon v. Kessler*, 614 P.2d 94, 97 (Or. 1980)). Similarly, the South Dakota Supreme Court has concluded that the State constitution, including the right to bear arms, protects an individual's right to self-defense. *Conaty v. Solem*, 422 N.W.2d 102, 104-05 (S.D. 1988).

Although all the States, to various degrees, sanction the use of deadly force as a last resort for self-defense, *see, e.g.*, Martha C. Nussbaum, *Two Conceptions Of Emotion In Criminal Law*, 96 Colum.

L. Rev. 269, 327 (1996); *Beard v. U.S.*, 158 U.S. 550, 563 (1895),[7] many Western States have expanded the right to self-defense through "make my day" or "castle doctrine" laws that give individuals a broad right to use deadly force for self-defense within the home, even if not a last resort. *See, e.g.*, Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality In Self-Defense Law*, 2 J.L. Econ. & Pol'y 331, 336-39 (2006). Currently, at least eleven of the eighteen Western States have some form of "make my day" or "castle doctrine" statute on the books, eight of which have been enacted in the past two years. Most States having such laws are "stand your ground" States that do not impose a duty to retreat. Alaska Stat. Ann. § 09.65.330 (2006); Ariz. Rev. Stat. § 13-418 *et seq.* (2006); Colo. Rev. Stat. Ann. § 18-1-704.5 (1985); Idaho Code Ann. § 6-808 (2006); Kan. Stat. Ann. § 21-3218 *et seq.* (2006); Mont. Code Ann. § 45-3-103 (1973); N.D. Century Code § 12.1-05-07 (2007); 21 Okla. St. Ann. § 1289.25 (2006); S.D. Codified Laws

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[7] In *Beard*, this Court held:

> A man may repel force by force in defense of his person, habitation, or property against anyone or many who manifestly intend and endeavor to commit a known felony by violence or surprise or either. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and if, in the conflict between them he happen to kill him, such killing is justifiable.

Beard, 158 U.S. at 563 (citing 2 Whart. Cr. Law, § 1019).

§ 22-18-4 (2006); Texas Penal Code Ann. § 9.31 (2007); Utah Code Ann. § 76-2-405 (1973).

Furthermore, many Western courts have interpreted broadly an individual's right to self-defense outside the home. *See, e.g., Utah v. Starks*, 627 P.2d 88 (Utah 1981) (defendant may use deadly force in self-defense even after defendant armed himself and went to a location where he knew he would find the deceased); *Wyoming v. Bristol*, 84 P.2d 757 (Wyo. 1938) (defendant who armed himself, went to the restaurant in which his enemy was eating, and was attacked, unprovoked, by his enemy, could use deadly force against his enemy in self-defense); *Thomas v. Texas*, 51 S.W. 1109 (Tex. Crim. App. 1899) (deadly force may be used in self-defense even if defendant seeks out deceased for the purpose of provoking difficulty, so long as there was no actual provocation).

Ultimately, Western jurisprudence reveals that Westerners share the same views of the Second Amendment as did the Framers. Specifically, the right to "keep and bear arms" is both an individual and fundamental right, the exercise of which may be used by citizens for their own self-defense and to protect their Republic from tyranny.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. LDF's first Director Counsel was Thurgood Marshall. Since its founding, LDF has been committed to transforming this nation's promise of equality into reality for all Americans, with a particular emphasis on the rights of African Americans. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

In densely populated urban centers like the District of Columbia (the "District"), gun violence deprives many residents of an equal opportunity to live, much less succeed. The effects of gun violence on African-American citizens are particularly acute; in 2004 alone, all but two of the 137 firearm homicide victims in the District were African Americans, most of them between the ages of fifteen and twenty-nine years old. *See* The Centers for Disease Control and Prevention, *WISQARS, Leading*

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[1] Counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief. Letters of consent by the parties to the filing of this briefing have been lodged with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Causes of Death Reports (1999-2004), http://webappa.cdc.gov/sasweb/ncipc/leadcaus.html. LDF thus has an interest in this case, which raises significant issues regarding the authority of locally elected officials to enact regulations intended to promote public health and safety by reducing gun deaths, gun injuries, and gun-related violence.

SUMMARY OF ARGUMENT

The Second Amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II. Throughout the history of the United States, this language has consistently been interpreted to permit Congress and the various State legislatures to enact regulations governing an individual's possession or use of firearms—including absolute prohibitions on particularly dangerous categories of firearms. This Court has never invalidated such a statute under the Second Amendment. Moreover, until this decade, despite many opportunities to do so, no federal Court of Appeals had ever recognized the existence of an individual right under the Second Amendment to "keep and bear Arms" for purely private purposes. Rather, this Court and the overwhelming majority of courts—both State and federal—that have addressed the issue have almost unanimously and correctly held that the right protected by the Second Amendment is one that exists only in the context of a lawfully organized militia. To hold differently now—in the face of precedent, history, and an unmistakable public health and safety imperative—would constitute a radical and unwarranted departure from the jurisprudence of this Court.

Having litigated the cases leading up to and including *Brown v. Board of Education*, 347 U.S. 483 (1954), wherein this Court found its earlier precedent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), to be wrongly decided and inconsistent with the Equal Protection Clause of the Fourteenth Amendment, *amicus* is well aware that there are times when this Court must change course and depart from precedent, even where that precedent is clear and established. Indeed, *amicus* has previously urged this Court to alter or overrule precedent and would do so again if it were necessary and appropriate.

This case presents no such occasion. The type of radical departure from this Court's Second Amendment jurisprudence that is reflected in the opinion of the D.C. Circuit is not warranted. Although the type, use, cultural significance and regulations on the purchase, possession, and use of firearms vary from community to community, handguns—because they are portable and easy to conceal—are uniquely lethal instruments, which are involved in the vast majority of firearm violence in America. Handgun violence in the District exacts a particularly high toll on the District's African-American residents. Multiple municipalities, including the District, have placed significant restrictions on the possession and use of handguns, while permitting the registration of other weapons such as shotguns and rifles. Nevertheless, in contravention of the almost unanimous authority of the State and federal courts nationwide, the D.C. Circuit interpreted the Second Amendment to invalidate those regulations. *See Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007). The D.C. Circuit's ruling threatens the viability of any regulation or prohibition on any particular category of firearm, no matter how deadly the weapon, how grave a threat it poses to public health and safety, or how reasonable the regulation.

This Court should reverse the decision below and reaffirm that its consistent and established Second Amendment jurisprudence remains firmly in place today.

ARGUMENT

I. A Radical Departure from This Court's Second Amendment Jurisprudence Is Not Warranted

Amicus recognizes the importance of principles of *stare decisis*, *see, e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992), but also acknowledges that a departure from prior precedent can be warranted under certain circumstances, *see, e.g.*, *Brown v. Bd. of Educ.* 347 U.S. 483, 492-93 (1954) (reexamining the meaning of the Fourteenth Amendment and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), in light of the "full development and . . . present place [of public education] in American life"). This case does not present such circumstances. As summarized by Chief Justice Rehnquist in reaffirming this Court's landmark ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966),

> While "'*stare decisis* is not an inexorable command,'" *State Oil Co. v. Khan*, 522 U.S. 3, 20, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)), particularly when we are interpreting the Constitution, *Agostini v. Felton*, 521 U.S. 203, 235, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997), "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *United States v. International Business Machines Corp.*, 517 U.S. 843, 856, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) (quoting *Payne*, *supra*, at 842 (Souter, J., concurring) (in turn quoting *Arizona v. Rumsey*, 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984))).

Dickerson v. United States, 530 U.S. 428, 443 (2000). *See also John R. Sand & Gravel Co. v. United States*, No. 06-1164, slip op. at 9 (Jan. 8, 2008) ("To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness would itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability. We have not found here any factors that might overcome these considerations.").

No such "special justification" for departing from well-established precedent has been demonstrated here. The established understanding of the Second Amendment has not proven unworkable; rather, restrictions on certain categories of firearms are prevalent throughout the country and have been in place for decades. Furthermore, there have been no evolving principles of law that have rendered the established understanding of the Second Amendment "no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855; *see also Dickerson*, 530 U.S. at 443 (acknowledging that *stare decisis* is not controlling where "subsequent cases have undermined [a precedent's] doctrinal underpinnings"). Nor have there been fundamental shifts in any facts that would justify abandoning precedent. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2721-25 (2007) (Kennedy, J.) (reversing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) in light of new "widespread agreement" among economists); *Casey*, 505 U.S. at 854-55; *Brown*, 347 U.S. at 492-93. If anything, the contemporary epidemic of handgun violence in urban areas suggests that arguments in favor of a radical reinterpretation of the Second Amendment should be rejected.

A. The Second Amendment Does not Protect an Individual Right to "Keep and Bear Arms" for Purely Private Purposes

For over two hundred years, no federal court (without being reversed) has ever found that a statute is facially invalid under the Second Amendment. This Court has never done so, and with the exception of the court below and the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the federal Courts of Appeals and the majority of the State appellate courts have been consistent with respect to the Second Amendment: it does not protect an individual right to possess or use firearms outside of the context of a lawfully organized militia. Indeed, the text of the Second Amendment itself does not provide for such a right (*see* Petitioners' Br. at 17-21), and for the Court to recognize an individual right to "keep and bear Arms"[2] would represent a radical departure from the consistent and long-established understanding of the Second Amendment.

This Court has never invalidated a challenged firearm restriction on Second Amendment grounds. *See Presser v. Illinois*, 116 U.S. 252, 265 (1886) (holding that the Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the States"); *Miller v. Texas*, 153 U.S. 535, 538 (1894) ("[I]t is well settled that the restrictions of these amendments operate only on the Federal power, and have no reference whatsoever to proceedings in state courts."); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900) (citing *Presser*); *Twining v. New Jersey*, 211 U.S. 78,

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[2] Although we will not repeat petitioners' and other *amici*'s extensive analysis of the Second Amendment's text, *amicus* agrees that the phrase "keep and bear Arms" must be read in the context of the preceding clause addressing a "well regulated Militia," *see* Petitioners' Br. at 17-21, and cannot be fairly read to recognize the right of an individual to "keep and bear Arms" for purely private purposes.

98 (1908) (same). Similarly, this Court has consistently held that specific restrictions on the ability of individuals to possess and use guns are permissible. *See, e.g., Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) ("the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons"); *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (law prohibiting felons from possessing guns does not "trench upon any constitutionally protected liberties").

This Court could not reinterpret the Second Amendment to protect an individual right to "keep and bear Arms" for purely private uses without overruling *United States v. Miller*, 307 U.S. 174 (1939). *Miller* clearly states that the Second Amendment's guarantee of the right to bear arms can be understood only in the context of the militia:

> The Constitution as originally adopted granted to the Congress the power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *With obvious purpose to assure the continuation and render possible the effectiveness of such*

> *forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.*

Id. at 178 (emphasis added). Under *Miller*, any possession or use of a firearm not in that context would fall outside the scope of the Second Amendment.

Notably, even the D.C. Circuit recognized that the Amendment must be construed in light of its first clause, which explicitly refers to a "well regulated Militia." The D.C. Circuit reasoned that "[o]nly 'Arms' whose 'use or possession . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia' would qualify for protection" under the Second Amendment. *Parker*, 478 F.3d at 394 (quoting *Miller*, 307 U.S. at 177).[3] Under this interpretation of *Miller*, for an individual to assert successfully a Second Amendment right, he or she right need not participate in an organized militia, but the firearm that he or she "keep[s] and bear[s]" must be of the *type* that could be used in a militia. This represents a recognition that the concept of the militia places at least *some* substantive limits on the right to "keep and bear Arms" set forth in the Second Amendment.

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[3] This interpretation of *Miller* was also utilized by the only other federal Court of Appeals to conclude that the Second Amendment guarantees an individual right to possess and use firearms for purely private purposes, the Fifth Circuit in *Emerson*, *supra*, 270 F.3d at 224 (arguing that *Miller's* ruling was premised on the notion that a sawed-off shotgun "is not . . . one of the 'Arms' which the Second Amendment prohibits infringement of the right of the people to keep and bear").

Once this concession is made, the question is no longer whether the concept of a "militia" places *any* limits on the "right of the people to keep and bear Arms," but rather *how* it limits that right. Is the right guaranteed as to the *manner* in which the people "keep and bear Arms" (i.e., only in connection with the activities of a militia) or is the right related to the *types* of "Arms" that one may "keep" or "bear" (i.e., only those firearms that could actually be used in a militia)? As explained by the First Circuit only a few years after the Court rendered its ruling in *Miller*, the latter interpretation, which is the basis of the opinion below, would grant a "right" to the "possession or use by private persons not present or prospective members of any military unit, of distinctly military arms, such as machine guns, trench mortars, anti-tank or anti-aircraft guns," while permitting the government to regulate only those "weapons which can be classed as antiques or curiosities." *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

The drafters of the Second Amendment surely did not intend to protect an individual's right to "keep and bear" only the deadliest weapons technologically possible in a given era. And, indeed, the only reasonable interpretation of *Miller* is that it is just the nature of the "possession or use" of a weapon, not the character of the weapon itself, that must be related to a militia in order for Second Amendment rights to attach. *Miller*, 307 U.S. at 178. The D.C. Circuit has misinterpreted the case.

The Court's understanding of the rights conferred by the Second Amendment, as reflected in *Miller*, has remained fairly constant over time, even though the Court has not had a more recent occasion to construe the Amendment itself. *See, e.g., Lewis,* 445 U.S. at 65 n.8 ("[L]egislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." (citing *Miller,* 307 U.S. at 178)); *Adams v. Williams,* 407 U.S. 143, 150 (1972) (Douglas, J., dissenting) ("There is no reason why all pistols should not be barred to everyone except the police."); *United States v. Lopez,* 514 U.S. 549, 603 (1995) (Stevens, J. dissenting) ("Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use. . . .").[4]

Other statements by former members of this Court support the same conclusion. In an interview after his retirement from the bench, Chief Justice Burger harshly criticized the argument that the Second Amendment recognizes an individual right to possess or use firearms for purely personal purposes, characterizing that argument as

> *one of the greatest pieces of fraud, I repeat the word "fraud,"* on the American public by special interest groups that I've seen in my lifetime.

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[4] The majority opinion in *Lopez* appeared also to recognize that the federal firearm regulation at issue (the Gun Free School Zones Act, 18 U.S.C. § 922(q) (1990)) would have been within congressional authority had there been proven some connection between the regulated conduct and interstate commerce. *See* 514 U.S. at 559-61.

> The real purpose of the Second Amendment was to ensure that state armies—the militia—would be maintained for the defense of the state.

Warren E. Burger, *The Right to Bear Arms*, Parade Mag., Jan. 14, 1990, at 4, quoted in *Silveira v. Lockyer*, 312 F.3d 1052, 1063 (9th Cir. 2002) (emphasis added). Similarly, Justice Powell said in a speech before the American Bar Association: "[w]ith respect to handguns," in contrast "to sporting rifles and shotguns," it "is not easy to understand why the Second Amendment, or the notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number of murders in our society." Lewis Powell, Capital Punishment, Remarks Delivered to the Criminal Justice Section, ABA 11 (Aug. 7, 1988), quoted in Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 655 (1989).[5]

Although these statements do not carry the weight of precedent, they illustrate how radical the position taken by the D.C. Circuit truly is. A robust Second Amendment right to "keep and bear Arms" for purely private purposes has *never* been taken seriously by any majority of the members of the Court. Nor has the Court *ever* invalidated a restriction on firearms under the Second Amendment. To do so now would represent a radical and unwarranted departure from the Court's Second Amendment jurisprudence.

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[5] Erwin Griswold, former United States Solicitor General and dean of Harvard Law School has written, "[T]hat the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American Constitutional law." Erwin Griswold, *Phantom Second Amendment "Rights"*, Wash. Post, Nov. 4, 1990, at C7.

Significantly, the Court's Second Amendment jurisprudence has been consistently and effectively applied by both lower federal courts and State courts of last resort. The First,[6] Third,[7] Fourth,[8] Sixth,[9]

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[6] In *Cases*, 131 F.2d at 923, the First Circuit, focusing on the Second Amendment's first clause, rejected a criminal defendant's Second Amendment claim on the grounds that the defendant had produced no evidence that he "was or ever had been a member of any military organization" and that he acted "without any thought or intention of contributing to the efficiency of the well regulated militia . . . ."

[7] In *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), the Third Circuit rejected a criminal defendant's argument that, because he was associated with an informally organized militia, his possession of a machine gun was protected by the Second Amendment. Then-Judge Alito dissented from the opinion, but only on the grounds that a federal prohibition on machine guns exceeded congressional authority under the Commerce Clause. *See id.* at 292 (Alito, J., dissenting). Then-Judge Alito observed that he "would view this case differently if Congress . . . had made a finding that intrastate machine gun possession, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce." *Id.*

[8] In *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995), the Fourth Circuit, relying on the first clause of the Second Amendment, rejected a Second Amendment claim brought by a citizen who had been denied an application to purchase a handgun. The Fourth Circuit concluded that "the Second Amendment preserves a collective, rather than individual right" that "must bear a reasonable relationship to the preservation or efficiency of a 'well-regulated militia'" (quoting *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (in turn quoting *Miller*, 307 U.S. at 178)).

[9] In *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), the Sixth Circuit rejected a Second Amendment claim on the grounds that the Second Amendment "applies only to the

Seventh,[10] Eighth,[11] Ninth,[12] Tenth,[13] and Eleventh Circuits[14] have all concluded that the Second

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right of the State to maintain a militia and not the individual's right to bear arms" (quoting *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971)).

[10] In *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999), the Seventh Circuit rejected a Second Amendment challenge to 18 U.S.C. § 922 (g)(9), which prohibits individuals convicted of domestic violence from owning firearms, holding that the Second Amendment "inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia."

[11] In *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992), the Eighth Circuit did not explicitly hold that the Second Amendment does not protect an individual right, but held that, regardless of whether such a right exists, it cannot apply where the defendant's possession and use of a machine gun was not "reasonably related to the preservation of a well regulated militia" because the purpose of the Amendment was to restrain federal interference with the State militias. Like the Third Circuit in *Rybar*, the Eighth Circuit ruled that membership in an informal private militia was insufficient to trigger any protection under the Second Amendment. *Id.*

[12] In *Silveira v. Lockyer*, 312 F.3d 1092 (9th Cir. 2002), the Ninth Circuit, relying on an analysis of the text of the Second Amendment, the historical context of ratification, and relevant Supreme Court precedent, rejected the notion that the Second Amendment protects an individual right to possess or use firearms.

[13] In *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), the Tenth Circuit upheld a conviction for the knowing possession of an unlicensed machine gun, on the grounds that the defendant had shown no connection to the State militia. The Tenth Circuit based its analysis on the purpose of the Amendment, which it concluded was to preserve the effectiveness and assure the continuation of the state militia. The Tenth Circuit rejected the argument that, because "militia" under Kansas law was defined to include all able-bodied men between the ages of twenty-one and forty-five,

Amendment does not refer to an individual right to "keep and bear Arms" for purely private purposes.[15] Similarly, the majority of State appellate courts (and the courts of the District itself) considering this question have also concluded that there is no right to "keep and bear Arms" outside of the context of the activity of a lawfully organized militia.[16] Moreover, the vast majority of State appellate courts considering the question of whether the term "bear

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defendant was effectively a member of a "militia" for Second Amendment purposes. *Id.*

[14] In *United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997), the Eleventh Circuit rejected a criminal defendant's Second Amendment claim on the grounds that he failed to demonstrate "a reasonable relationship between his possession of . . . machineguns and pipe bombs and 'the preservation or efficiency of a well regulated militia'" (quoting *Miller*, 307 U.S. at 177). As in *Oakes*, the Court rejected an argument based on the definition of "militia" under State law (in this case, under Georgia law). *Id.* at 1272-73.

[15] The Second Circuit has not directly addressed the issue of whether the Second Amendment protects an individual right to possess or use firearms. In *United States v. Toner*, 728 F.2d 115, 128-29 (2d Cir. 1984), however, the Second Circuit, citing *Miller*, held that firearm restrictions are subject only to rational basis review and, applying that standard, upheld a statute that prohibited gun ownership by undocumented aliens.

[16] *See, e.g.*, *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. State*, 432 P.2d 929, 930 (Nev. 1967); *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968); *In re Cassidy*, 51 N.Y.S.2d 202, 205 (N.Y. App. Div. 1944); *State v. Fennell*, 382 S.E.2d 231, 232 (N.C. Ct. App. 1989); *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976); *Masters v. State*, 653 S.W.2d 944, 945 (Tex. App. 1983); *State v. Vlacil*, 645 P.2d 677, 679-80 (Utah 1982); *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987); *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984).

arms" can refer to non-military uses of firearms have concluded that it does not.[17]

To be sure, as the D.C. Circuit noted, several State appellate courts have referred to an individual "right" to possess and use firearms, but those decisions are in the minority, generally rely on State constitutional provisions, and contain no detailed analysis of the Second Amendment. Most important, none of those cases found a statute facially invalid for violating the Second Amendment.[18] Until the Fifth Circuit's 2001 ruling in *Emerson*, no federal court in this nation's history had ruled (without being reversed) that the Second Amendment protects an individual right to the "keep and bear Arms" for purely private purposes. This Court should not lightly disregard the accumulated wisdom of two centuries of jurists interpreting the Second Amendment and ignore the significance of having clarity in this area of the law.

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[17] *See, e.g.*, *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840) (stating that "[a] man in pursuit of deer, elk and buffaloes, [sic] might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms*," and ruling that with the phrase "keep and bear arms," "[n]o private defence was contemplated") (emphasis in original); *English v. State*, 35 Tex. 473, 476 (1872) ("The word 'arms' in the connection we find it in the Constitution of the United States refers to the arms of the militiaman or soldier, and the word is used in its military sense."); *Hill v. Georgia*, 53 Ga. 472, 475 (1874) ("[T]he language of the constitution of this state, as well as that of the United States, guarantees only the right to keep and bear the 'arms' necessary for a militiaman."); *Fife v. State*, 31 Ark. 455, 459 (1876) (defining "arms" as "weapons [that] are adapted to the ends indicated above, that is, the efficiency of the citizen as a soldier, when called on to make good the defense of a free people," and upholding a prohibition on "any pistol of any kind whatever" as consistent with "the constitutional right of the citizens of the State to keep and bear arms for their common defense."); *State v. Workman*, 35 W. Va. 367 (1891) ("[I]n regard to the kind of arms referred to in the [Second A]mendment, it must be held to refer to the weapons of warfare to be used by the militia."); *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905) (observing that it is "apparent from the [S]econd [A]mendment to the federal [C]onstitution" that the right to bear arms applies only to "a member of a well-regulated militia, or some other military organization provided for by law"); *In re Ramirez*, 193 Cal. 633, 651-52 (1924) ("[T]he right to keep and bear arms . . . refers only to the bearing of arms by the citizens in the defense of a common cause."); *cf. Ex parte Thomas*, 97 P. 260 (Okla. 1908) (interpreting Oklahoma Constitution) ("[T]he arms, the right to keep which is secured, are such as are usually employed in civilized warfare.").

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[18] The D.C. Circuit discusses decisions in seven States that the D.C. Circuit interprets as recognizing an individual right to "keep and bear Arms." But all of the cases rely primarily on the various States' own constitutions, and none of the cases in question actually discuss or analyze the Second Amendment at any length. *See Brewer v. Commonwealth*, 206 S.W.3d 343, 347 (Ky. 2006); *State v. Williams*, 148 P.3d 993, 998 (Wash. 2006); *Rohrbaugh v. State*, 607 S.E.2d 404, 412-13 (W. Va. 2004); *State v. Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *Stillwell v. Stillwell*, 2001 Tenn. App. LEXIS 562, at *10-12 (2001); *State v. Anderson*, 2000 Tenn. Crim. App. LEXIS 60, at *19 n.3 (2000); *Hilberg v. Woolworth*, 761 P.2d 236, 240 (Colo. 1988); *State v. Nickerson*, 247 P.2d 188, 192-93 (Mont. 1952). Furthermore, three of these cases expressly acknowledged the authority of the State to restrict an individual's right to possess and use firearms in order to promote public health and welfare. *See Rohrbaugh*, 607 S.E.2d at 413; *Blanchard*, 776 So. 2d at 1168; *Hilberg*, 761 P.2d at 240. A fourth State appears to take such restrictions for granted. *See Williams*, 148 P.3d at 998. Of the eight decisions cited by the D.C. Circuit, only *one* decision actually overturned a law or reversed a judgment on the basis of an individual right to "keep and bear Arms." *See Stillwell*, 2001 Tenn. App. LEXIS 562, at *10-12. That unpublished decision, in which the court reversed a family court order forbidding a father to carry weapons while visiting his children, relies entirely on State law and State precedent. *See id.* Although the court mentions the Second Amendment in passing, the court does not analyze or discuss it. *See id.* In sum, therefore, the D.C. Circuit mischaracterizes the State precedent which it purports provides authority for an independent right to bear arms.

B. The Clear and Established Understanding of the Second Amendment Should Not Be Disturbed

1. Abandoning the clear and established understanding of the Second Amendment would produce substantial upheaval in the manner in which firearms have been regulated nationwide.

A recognition by this Court of an individual right to "keep and bear Arms" for purely private purposes would represent more than a mere doctrinal shift; as a practical matter, it would appear to require a massive change in the way firearms have been regulated for centuries. From pre-colonial times in England until today, reasonable regulations have been permitted on an individual's ability to obtain, possess, and use firearms. *See* Petitioners' Br. at 42-43.[19] The District itself has a history of firearms regulations dating back to 1801. *See id.* at 3-4, citing, *inter alia*, Town of Georgetown Ordinance of Oct. 24, 1801; Act of the Corporation of the City of Washington of Dec. 9, 1809. The principal characteristic of the District's firearms legislation that is being challenged in this case—a rule that prohibits handguns while permitting shotguns and rifles (*see* D.C. Code § 7-2502.02)—was enacted over 30 years ago, in 1976, after the District Council received substantial evidence that handguns were disproportionately linked to violent and deadly crime, and posed unique risks in an urban setting. *See* PA101a-04a, 112a. In sum, the District's handgun regulations are reasonable, passed by a legislature, in line with long-standing historical practices and Supreme Court precedents, and recognizes the unique circumstances posed by the link between the District's high crime rate and the prevalence of handguns.[20]

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[19] Some early firearm regulations were facially discriminatory or were enacted with racially discriminatory intent. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991). Neither is the case with respect to the District's handgun ban. Furthermore, as a general principle, we dispute the contention that regulations on firearms do not serve the interests of many African-American communities, as discussed *infra*, pp. 25-33. To the extent that

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any particular regulation was or were to be enacted with racially discriminatory intent, that regulation would of course be subject to challenge under the Equal Protection Clause of the Fourteenth Amendment, or the Due Process Clause of the Fifth Amendment. *See, infra*, pp. 30-32.

[20] Although the D.C. Circuit purported to hold that "reasonable restrictions" on firearms are permissible under the Second Amendment, *Parker*, 478 F.3d at 399, the examples of "reasonable restrictions" recited in the opinion (and analogized to reasonable time, place and manner restrictions under the First Amendment) are trivial at best, *e.g.*, prohibitions on carrying weapons "when under the influence of intoxicating drink, or [bringing a firearm] to a church. . . ." *Id.* (quoting *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921)). The "reasonable restrictions" described by the majority opinion would apparently not include prohibitions for even obviously dangerous weapons such as machine guns or bazookas. The ability to impose "reasonable restrictions," as that term was employed by the D.C. Circuit, therefore,

Regulations restricting or prohibiting entirely the possession and use of certain types of weapons are not uncommon. Although the constitutionality of handgun prohibitions by non-federal actors is not presented on this appeal, at least ten municipalities, including Chicago and Oakland, have handgun regulations comparable to that of the District.[21] In addition to these municipalities, nine States, Puerto Rico, and at least eleven other municipalities have enacted bans on "assault weapons" or semi-automatic weapons.[22] Eighteen States, the District

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would allow little or no discretion to legislators in trying to address serious problems of health and safety. If, on the other hand, the term "reasonable restrictions" is meant to encompass bans on uniquely dangerous categories of weapons, then it is difficult to imagine why modern handguns, given their lethal nature—as demonstrated, for instance, in the recent Virginia Tech shootings in which a single individual wielding two handguns discharged over 170 rounds in nine minutes, killing thirty people and wounding twenty-five more, *see* Reed Williams & Shawna Morrison, *Police: No Motive Found*, Roanoke Times, April 26, 2006, at A1—should be treated any differently from the types of weapons discussed above.

[21] *See, e.g.*, Oakland, CA Municipal & Planning Codes §§ 9.36.400 – 9.36.440 (2007) (compact handguns); City of Chicago, IL Municipal Code §§ 8-20-030(k), 8-20-40, 8-20-50 (2007); City Code of the City of Evanston, IL § 9-8-2 (2007); Highland Park, IL City Code §§ 134.001 – 134.099 (2007); Morton Grove, IL Village Code §§ 6-2-1 – 6-2-3 (2007); Oak Park Village Code §§ 27-1-1, 27-2-1 (2007); Winnetka, IL Village Code § 9.12.020 (2007); Village of Wilmette, IL Code of Ordinances § 12-24 (2007); Cambridge Municipal Code §§ 9.16.20 – 9.16.50 (2006); Toledo, OH Municipal Code §§ 549.01(c), 549.25 (2007) (certain handguns).

[22] *See* Cal. Penal Law §§ 12275-12289.5 (2007); Conn. Gen. Stat. §§ 53-202a–j, m–o (2007); Haw. Rev. Stat. §§ 134-1, 134-4(e) (2007); Md. Code §§ 4-301 – 4-303 (2007); Mass. Gen.

of Columbia, Puerto Rico, and the federal government have prohibited armor-piercing or "cop-killer" bullets.[23] And numerous other States and the federal government have adopted categorical bans on other types of more potent weaponry, such as

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Laws ch. 140 §§ 121, 131M (2007); N.J. Stat. Ann. §§ 2C: 39-1(w), 39-5(f), 2C: 58-12 (2007); N.Y. Penal Law §§ 265.00(21-22), 265.10, 265.20(16) (2007); P.R. Laws Ann. tit. 25, § 456(m) (2005); Aurora, IL Code of Ordinances, § 29-49 (2007); City of Chicago, IL Municipal Code §§ 8-20-030(h), 8-20-40, 8-20-50 (2006); South Bend, IN Code of Ordinances §§ 13-94 – 13-99 (2007); Code of the City of Albany, NY §§ 193-13 – 193-16 (2007); Code of the City of Buffalo, NY §§ 180-1(b), (f) (2007); Administrative Code of the City of New York, NY §§ 10-301(16), 10-303.1 (2007); Code of the City of Rochester, NY §§ 47-5(b), (f) (2007); Cincinnati, OH Administrative Code § 708-37 (2007); Codified Ordinances of Cleveland, OH §§ 628.01-628.99 (2006); Columbus City, OH Codes §§ 2323.11(G)(1), 2323.31 (2007); Code of Ordinances of the City of Dayton, OH §§ 138.24 – 138.99 (2006); Toledo, OH Municipal Code §§ 549.01(x), 549.23, 549.25 (2007).

[23] *See, e.g.*, 18 U.S.C. §§ 921(a)(17)(B), 922(a)(7)-(8), 929 (2008); Cal. Penal Law § 12320 (2007); Conn. Gen. Stat. § 53-2021 (2007); D.C. Code §§ 7-2501.01(13a), 7-2505.02 (2007); Fla. Stat. § 790.31 (2007); Haw. Rev. Stat. § 134-8(a) (2007); 720 Ill. Comp. Stat. § 5/24-2.1 (2007); Ind. Code § 35-47-5-11 (2007); Ky. Rev. Stat. §§ 237.060(7), 237.080 (2007); La. Rev. Stat. §§ 40:1810-12 (2007); Me. Rev. Stat. tit. 17-A, § 1056 (2007); Mich. Comp. Laws § 750.224c (2007); Miss. Code § 97-37-31 (2007); N.J. Rev. Stat. § 2C:39-3(f) (2007); N.Y. Penal Law §§ 265.00(18), 265.01(8); Okla. Stat. Ann. tit. 21 § 1289.19 (2007); Or. Rev. Stat. § 166.350 (2005); 18 Pa. Cons. Stat. § 6121 (2007); P.R. Laws Ann. tit. 25, § 455(j), 458(j), 459a (2005) ; R.I. Gen. Laws §11-47-20.1 (2007); Tx. Penal Code §§ 46.01(12), 46.05 (7) (2007). Wilmington, Delaware has prohibited armor-piercing bullets, although Delaware does not have a State-wide ban. *See* Wilmington, DE Code of Ordinances § 36-156 (2007).

machine guns, rocket launchers, and chemical and biological weapons.[24]

If the reasoning of the D.C. Circuit replaces the current state of the law, however, its effects could extend well beyond handgun regulations. The D.C. Circuit held that the District's handgun ban was unconstitutional because the Second Amendment guarantees an individual "right" to "keep and bear Arms," which includes any weapons that are in "common use" in a militia, or are the "lineal descendent[s]" of weapons that were in "common use" by militias during colonial times. *Parker*, 478 F.3d at 398. Ignoring the extent to which handguns are used today in the commission of violent crime, and absent any factual support, the D.C. Circuit concluded that "there can be no question" that handguns are among the type of "Arms" in "common use" today, and therefore that an individual's right to "keep and bear" handguns is protected under the Second Amendment. *Id.* at 397-98. The majority then adopted a categorical rule that any prohibition on the possession of any type of protected "Arm" is *per se* unconstitutional, without regard to the reasonableness of the regulatory scheme as a whole or the lethal nature of a particular class of weapons: "Once it is determined . . . that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them." *Id.* at 400.

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[24] *See, e.g.*, 18 U.S.C. 922(o) (1948) (machine guns); Tx. Penal Code §§ 46.01(9), 46.05(2) (2007) (machine guns); Ga. Code §§ 16-11-120 – 16-11-125 (2007) (rocket launchers); Col. Rev. Stat. § 18-12-109 (2007) (chemical, biological, and radiological weapons); S.C. Code § 16-23-710 (2006) (nuclear weapons).

A Second Amendment jurisprudence where the right to "keep and bear Arms" is based on whether the weapon is a "lineal descendant" from Colonial weaponry would be entirely unworkable and unprincipled. The logic of the D.C. Circuit's rule would render unconstitutional not only regulations on the possession or use of handguns but also bans on other extremely dangerous categories of weapons, such as assault weapons, armor-piercing bullets, machine guns, and rocket launchers, assuming that a "lineal descent" can be demonstrated at trial. If today's lethal handguns are thought of as the "lineal descendents" of revolutionary-era "single-shot pistols," *id.* at 398, then it would follow that automatic or semi-automatic rifles are the "lineal descendents" of the revolutionary-era musket, and that armor-piercing bullets are mere "upgrades" over revolutionary-era bullets.

Equally unhelpful is the D.C. Circuit's reliance on the fact that handguns "are also in 'common use' today." *Id.* The scope of constitutional rights should not depend on the vagaries of ownership trends, and particularly not of those engaged in crime. Of greater concern is the fact that the D.C. Circuit, while providing no test for determining when a weapon is in "common use," also provided no limits whatsoever, implying that the Constitution protects an individual's inalienable right to "keep and bear" even "distinctly military arms." *Cases*, 131 F.2d at 922.

In holding that the Constitution does not permit any prohibition on particular categories of "Arms" in "common use," no matter how dangerous, the D.C. Circuit adopted an unnecessarily radical and absolutist position. This position has never been taken seriously by policymakers because there are sound, common-sense bases for prohibiting the private use of certain types of weapons. For example, as President Reagan stated upon signing into law the original federal prohibition on armor-piercing bullets,

> H.R. 3132 [will] ban the production or importation of the so-called "cop-killer bullets," which pose an unreasonable threat to law enforcement officers who use soft body armor. This bill . . . recognizes that certain forms of ammunition have no legitimate sporting, recreational, or self-defense use and thus should be prohibited. Such action is long-overdue.

President Ronald Reagan's Statement Upon Signing H.R. 3132, 22 Weekly Comp. Pres. Doc. 1130 (Sept. 1, 1986). A *per se* rule barring prohibitions on essentially any category of firearms, regardless of the scope of the regulation, is not compelled by the Second Amendment or common sense. Abandoning this Court's clear and established understanding of Second Amendment jurisprudence would wreak havoc.

2. Abandoning the clear and established understanding of the Second Amendment unduly limits the ability of States and municipalities struggling to address the problem of gun violence, a problem of particular interest to this nation's African-American community

Firearm regulations like those of the District are one piece of a much larger puzzle—how to address the unacceptable levels of injuries and fatalities from gun violence in many communities across the nation. The fact that local firearm regulations alone do not solve this puzzle does not mean that such regulations have no place at all in the fight to ensure the safety of our nation's residents. States and localities must have flexibility to assess their public health and safety needs, and to determine the best means of achieving them. Accordingly, the degree of gun regulation may vary from place to place. Under these circumstances, the lower court's radical departure from this Court's clear and established Second Amendment jurisprudence should be reversed.

Legislatures enact firearm regulations to reduce crime and save lives threatened by the vexing problem of gun violence. African Americans, especially those who are young, are at a much greater risk of sustaining injuries or dying from gunshot wounds. The number of African-American children and teenagers killed by gunfire since 1979 is more than ten times the number of African-American citizens of all ages lynched throughout American history. *See* Children's Defense Fund, *Protect Children, Not Guns* 1 (2007), *available at* www.childrensdefense.org/gunreport. Firearm homicide is the leading cause of death for fifteen to thirty-four year-old African Americans. *See* The Centers for Disease Control and Prevention, *WISQARS, Leading Causes of Death Reports (1999-2004)*, http://webappa.cdc.gov/sasweb/ncipc/leadcaus.html. Although African Americans comprise only thirteen percent of the United States population, African Americans suffered almost twenty-five percent of all firearm deaths and fifty-three percent of all firearm homicides during the years 1999 to 2004. *See The Centers for Disease Control, WISQARS Injury Mortality Reports (1999-2004)*, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html.

With respect to handguns specifically, African Americans again suffer disproportionately. From 1987 to 1992, African-American males were victims of handgun crimes at a rate of 14.2 per 1,000 persons compared to a rate of 3.7 per 1,000 for white males. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Crime Data Brief, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft* (Apr. 1994), *available at* www.ojp.usdoj.gov/bjs/pub/ascii/hvfsdaft.txt. During the same period, African-American women were victims of gun violence at a rate nearly four times higher than white women. *See id.* Overall, African-American males between sixteen and nineteen years old had the highest rate of handgun crime victimization, at a rate of forty per 1,000 persons, or four times that of their white counterparts. *See id.*

Gun violence also adds significant direct and indirect costs to America's criminal justice and health care systems, while reducing the nation's overall life expectancy. *See generally* Phillip Cook & Jens Ludwig, *Gun Violence: The Real Costs* (Oxford Univ. Press 2002) (estimating medical expenditures relating to gun violence, with costs borne by the American public because many gun victims are uninsured and cannot pay for their medical care); Linda Gunderson, *The Financial Costs of Gun Violence*, 131 Annals of Internal Medicine 483 (1999) (noting that the American public paid about eighty-five percent of the medical costs relating to gun violence); Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs*, (2005), *available at*: http://knowledge.wharton.upenn.edu/ papers/1294. pdf?CFID=48458188&CFTOKEN=83914080&jsessionid=a830d9608bc97d6668e1 (concluding, among other things, that the elimination of all firearm deaths would increase the male life expectancy more than the eradication of all colon and prostate cancers).

Although African Americans suffer from a disproportionate share of gun violence nationally, these disparities are significantly larger in the District. In 2004 alone, all but two of the 137 firearm homicide victims in the District were African-American, most of them between the ages of fifteen and twenty-nine years old. *See* CDC, *WISQARS, Injury Mortality Reports (2004), supra*. African Americans make up approximately sixty percent of the District's population, but comprise ninety-four percent of its homicide victims. *See* D.C. Dep't of Health, Center for Policy, Planning, and Epidemiology, State Center for Health Statistics, Research and Analysis Division, *Homicide in the*

District of Columbia, 1995-2004 5 (Feb. 1, 2007), *available at* http://www.doh.dc.gov/doh/lib/doh/services/administration_offices/schs/pdf/5yrs_homicides_1995-2004 (final).pdf. Between 1999 and 2004, African Americans in the District died from firearm use at a rate 10.6 times higher than did whites, and suffered from firearm homicide at a rate 16.7 times higher than did whites. *See* CDC, *WISQARS, Injury Mortality Reports (1999-2004), supra.* The vast majority of these deaths were the result of handgun violence. *See* Nat'l Public Radio (NPR), *D.C. Mayor Addresses Blow to Handgun Ban* (Mar. 13, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=7867355 (noting that 80 percent of homicides in the District are committed with handguns).

Given the prevalence of gun violence in the District and the devastating impact on its residents, the District Council had sound reasons to conclude that its handgun regulations would constitute a wise policy. Ultimately, the overall effectiveness of the District's handgun prohibition is not relevant to the Court, given the applicable legal standard as discussed above. However, we submit that, although the District's prohibition may not be a complete solution, especially because the absence of regional regulations permits guns to continue to flow into the District from neighboring jurisdictions, local efforts to reduce the number of handguns on the District's streets should be considered one piece of a larger solution. Indeed, the enactment of the handgun ban in the District thirty years ago was accompanied by an abrupt decline in firearm-caused homicides in the District, but not elsewhere in the Metropolitan area. *See* Petitioners' Br. 52 (*citing* Colin Loftin, et al., *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New England J. Med. 1615 (1991)). A recent study revealed that a ten percent increase in handgun ownership causes a two percent increase in homicides. *See id.* (*citing* Mark Duggan, *More Guns, More* Crime, 109 J. Pol. Econ. 1086, 1095-98 (2001)). These trends underscore the importance of the District's efforts and certainly do not counsel in favor of an unwarranted jurisprudential break that could drastically limit or foreclose such efforts. This Court's settled precedents provide the necessary latitude for the District to best protect its citizens by making the policy decision that fewer handguns, not more, promote public health and safety.

In short, a decision by this Court upholding the D.C. Circuit's invalidation of the District's handgun regulations would interfere with legitimate efforts to save lives. Given the clear and established understanding of the Second Amendment, which would allow the District's firearm regulations to remain in place, there is no basis for this Court to issue such a ruling.

3. Abandoning the clear and established understanding of the Second Amendment would not address racial discrimination in the administration of criminal justice in general or the administration of firearm restrictions in particular

Concerns about this nation's past or present-day problems with racial discrimination do not provide a basis for invalidating the District's handgun regulations. The solution to discriminatory enforcement of firearm laws is not to reinterpret the Second Amendment to protect an individual right to "keep and bear Arms" for purely private purposes, but rather to employ, as necessary, this Court's traditional vehicle for rooting out racial discrimination: the Equal Protection Clause of the Fourteenth Amendment, or, where the actions of the federal government are at issue, the Due Process Clause of the Fifth Amendment. *See United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (administration of a criminal law may be "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of enforcement and prosecution amounts to "a practical denial" of equal protection of the laws) (*quoting Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)); *see also Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in the selection of the grand jury violates Equal Protection); *Batson v. Kentucky*, 476 U.S. 79 (1986) (invalidating the use of race as a factor in the exercise of peremptory challenges).[25] To the extent the history surrounding the adoption of early gun control laws, or even the Second Amendment itself, is tainted by racial discrimination, *see* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998) (arguing that a major function of the "well regulated militia" of the Second Amendment during colonial and post-revolutionary times was the maintenance of slavery in the South and the suppression of slave rebellion); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment:*

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[25] Consistent with this position, LDF filed briefs in all of these cases either as counsel for a party or as an *amicus*.

Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309 (1991) (tracing the discriminatory intent of early firearms restrictions), then the Fourteenth Amendment is the appropriate vehicle for that bias to be ferreted out and eliminated.

Contrary to the assertions of some, the modern firearm regulations at issue in this case should not be confused with the Black Codes, other discriminatory laws that the Fourteenth Amendment invalidated, or more recent cases where Fourteenth Amendment protections have been implicated. The Fourteenth Amendment's protections rightly extend in the face of a colorable assertion that the District's firearm regulations (or those of any other jurisdiction) are racially discriminatory in origin or application, but such a showing has not been made here or even alleged by Respondents.

CONCLUSION

This Court, all but two of the federal Courts of Appeals, and the various State appellate courts have consistently held that the Second Amendment does not protect an individual right to "keep and bear Arms" for purely private purposes. Prior to the decision below, no federal court had ever found a statute facially invalid under the Second Amendment without subsequently being reversed. While evolution in the understanding of a Constitutional provision is sometimes warranted, nothing has changed in regard to the Second Amendment that would justify this Court in radically departing from its jurisprudence here; if anything, the lethal nature of the modern handgun and the epidemic of handgun violence and its attendant effects on the African-American community in this country should cast doubt on the radical reinterpretation of the Second Amendment proffered by the D.C. Circuit.

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IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF NATIONAL NETWORK TO END DOMESTIC VIOLENCE, NATIONAL NETWORK TO END DOMESTIC VIOLENCE FUND, DISTRICT OF COLUMBIA COALITION AGAINST DOMESTIC VIOLENCE, (CONTINUED ON INSIDE COVER)

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SEXUAL VIOLENCE, NEW JERSEY COALITION FOR BATTERED WOMEN, NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE, NORTH DAKOTA COUNCIL ON ABUSED WOMEN'S SERVICES/COALITION AGAINST SEXUAL ASSAULT IN NORTH DAKOTA, ACTION OHIO, OHIO DOMESTIC VIOLENCE NETWORK, OREGON COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE, PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, PUERTO RICO COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT (COORDINADORA PAZ PARA LA MUJER, INC.), RHODE ISLAND COALITION AGAINST DOMESTIC VIOLENCE, SOUTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT, SOUTH DAKOTA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT, TENNESSEE COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE, VERMONT NETWORK AGAINST DOMESTIC AND SEXUAL VIOLENCE, WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE, WEST VIRGINIA COALITION AGAINST DOMESTIC VIOLENCE, WISCONSIN COALITION AGAINST DOMESTIC VIOLENCE, WYOMING COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT

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INTEREST OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Petitioners, and urge the Court to reverse the decision of the Court of Appeals for the District of Columbia Circuit.[1]

The **National Network to End Domestic Violence (NNEDV)** is a non-profit organization incorporated in the District of Columbia in 1995. The mission of NNEDV is to create a social, political, and economic environment in which violence against women no longer exists. A network of state domestic violence coalitions, representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women and their children and those who provide direct services to them. NNEDV has a long history of working at the local, state, and national levels to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers. NNEDV was instrumental to Congressional enactment and implementation of the Violence Against Women Acts of 1994, 2000, and 2005.

The **National Network to End Domestic Violence Fund (NNEDV Fund)** is a non-profit organization incorporated in the District of Columbia in 1996 for the purposes of providing technical assistance, training, and public education to advocates, professionals, and individuals who encounter battered women in their work and communities. NNEDV Fund has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, educators, state and local welfare and justice system personnel, and others working to end domestic violence.

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[1] Pursuant to Sup. Ct. R. 37.3(a), all parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court. Pursuant to Sup. Ct. R. 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and no person or entity, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation of this brief.

The **District of Columbia Coalition Against Domestic Violence (DCCADV)** is a non-profit organization, founded in 1986, that serves as the professional association for the District of Columbia's anti-domestic violence service providers, and is the primary representative of battered women and their children in the public policy arena. DCCADV has worked locally to protect the rights of survivors of domestic violence by supporting member organizations and by directly assisting those suffering from the effects of domestic abuse. DCCADV is extremely interested in ensuring that the laws of the District of Columbia protect both the safety and legal rights of domestic violence victims. DCCADV supports local legislative efforts aimed at eliminating gun violence and preventing handguns from exacerbating the devastating effects of domestic violence.

The **Alabama Coalition Against Domestic Violence (ACADV)** is a non-governmental, non-profit organization that speaks on behalf of all Alabama domestic violence shelters. It has been a leader in education, policy reform, and advocacy. ACADV operates a 24-hour statewide hotline for domestic violence, and has a long history of collaboration at the state and local level. Staff and member programs work in partnership with the Alabama Legislature to pass laws that protect victims of domestic violence and hold perpetrators accountable. ACADV provides training and technical assistance to thousands of professionals around the state to promote an effective criminal justice response to domestic violence.

The **Arizona Coalition Against Domestic Violence (AzCADV)** is a non-profit organization, formed in 1980, and comprised of representatives from domestic violence programs, survivors, concerned individuals, and community-based organizations and groups. The mission of AzCADV is to lead, advocate, educate, collaborate, and end domestic violence in Arizona. AzCADV engages in systems advocacy to improve community awareness and responses to domestic violence victims through legislative and public policy efforts.

The **Arkansas Coalition Against Domestic Violence (ACADV)** was established in 1981 and consists of domestic violence service providers. ACADV works to eliminate domestic violence by strengthening the existing support systems serving victims of domestic violence and their children, developing legislation that provides legal protection to victims, promoting public policies that meet the needs of victims, pursuing funding for programs working with victims, and providing training for the public and those working with victims. ACADV member organizations have been involved in the reform of state laws addressing domestic violence.

The **California Partnership to End Domestic Violence (CPEDV)** is a statewide, membership-based coalition of 195 domestic violence service providers and other supporters, who offer a united voice on legislation and budgetary initiatives affecting victims of domestic violence and their children at the local, state, and national levels. CPEDV has worked with lawmakers and allied partners to enact over 100 statutes on these issues.

The **Connecticut Coalition Against Domestic Violence (CCADV)** is a membership organization made up of 18 domestic violence programs intent on ending domestic violence. CCADV provides a range of services and information in support of domestic violence victims and those who assist them. CCADV also utilizes education and advocacy to support legislation, policies, and regulations that improve the quality of life for victims of domestic violence.

The **Delaware Coalition Against Domestic Violence (DCADV)** is a non-profit organization incorporated in 1994 that works to eliminate domestic violence through training, resource provision, and advocacy. DCADV plays an instrumental role in advocating for laws and policies that positively impact the lives of battered women and their children at both the state and national levels.

The **Family Violence Prevention Fund (FVPF)** is a national non-profit organization founded in 1980 that works to end violence against women and children. FVPF has worked to ensure that violence prevention efforts become self-sustaining by attempting to transform the way health care providers, police, judges, employers, and others address violence. FVPF was instrumental in developing the Violence Against Women Act and its reauthorizations.

The **Florida Coalition Against Domestic Violence (FCADV)** is a non-profit organization that serves as the professional association for Florida's certified domestic violence centers. The mission of FCADV is to work toward ending domestic violence through public awareness, policy development, and support for Florida's domestic violence centers.

FCADV works closely with the executive and legislative (state and federal) branches of government to create and implement public policy that strengthens penalties for batterers and enhances services for survivors of domestic violence.

The **Georgia Coalition Against Domestic Violence (GCADV)** is a non-profit organization comprised of a network of domestic violence programs in Georgia. GCADV provides technical assistance and domestic violence training to lawyers, judges, law enforcement, probation officers, batterer intervention programs, and advocates. GCADV works with other state-wide partners in developing policy designed to strengthen systems' response to domestic violence.

The **Hawaii State Coalition Against Domestic Violence (HSCADV)** is a private, non-profit organization serving as a statewide coalition of domestic violence programs. HSCADV's mission is to ensure the safety and protection of women in intimate relationships by coordinating domestic violence prevention and intervention services, by affecting public policy, by providing training and education, and by establishing coordinated and consistent procedures and actions by the civil and criminal justice systems in Hawaii. HSCADV supports gun control legislation, and is especially concerned about victims of domestic violence, particularly women and children, who are killed by guns.

The **Idaho Coalition Against Sexual & Domestic Violence (ICASDV)** is a statewide non-profit dual coalition that advocates on behalf of victims of domestic violence and sexual assault. Incorporated in 1980, ICASDV has grown to become a statewide membership network of over 80 shelter programs, counseling programs, law enforcement, victim witness units, prosecutors, and allied professionals—advocating for the safety and rights of victims of domestic violence and sexual assault. ICASDV is involved in state and federal policy work aimed at continuing safety for all victims.

The **Indiana Coalition Against Domestic Violence, Inc. (ICADV)** is a non-profit corporation incorporated in 1980. ICADV is a coalition comprised of 47 residential and non-residential domestic violence programs, and more than 200 members statewide. ICADV's mission is to eliminate domestic violence throughout the state of Indiana. In support of the mission, the organization's primary focus is to provide public awareness and education, advocate for systemic and societal change, and influence public policy and the allocation of resources. ICADV collaborates with numerous partners who share the vision of eliminating domestic violence.

The **Iowa Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in 1985. ICADV provides educational and technical assistance to domestic violence programs, and acts on a state and national level to promote public policy and legislation on behalf of battered women and their children. ICADV recognizes the nexus between domestic violence homicides and firearms and works to eliminate personal and institutional violence against women by supporting programs providing safety and services to battered women and their children.

The **Kansas Coalition Against Sexual and Domestic Violence (KCSDV)** is a non-profit organization incorporated in 1988, and is comprised of domestic violence and sexual assault programs. KCSDV seeks to protect the interests and missions of member programs, the individual battered, formerly battered women, and sexual assault survivors served by these member programs. KCSDV and its member programs work closely with courts, legislators, law enforcement agencies, prosecutors, and the media across the state to provide a safer and more effective network to protect victims of sexual and domestic violence.

The **Kentucky Domestic Violence Association (KDVA)** is a non-profit organization founded in 1981 and dedicated to advocating for safety and justice for battered women and their children. KDVA has assisted battered women and their children in trying to establish their safety and stability. The legislative power to restrict the ability of domestic violence perpetrators to access firearms is a critical component in the effort to make and keep families safe. KDVA supports such efforts.

Legal Momentum works to protect domestic violence victims by advocating in the courts, Congress and state legislatures, and with unions and private business. Legal Momentum views government power to restrict private possession and use of guns as a constitutional tool that can have a significant role in protecting victims of domestic and sexual violence from lethal attacks.

The **Louisiana Coalition Against Domestic Violence, Inc. (LCADV)** is a non-profit organization incorporated in Louisiana in 1982. LCADV is a statewide network of battered women's programs, other organizations, and individuals who share the goal of ending violence against women and children in Louisiana. LCADV empowers its members through advocacy, education, resource development, and technical assistance.

Jane Doe Inc., The Massachusetts Coalition Against Sexual Assault and Domestic Violence (JDI), was founded in 1998, and is a statewide membership organization of community-based sexual assault and domestic violence programs and other organizations and individuals committed to ending sexual and domestic violence. JDI supports victims of domestic violence by advocating for responsive public policy, raising awareness, promoting collaboration, and supporting its member organizations in providing comprehensive prevention and intervention services.

In order to protect victims of domestic violence, laws designed to keep guns out of the hands of batterers must be upheld and enforced. JDI has been involved with and/or reviewed five bills designed to restrict access to assault weapons, protect children from unsafe guns, and improve the tracing of guns used in crimes.

The **Michigan Coalition Against Domestic and Sexual Violence (MCADSV)** is a non-profit organization incorporated in 1978 and is dedicated to the empowerment of all of the state's survivors of domestic and sexual violence. MCADSV's mission is to develop and promote efforts aimed at the elimination of all domestic and sexual violence in Michigan. MCADSV promotes public awareness, and provides leadership, advocacy, training, and technical assistance on a statewide level on issues regarding domestic violence and sexual assault. MCADSV participates in collaborative efforts to promote social change with local, state, and national organizations and provides a forum for the exchange and development of skills and information regarding the community's response to domestic and sexual violence.

The **Mississippi Coalition Against Domestic Violence (MCADV)** is a statewide, non-profit agency founded in 1980 by domestic violence shelter programs. MCADV advocates for battered women, and pursues the mission to end domestic violence in the state of Mississippi by providing technical assistance to domestic violence shelters, by providing referrals to domestic violence victims, and by conducting trainings and special events for law enforcement and the general public. MCADV seeks to build awareness of domestic violence issues.

The **Montana Coalition Against Domestic and Sexual Violence (Montana Coalition)** is a non-profit organization representing domestic violence programs and battered and formerly battered women. The Montana Coalition has extensive experience in dealing with the physical, emotional, and economic dangers women and their families face when they stand up to their batterers in a court of law.

The **National Alliance To End Sexual Violence (NAESV)** is a non-profit organization incorporated in 1995 and dedicated to ending sexual violence. NAESV advocates on behalf of the victims/survivors—women, children, and men—by actively addressing emerging public policy issues affecting victims of sexual assault, advocates, and other professionals who provide services and interventions to victims across the country.

The **National Center on Domestic and Sexual Violence** is a non-profit organization incorporated in Texas that designs, customizes, and provides training and consultation, influences policy, promotes collaboration, and enhances diversity with the goal of ending domestic and sexual violence.

The **Nevada Network Against Domestic Violence (NNADV)** is a non-profit organization incorporated in 1980 that promotes social change and empowers women and all persons affected by domestic violence. NNADV has a long history of working at the state and local levels to promote a strong criminal justice response to domestic violence, and works with state partners and local communities to implement best practices in the prosecution of domestic violence cases. NNADV member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. NNADV has been involved in the reform of state laws addressing domestic violence for more than two decades.

The **New Hampshire Coalition Against Domestic and Sexual Violence (NHCADSV)** is a statewide network of independent member programs committed to ending domestic and sexual violence. The mission of NHCADSV is to ensure that quality services are provided to victims/survivors of domestic and sexual violence, to prevent future violence by educating the public, to influence public policy, and to encourage the provision of quality services and accountability for perpetrators.

NHCADSV is comprised of 14 member programs throughout New Hampshire that provide services to survivors of sexual assault and victims of domestic violence and their children. NHCADSV provides technical assistance and training to domestic violence and sexual assault programs, social service agencies, the courts, and law enforcement agencies on issues of domestic violence and sexual assault. NHCADSV also spearheaded an effort to revise New Hampshire's domestic violence statute to better protect domestic violence survivors and their families from gun violence.

The **New Jersey Coalition for Battered Women (NJCBW)** is a statewide coalition comprised of domestic violence service programs and concerned individuals, whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include 28 domestic violence programs in New Jersey. NJCBW advocates for legislation and policies that will increase the safety and options of victims of domestic violence, including those that protect victims from firearms. It also provides information, resources, technical assistance, and training to domestic violence programs, the public, and those involved with New Jersey's response to domestic violence.

The **North Carolina Coalition Against Domestic Violence (NCCADV)** is a non-profit organization incorporated in 1981. The mission of NCCADV is to create social change through the elimination of the institutional, cultural, and individual oppressions that contribute to domestic violence. NCCADV represents a network of more than 90 local domestic violence service providers and serves as the voice of battered women and their children and those who provide direct services to them. NCCADV works at the local, state, and national levels to promote a strong criminal justice response to domestic violence.

The **North Dakota Council on Abused Women's Services/Coalition Against Sexual Assault in North Dakota (NDCAWS/CASAND)** is a non-profit organization incorporated in 1978. The mission of NDCAWS/CASAND is to provide leadership and support in the identification, intervention, and prevention of domestic and sexual violence. The organization has maintained a consistent presence in legislative and policy work advocating for victims' rights and support in a variety of systems. NDCAWS/CASAND continues to facilitate and enhance work on a statewide basis with law enforcement and other criminal justice personnel to address victim and officer safety and offender accountability by, among other things, offering multidisciplinary training relating to firearms and domestic violence.

ACTION OHIO is a statewide coalition of domestic violence organizations and individuals concerned about domestic violence. Founded in 1976, ACTION OHIO strives to help create a society where family violence is no longer acceptable and all persons have equal access to power and resources. ACTION OHIO's ultimate vision is the elimination of violence. ACTION OHIO has been a leading advocate in Ohio for the development of county domestic violence task forces, for baseline funding for domestic violence shelters, for greater accountability for domestic violence offenders, and for enhanced protections for battered victims and their children.

The **Ohio Domestic Violence Network (ODVN)** is a membership organization comprised of 78 domestic violence programs and 213 allied professionals, representing batterers' intervention programs and other legal and social service agencies that provide services and advocacy to victims and perpetrators of domestic violence. ODVN seeks individual, legislative and social change, produces and shares information, and educates the public and other agencies about domestic violence and resource options.

The **Oregon Coalition Against Domestic and Sexual Violence (OCADSV)** is a non-profit organization incorporated in 1979. The mission of OCADSV is to create a social, political, and economic environment in which violence against women no longer exists. OCADSV's member organizations have been involved in the reform of state laws addressing domestic violence. Along with local, state, and national leaders in domestic and sexual violence and criminal justice issues, OCADSV assists in formulating new approaches and innovative legal solutions to ending domestic and sexual violence.

The **Pennsylvania Coalition Against Domestic Violence (PCADV)** is a private non-profit organization that provides services and advocacy on behalf of victims of domestic violence and their children. PCADV is a membership organization of 61 programs providing training and technical assistance to domestic violence programs, private and government agencies, policy-makers, attorneys, the courts, law enforcement and criminal justice personnel, health care providers, the media, and the general public on issues of domestic violence. PCADV and its members are involved in the legislative development of Pennsylvania's Protection From Abuse Act, which allows courts to order removal of domestic violence defendants' firearms.

The **Puerto Rico Coalition Against Domestic Violence and Sexual Assault, Coordinadora Paz para la Mujer, Inc. (CPM)**, is a non-profit organization formed by organizations and individuals advocating for women facing violence and any of its manifestations. CPM members are involved in the reform of state laws addressing domestic and sexual violence. Along with local leaders in domestic and sexual violence and criminal justice issues, CPM continues to formulate new approaches and innovative legal solutions to ending domestic and sexual violence.

The **Rhode Island Coalition Against Domestic Violence (RICADV)** is a non-profit organization incorporated in 1979 intent on ending domestic violence. The mission of RICADV is to support our member agencies and to provide leadership on the issue of domestic violence. RICADV works at the state, local, and national levels to promote a strong criminal justice response to domestic violence. RICADV works with states and local communities to implement best practices in the prosecution of domestic violence cases, and has worked for many years to protect victims of abuse from gun violence.

The **South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA)** is a non-profit organization incorporated in 1981. SCCADVASA is a coalition formed by organizations and individuals advocating for women facing violence and any of its manifestations. SCCADVASA is a state-level network of 23 organizations and individual women serving as a voice for battered women and their children and those who provide direct services to them. SCCADVASA has been instrumental in the enactment and implementation of several pieces of legislation addressing domestic violence and sexual assault in both South Carolina and the nation.

The **South Dakota Coalition Against Domestic Violence and Sexual Assault (SDCADVSA)** is committed to the elimination of personal and societal violence in the lives of women and their children. SDCADVSA's mission is to work for the major societal changes necessary to eliminate all forms of oppression, particularly those aimed at women and their children. SDCADVSA supports coalitions at the state, local, regional, tribal, and national levels, and works toward community-based nonviolent alternatives, public education and technical assistance, policy development, and innovative legislation.

The **Tennessee Coalition Against Domestic and Sexual Violence (TCADSV)** is a non-profit organization composed of a diverse mix of community leaders and program members who share a common vision of ending violence against women and children through public policy advocacy, education, and activities which increase the capacity of programs and communities to address violence. TCADSV's services include technical assistance, training, curriculum and resource development, and public policy advocacy. As a statewide coalition, TCADSV serves domestic violence and sexual assault programs, community groups and organizations, criminal justice agencies, victim service agencies, allied professionals, and individuals.

The **Vermont Network Against Domestic and Sexual Violence (The Vermont Network)** is a non-profit organization incorporated in Vermont. Its mission is to eradicate domestic and sexual violence through advocacy, empowerment, and social change. The Vermont Network is comprised of 16 member organizations and provides training and technical assistance to its member programs and other groups or organizations working to end domestic and sexual violence, including law enforcement, members of the judiciary, prosecutors, health care professionals, governmental agencies, and others. The Vermont Network is active in reforming state laws that address domestic and sexual violence, and in providing technical assistance and training for the implementation of state laws.

The **Washington State Coalition Against Domestic Violence (WSCADV)** is a non-profit organization incorporated in 1990. WSCADV is a statewide membership organization committed to eradicating domestic violence through advocacy and action for social change. WSCADV was organized to share resources, develop common strategies, and strengthen community responses to domestic violence around the state. The core commitment of the WSCADV is to support domestic violence survivors, emergency shelters, and advocacy programs by advocating for laws and public policies that promote safety and justice for domestic violence victims.

The **West Virginia Coalition Against Domestic Violence (WVCADV)** is a non-profit organization committed to ending personal and institutional violence in the lives of women, children, and men. WVCADV's 14 licensed member programs provide safe space and direct services for victims of domestic violence. The Coalition Statewide Office coordinates shared resources supporting policy analysis and social change work that provides statewide systems and local communities with viable options for responding meaningfully to the needs of victims of domestic violence. Because firearms are the most commonly used weapon in domestic violence fatalities in West Virginia, WVCADV supports efforts to keep guns out of the hands of perpetrators of domestic violence.

The **Wisconsin Coalition Against Domestic Violence (WCADV)** is a non-profit membership organization of battered women, formerly battered women, and domestic abuse programs, all committed to ending domestic violence. Founded in 1978, its mission is to end violence against women through partnerships, advocacy, and direct services. Recently, WCADV helped lead a coalition that successfully prevented state legislation from passing that would have allowed individuals to carry concealed guns. WCADV is also involved in efforts to ensure the even implementation and enforcement of federal firearms policy at the state and local levels.

The **Wyoming Coalition Against Domestic Violence and Sexual Assault (WCADVSA)** is a non-profit organization incorporated in Wyoming. The mission of WCADVSA is to support its members in creating a social, political, and economic environment in which violence against women no longer exists. The Coalition has 24 member programs across the state that advocate for victims of domestic and sexual violence and the families of victims.

SUMMARY OF ARGUMENT

Domestic violence is a pervasive societal problem that affects a significant number of women and children each year. Correctly recognized as a national crisis, domestic violence accounts for a significant portion of all violence against women and children. The effect of such violence on the lives of its victims shocks the conscience. Domestic violence victims are battered and killed. They are terrorized and traumatized. They are unable to function as normal citizens because they live under the constant threat of harassment, injury, and violence. And these are just the more obvious effects. Other wounds exist beneath the surface—injuries that are not so easily recognizable as a bruise or a broken bone, but that affect victims' lives just the same. For example, victims often miss work due to their injuries, and must struggle with the prospect of losing their jobs, resulting in significant financial and emotional burdens. Lacking safe outlets for escape or legal recourse, these victims persevere.

One particularly ominous statistic stands out in its relevance here: domestic violence accounts for between one-third and almost one-half of the female murders in the United States. These murders are most often committed by intimate partners with handguns. And while murder is the most serious crime that an abuser with a gun can commit, it is not the only crime; short of murder, batterers also use handguns to threaten, intimidate, and coerce victims. Handguns empower batterers and provide them with deadly capabilities, exacerbating an already pervasive problem.

This crisis has not gone unaddressed; Congress and numerous states have attempted to limit the access that batterers have to handguns. Chief among the Congressional statutes is 18 U.S.C. § 922(g)(9), which addresses the lethal and widespread connection between domestic violence and access to firearms by prohibiting those convicted of domestic violence crimes from possessing guns. Many states also have laws addressing the nexus between domestic violence and firearms. For example, faced with a record of handgun violence in its urban environment, including domestic gun violence, the District of Columbia ("the District") enacted comprehensive legislation regulating handgun possession in D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02. The D.C. Council had ample empirical justifications for determining that such laws were the best method for reducing gun violence in the District. Important government interests support statutes and regulations intended to reduce the number of domestic violence incidents that turn deadly; such statutes should be given substantial deference.

For these reasons, the opinion of the Court of Appeals for the District of Columbia Circuit should be REVERSED.

ARGUMENT

> Women are killed by intimate partners—husbands, lovers, ex-husbands, or ex-lovers—more often than by any other category of killer. It is the leading cause of death for African-American women aged 15-45 and the seventh leading cause of premature death for U.S. women overall. Intimate partner homicides make up 40 to 50 percent of all murders of women in the United States, [and that number excludes ex-lovers, which account for as much as 11 percent of intimate partner homicides of women]. . . . When a gun [is] in the house, an abused woman [is] 6 times more likely than other abused women to be killed.[2]

I. DOMESTIC VIOLENCE IS A SERIOUS CRIME THAT LEAVES MILLIONS OF WOMEN AND CHILDREN NATIONWIDE SCARRED BOTH PHYSICALLY AND EMOTIONALLY

The Violence Against Women Act defines domestic violence as:

> felony or misdemeanor crimes of violence [further defined in the Act] committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse . . . or by any other person against an adult or youth victim who is protected from that person's acts under

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[2] Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NIJ Journal, Nov. 2003, at 15, 16, 18 [hereinafter *Risk Factors*].

> the domestic or family violence laws of the jurisdiction.[3]

Experts in the field of domestic violence have come to understand domestic violence as a pattern of coercive controls broader than the acts recognized by the legal definition, including a range of emotional, psychological, and financial tactics and harms batterers perpetrate against victims.[4] Regardless of the definition applied, domestic violence is a profound social problem with far-reaching consequences throughout the United States. Between 2001 and 2005, intimate partner violence constituted, on average, 22% of violent crime against women.[5] In the United States, intimate partner violence results each year in almost two million injuries and over half a million hospital emergency room visits.[6] About 22% of women, and seven percent of men, report having been physically assaulted by an intimate partner.[7] According to one study of crimes reported by police in 18 states and the District, family violence accounted for 33% of all violent crimes; 53% of those crimes were between spouses.[8]

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[3] 42 U.S.C. § 13925(a)(6).

[4] *See, e.g.*, Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853, 853 n.1 (1994); Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 Drake L. Rev. 295, 300 (2004); Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* 84-85 (2007) (discussing definitional shortcomings). Domestic violence also affects children and the elderly, but this brief focuses on intimate partner violence. Because intimate partner violence disproportionately affects women in male-female relationships, this brief speaks in terms of female victims; this problem, however, also affects men and same sex couples. *See, e.g.*, Callie Marie Rennison, Bureau of Justice Stat., U.S. Dep't of Justice, *Intimate Partner Violence, 1993-2001*, NCJ 197838, at 1 (Feb. 2003), *available at* http://www.ojp.gov/bjs/pub/pdf/ipv01.pdf (85% of victims are women).

[5] Shannan Catalano, Bureau of Justice Stat., U.S. Dep't of Jusitce, *Intimate Partner Violence in the U.S.*, at 1, *available at* http://www.ojp.usdoj.gov/bjs/intimate/victims.htm (last visited Jan. 7, 2008).

Domestic violence has severe and devastating effects. Injuries such as broken bones, bruises, burns, and death, are physical manifestations of its consequences. But there are also emotional and societal impacts. Domestic violence is characterized by a pattern of terror, domination, and control—it thus obstructs victims' efforts to escape abuse and achieve safety.[9] Victims of domestic violence often have difficulty establishing independent lives due to poor credit, rental, and employment histories resulting from their abuse.[10] Similarly, victims often miss work due to their injuries and can ultimately lose their jobs as a result of the violence against them.[11] Moreover, the injuries that domestic violence causes go beyond the immediate injury. Chronic domestic violence is associated with poor health, and can manifest itself as stress-related mental and physical health problems for as long as a year after the abuse.[12]

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[6] Katherine A. Vittes & Susan B. Sorenson, *Are Temporary Restraining Orders More Likely To Be Issued When Applications Mention Firearms?*, 30 Evaluation Rev. 266, 266, 267 (2006).

[7] Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control and Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, NCJ 183781, at iv (Nov. 2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

[8] Matthew R. Durose et al., Bureau of Justice Stat., U.S. Dep't of Justice, *Family Violence Statistics*, NCJ 207846, at 2 (June 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs05.pdf.

[9] *See, e.g.*, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 92-93 (1991).

[10] *See* Susan A. Reif & Lisa J. Krisher, *Subsidized Housing and the Unique Needs of Domestic Violence Victims*, Clearinghouse Rev., May-June 2000, at 20.

Above all, incidents of abuse often turn deadly. American women who die by homicide are most often killed by their intimate partners—according to various studies, at least one-third,[13] and perhaps up to one-half of female murder victims, are killed by an intimate partner.[14] A study based on the Federal Bureau of Investigation's Supplementary Homicide Report found that female murder victims were more than 12 times as likely to have been killed by a man they knew than by a male stranger.[15] Of murder victims who knew their offenders, 62% were killed by their husband or intimate acquaintance.[16]

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[11] *See* Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *Costs of Intimate Partner Violence Against Women in the United States,* at 19, 26 (2003), *available at* http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf (each year victims lose almost eight million days of paid work and over five million days of household work because of domestic violence).

[12] *See* Stephanie Riger & Susan Staggs, *The Impact of Intimate Partner Violence on Women's Labor Force Partipation,* at 1 (2004), *available at* http://www.ncjrs.org/pdffiles1/nij/-grants/207143.pdf.

[13] Rennison, *supra* note 4, at 1.

[14] Campbell, *supra* note 2, at 18.

[15] Violence Policy Center, *When Men Murder Women: An Analysis of 2005 Homicide Data,* at 3 (Sept. 2007) [hereinafter *When Men Murder Women*].

Although victims bear the primary physical and emotional brunt of domestic violence, society pays an economic price. Victims require significant medical attention—The Centers for Disease Control and Prevention reports that the health-related costs of domestic violence approach $4.1 billion every year.[17] Gun-related injuries account for a large portion of that cost.[18] Combined increased healthcare costs and lost productivity cost the United States over $5.8 billion each year.[19] Domestic violence also accounts for a substantial portion of criminal justice system activity.[20] For example, according to a study assessing the economic impact of domestic violence in Tennessee, the state of Tennessee spends about $49.9 million annually in domestic violence court processing fees.[21]

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[16] *Id.*

[17] Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *supra* note 11, at 2.

[18] *See* Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 281 J. Am. Med. Ass'n 447, 447 (1999) (estimating that gunshot injuries overall cost the United States $2.3 billion in medical costs in 1994).

[19] Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *supra* note 11, at 2; Vittes & Sorenson, *supra* note 6, at 267.

[20] *See, e.g.*, David Hirschel, et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases, Final Report to the DOJ* (Apr. 2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf (discussing domestic violence related arrest rates).

[21] Tennessee Economic Council on Women, *The Impact of Domestic Violence on the Tennessee Economy*, at 6 (Jan. 2006).

All levels of government recognize the impact that domestic violence has on individuals and on society. Congress's original enactment and recent reauthorization of The Violence Against Women Act acknowledges, and attempts to address, the severe impact of domestic violence.[22] In naming October 2007, National Domestic Violence Awareness Month, President George W. Bush stated that "[w]hen a family member is abused, it can have long-term damaging effects on the victim that leave a mark on family, friends, and the community at large."[23] This Court has recently emphasized the pervasiveness of domestic violence; Justice Souter appropriately noted in *Georgia v. Randolph*, that "domestic abuse is a serious problem in the United States."[24] State policy makers also uniformly recognize the devastating impact of domestic violence—every state has a civil protection mechanism in place.[25]

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[22] *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994). *See also Violence Against Women: A Week in the Life of America*, S. Prt. No. 102-118, at 1 (1992) (reciting incidents of domestic violence "[f]rom across the Nation, from small towns to major metropolitan areas, from midsize cities to rural communities" during one week in 1992 and finding that domestic violence "continues to plague" the United States).

[23] Proclamation No. 8183, 72 Fed. Reg. 56,877, 56,879 (Oct. 4, 2007) (urging Americans to educate others "about the vital importance of ending domestic violence").

[24] *Georgia v. Randolph*, 547 U.S. 103, 117 (2006).

[25] *E.g.*, Cal. Fam. Code §§ 6300-6306 (West 2007) (Civil Protection Orders can last up to five years and can be extended for another five years or can become permanent); Conn. Gen. Stat. § 46B-15 (2007) (six months); D.C. Code § 16-1003 (2007) (up to one year with possible extension); Iowa Code § 236.2 (2007) (one year); Mass. Gen. Laws Ann. Ch. 209A, § 1 (West 2007) (one year with possible extension for any additional time necessary

II. FIREARMS EXACERBATE AN ALREADY DEADLY CRISIS

Domestic violence perpetrators use firearms in their attacks with alarming frequency. Of every 1,000 U.S. women, 16 have been threatened with a gun, and seven have had a gun used against them by an intimate partner.[26] "American women who are killed by their intimate partners are more likely to be killed with guns than by all other methods combined. In fact, each year from 1980 to 2000, 60% to 70% of batterers who killed their female intimate partners used firearms to do so."[27]

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to protect the plaintiff); Miss. Code. Ann. § 93-21-7 (2007) (three years); N.J. Stat. Ann. § 2C:25-18 (West 2007) (indefinite); Ohio Rev. Code Ann. §3113.31 (West 2007) (five years); Va. Code Ann. § 16.1-279.1 (2007) (two years).

[26] Susan B. Sorenson, *Firearm Use In Intimate Partner Violence*, 30 Evaluation Rev. 229, 235 (2006) [hereinafter *Firearm Use*]. *See* Vittes & Sorenson, *supra* note 6, at 277 (one in six victims of domestic violence who filed for a restraining order at the Los Angeles County Bar Association's Barrister's Domestic Violence Project clinic between May 2003 and January 2004 reported being threatened or harmed by a firearm).

[27] Emily F. Rothman et al., *Batterers' Use of Guns to Threaten Intimate Partners,* 60 J. Am. Med. Women's Ass'n 62, 62 (2005) (noting also that "[f]our percent to 5% of women who have experienced nonlethal intimate partner violence . . . have reported that partners threatened them with guns at some point in their lives"). *See Firearm Use, supra* note 26, at 232 ("Women are more than twice as likely to be shot by their male intimates as they are to be shot, stabbed, strangled, bludgeoned, or killed in any other way by a stranger.") (citation omitted); Susan B. Sorenson, *Taking Guns From Batterers*, 30 Evaluation Rev. 361, 362 (2006) [hereinafter *Taking Guns*] (between 1976 to 2002, women in the United States were 2.2 times more likely to die of a gunshot wound inflicted by a male intimate partner than from any form of assault by a stranger); *When Men Murder Women,*

Thus, every year, 700-800 women are shot and killed by their spouses or intimate partners,[28] and handguns are the weapon of choice.[29] For example, according to the Violence Policy Center, "[i]n 2000, in homicides where the weapon was known, 50 percent (1,342 of 2,701) of female homicide victims were killed with a firearm. Of those female firearm homicides, 1,009 women (75 percent) were killed with a handgun."[30]

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supra note 15, at 3 (in 2005, "more female homicides were committed with firearms (52 percent) than with any other weapon"); Vittes & Sorenson, *supra* note 6, at 267 (55% of intimate partner homicides in 2002 were committed with a fire-arm).

[28] Kathryn E. Moracco et al., *Preventing Firearm Violence Among Victims of Intimate Partner Violence: An Evaluation of a New North Carolina Law,* at 1 (2006). *See also* Callie Marie Rennison & Sarah Welchans, Bureau of Justice Stat., U.S. Dep't of Justice, *Intimate Partner Violence*, NCJ 178247, at 1 (May 2000, Rev. Jan., 2002), *available at* http://www.ojp.usdoj.gov/bjspub/pdf/ipv.pdf ("The percentage of female murder victims killed by intimate partners has remained at about 30% since 1976."); Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 Evaluation Rev. 313, 314 (2006) (between 1982 and 2002, approximately 60% of the homicides by intimate partners in the United States were committed with a firearm).

[29] *Firearm Use, supra* note 26, at 233 (noting that the number of homicides by intimates with handguns has increased); *Taking Guns, supra* note 27, at 362 (firearms are the primary weapon used in fatal assaults on women).

[30] Violence Policy Center, *Facts on Firearms and Domestic Violence, available at* http://www.vpc.org/fact_sht/domviofs.htm (last visited Jan. 3, 2008). The number remains relatively consistent. In 2004, 72% of women killed by firearms were killed by handguns. *When Men Murder Women, supra* note 15, at 3.

The mere presence of or access to a firearm increases fatality rates in instances of abuse. A person intent on committing violence will naturally reach for the deadliest weapon available.[31] Accordingly, the presence of a gun in an already violent home acts as a catalyst, increasing the likelihood that domestic violence will result in severe injury or death.[32] When domestic violence incidents involve a firearm, the victim is 12 times more likely to die as compared to incidents not involving a firearm.[33]

Even when he does not actually fire his weapon, a batterer may use a gun as a tool to "threaten, intimidate, and coerce."[34] For example, batterers make threats with their firearm by pointing it at the victim; cleaning it; shooting it outside; threatening to harm people, pets, or others about whom the victim cares; or threatening suicide.[35] Such threats do not leave physical marks, but they can result in emotional problems, such as post-traumatic stress disorder.[36] Thus, a firearm is a constant lethal threat, and its presence may inhibit a victim of abuse from seeking help or from attempting to leave the relationship.[37]

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[31] Josh Sugarmann, *Every Handgun Is Aimed At You: The Case For Banning Handguns* 96 (2001).

[32] *See, e.g.*, Moracco et al., *supra* note 28, at 1; Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, 1090 (2003) (the intimate partner's access to a gun is strongly associated with intimate partner homicide). Estimates of the increased likelihood of death when a firearm is present vary. *Compare When Men Murder Women*, *supra* note 15, at 2 (three times more likely), *with Risk Factors*, *supra* note 2, at 16 (six times more likely).

[33] Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns*, 30 Evaluation Rev. 296, 297 (2006) (citation omitted).

[34] Vittes & Sorenson, *supra* note 6, at 267.

[35] *See* Rothman, *supra* note 27, at 68; Int'l Ass'n of Chiefs of Police, *Taking A Stand: Reducing Gun Violence In Our Communities* 16 (2007), *available at* http:www.theiacp.org/documents/pdfs/Publications/acf1875.pdf.

The statistics reveal a stark reality—guns exacerbate the already pervasive problem of domestic violence. The use of firearms intensifies the severity of the violence and increases the likelihood that domestic violence victims will be killed by their intimate partners.

III. THE STATUTE PLAINLY SURVIVES CONSTITUTIONAL SCRUTINY

There are important and wholly-sound reasons for restricting the use and availability of firearms under circumstances such as those presented above. Numerous approaches to reducing the use of firearms in domestic violence situations exist. Federal law, 18 U.S.C. § 922(g)(9), prohibits those who have been "convicted in any court of a misdemeanor crime of domestic violence" from possessing, shipping, transporting, or receiving firearms or ammunition.[38] The same prohibition applies, in 18 U.S.C. § 922(g)(8), to those subject to a court order restraining the person from "harassing, stalking, or threatening an intimate partner of such person."[39] In states such as Arizona, Delaware, and New Jersey, a conviction for a domestic violence crime subjects defendants to a firearm prohibition.[40] The entry of a qualified civil domestic violence protection order subjects the respondent to a mandatory prohibition on the possession of firearms in at least nine other states.[41] Many states give judges issuing civil protection orders discretion to prohibit firearm possession in the order.[42] And several other states authorize judges to order a domestic violence respondent to surrender the firearm permit or license for the duration of a protection order.[43]

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[36] Rothman, *supra* note 27, at 66.

[37] Rothman, *supra* note 27, at 63, 64 ("recent gun owners were 7.8 times more likely than non-gun-owners to have made gun-related threats to intimates in the preceding 3 years").

[38] 18 U.S.C. § 922(g)(9).

[39] 18 U.S.C. § 922(g)(8).

Faced with a record of handgun violence in its urban environment, including domestic gun violence, the District took a more comprehensive approach to addressing the hazard that handguns pose to victims of domestic violence. The District chose to address the nexus between domestic violence and firearm use, along with other issues of handgun violence, by disallowing the registration of pistols not registered prior to 1976,[44] by prohibiting the carrying of a pistol without a license,[45] and by requiring that pistols be kept unloaded and disassembled or locked with a trigger lock.[46] The D.C. Council acknowledged that firearms are used most often not to kill strangers, but to kill victims known to the killer.[47] It also recognized that the presence of a gun leads to death in situations, like domestic violence, that may not otherwise have turned deadly.[48] The D.C. Council thus had ample empirical justification to determine that such laws were the most effective way to reduce gun violence in the District and to protect its citizens, including potential victims of domestic violence.[49] Such legislative restrictions do not "trench upon any constitutionally protected liberties."[50]

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[40] *See* Ariz. Rev. Stat. Ann. § 13-3101 (2007); Del. Code. Ann. tit. 11, § 1448(a)(7) (2007); N.J. Stat. Ann. § 2C:39-7 (West 2007).

[41] *See, e.g.,* Cal. Fam. Code § 6389(a) (West 2007); Del. Code. Ann. tit. 11, § 1448(a)(6) (2007); Fla. Stat. Ann. § 790.233(1) (West 2007); Haw. Rev. Stat. § 134-7(f) (2007); Md. Code Ann., Pub. Safety §5-134(b)(10) (West 2007); Mass. Gen. Laws Ann. Ch. 209A, § 3B (West 2007); N.H. Rev. Stat. Ann. § 173-B:5 (2007); Va. Code. Ann. § 18.2-308.1:4 (West 2007); W. Va. Code § 61-7-7 (a)(7)(2007).

[42] *See, e.g.,* Ala. Code § 15-13-190(b) (2007); Alaska Stat. § 18.66.100(c)(7) (2007); Ind. Code § 34-26-5-9(c)(4) (2007); Mich Comp. Laws Ann. § 600.2950a (West 2007); N.Y. Dom. Rel. Law § 252(9) (McKinney 2007); N.D. Cent. Code tit. 14 § 14-07.1-02(4)(g) (2007); S.D. Codified Laws § 25-10-24 (2007); Tex. Fam. Code Ann. § 85.022(b)(6) (Vernon 2007); Utah Code Ann. § 30-6-4.2(2)(d) (West 2007).

[43] *See, e.g.,* Ariz. Rev. Stat. Ann. § 13-3602(G)(4) (2007); 750 Ill. Comp. Stat. 60/214(b)(14.5)(a) (2007); Me. Rev. Stat. Ann. tit. 19-A, § 4007(1)(A-1) (2007); 23 Pa. Cons. Stat. § 6108(a)(7) (2007); R.I. Gen. Laws § 8-8.1-3(a)(4) (2007).

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[44] D.C. Code § 7-2502.02(a)(4) (2007).

[45] D.C. Code § 22-4504(a) (2007).

[46] D.C. Code § 7-2507.02 (2007).

[47] *See Firearms Control Regulations Act of 1975, Council Act No. 1-142: Hearing Before the Comm. on the District of Columbia H.R. on H. Con. Res. 694*, 94th Cong. 26 (1976) ("Contrary to popular opinion on this subject, firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities. Most murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion or intoxication, and where the killer and victim are acquainted.").

[48] *See* Council of the District of Columbia, Afternoon Council Sess., 1976 Leg., 47th Sess. Tr. 46:25-47:1-11 (May 3, 1976) ("I have seen so many instances where people have made mistakes that can't be erased. In the heat of a passionate moment, somebody has been slain. . . . . Sometimes it was just a lover's quarrel. The damage inflicted was not meant to be mortal. And yet, there it was. At that moment, they probably wished that they had never seen a firearm, but it was much too late."); Council of the District of Columbia, Evening Council Sess., 1976 Leg., 50th Sess. Tr., 21:9-14 (June 15, 1976) ("More than that, that loaded weapon in the home often winds up in a criminal usage. . . . Somebody goes and gets that gun in a moment of passion and shoots somebody else with it where otherwise they may have slapped them."). Understandings of the dynamics of

Whether the D.C. Council addressed the domestic violence crisis, and other issues of violence, in the most effective way possible is not for this Court to

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domestic violence have evolved since 1976. Now, instances such as those the D.C. Council discussed are understood as part of an escalation of violence within a pattern of abuse based on power and control.

[49] *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-98 (2000) (holding that the city could properly rely on its own findings and studies about harm to the public health and safety and could also rely on other jurisdictions' findings and studies).

[50] *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (citations omitted). *See, e.g., United States v. Miller*, 307 U.S. 174, 178 (1939) (stating that the Second Amendment does not guarantee the right to bear a firearm not having "some reasonable relationship to the preservation or efficiency of a well regulated militia"); *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003) (stating that regardless of whether the Second Amendment protects a collective or an individual right, "rights under the amendment can be restricted"); *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001), *cert. denied* 536 U.S. 2362 (2002) (acknowledging that the rights guaranteed by the Second Amendment can be restricted in "reasonable" cases that are "not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country"); *United States v. Spruill*, 61 F. Supp. 2d 587, 591 (W.D. Tex. 1999) (holding that the Second Amendment does not prohibit the government from imposing some restrictions on gun ownership in a case involving 18 U.S.C. § 922(g)(8)).

decide.[51] Courts should not reverse the will of the legislature "simply because a better statute could possibly be crafted."[52] Important government interests support statutes and regulations intended to reduce the number of instances in which firearms are used in domestic violence situations; such statutes should be given substantial deference.[53] This Court should hold that the Court of Appeals for the District of Columbia Circuit erred in finding that D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 violate the Second Amendment.

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[51] *Spruill*, 61 F. Supp. 2d at 591 (stating that "elected representatives of the people are to be given wide latitude in addressing societal needs").

[52] *Id.* (noting that 18 U.S.C. § 922(g)(8) was designed to prevent "the family violence that seems epidemic in this country").

[53] *See Gardner v. Vespia*, 252 F.3d 500, 503 (1st Cir. 2001) (holding, in a case challenging 18 U.S.C. § 922(g)(9), that "the Second Amendment does not confer an absolute right to bear arms") (citation omitted); *Emerson*, 270 F.3d at 260-61 (adopting an individual rights model, but still holding that 18 U.S.C. § 922(g)(8) did not infringe upon the defendant's rights).

CONCLUSION

For the foregoing reasons, the court of appeals erred in finding that D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 violate the Second Amendment, and the opinion of the Court of Appeals for the District of Columbia Circuit should be REVERSED.

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE NATIONAL RIFLE ASSOCIATION AND THE NRA CIVIL RIGHTS DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI*[1]

The precise question presented by this case—whether three District of Columbia Code provisions violate the Second Amendment—belies its importance to the liberty cherished by the American people. If the Second Amendment is interpreted as Petitioners and their supporting *amici* prefer and the District's laws upheld, the individual right to keep and bear arms—identified by the Framers, in the very text of the Constitution, as integral "to the security of a free State"—will not only be infringed, but effectively abolished. See U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed"). This outcome would cause grave harm not only to the tens of millions of law-abiding Americans who keep and bear arms for self-defense and other lawful, private purposes, but to the entire nation, which in times of gravest peril has always relied upon the body of ordinary men and women, and their everyday familiarity with arms, for its security.

Amicus curiae the National Rifle Association (the "NRA") is widely recognized as America's foremost defender of Second Amendment rights—indeed, the NRA is America's oldest civil rights organization. The NRA was founded in 1871 by Union generals who, based on their experiences in the Civil War, desired to promote marksmanship and expertise with firearms among the citizenry. Today, the NRA has nearly four million members and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA also collects and publishes real-life examples of citizens from all walks of life whose lawful possession of firearms enabled them to protect themselves from violent criminals. The NRA has a vital interest in this case, as Petitioners' arguments, if accepted, would abrogate the fundamental right to keep and bear arms enjoyed by the NRA's members and other Americans. The passage of laws like the District's in other communities would then make the nation more, not less, dangerous, as armed citizens would cease to be an effective deterrent to burglars, rapists and other criminals.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amicus curiae the NRA Civil Rights Defense Fund (the "Fund") was established by the NRA in 1978 for purposes including assisting in the preservation and defense of the human, civil, and constitutional rights of the individual to keep and bear arms in a free society. To accomplish this, the Fund provides legal and financial assistance to individuals and organizations defending their right to keep and bear arms and advocates proven criminal justice reforms. Additionally, the Fund sponsors legal research and education on a wide variety of issues, including the meaning of the Second Amendment. The Fund has a compelling interest in this case because the arguments made by the Petitioners, if accepted by this Court, would severely harm the American people, whose Constitutional rights the Fund was created to protect.

SUMMARY OF THE ARGUMENT

In adopting the Second Amendment, the Framers guaranteed an individual right to keep and bear arms for private purposes, not a collective right to keep and bear arms only in connection with state militia service. This is clear from the text of the Amendment itself, which guarantees "the right of *the people* to keep and bear Arms." Throughout the Constitution, individual rights are guaranteed to "the people"; when the Framers refer to a power of a State, they refer, unsurprisingly, to "the States." While Petitioners stress Framing-era debates concerning the Militia, the Framing generation viewed the individual right to keep and bear arms for personal use as a fundamental right of a free people. The Framers also sought to ensure a well-regulated militia by guaranteeing private ownership of firearms, as civilian ownership and use of firearms would confer experience and arms invaluable to militia service, and a right of private ownership would prevent the federal government from effectively disarming the populace by declining to organize the militia.

This individual right to keep and bear arms is a fundamental right; the Second Amendment on its face describes it as essential to a "free State"—a democratic state free from government tyranny. As with the fundamental democratic rights guaranteed by the First Amendment, laws burdening Second Amendment rights should be subjected to strict scrutiny and struck down in their entirety when overly broad. Petitioners and their supporting *amici* attempt to conjure fears of legal bedlam should courts examine firearms laws under strict scrutiny, yet they present no real argument that long-standing laws regulating the ownership and use of firearms, such as laws barring ownership by convicted felons or the insane, would fail to pass muster under that test.

The D.C. Code provisions at issue in this case cannot survive strict scrutiny (or any level of scrutiny) and should be found facially invalid. While handguns and other firearms, like many other everyday objects such as automobiles, are involved in crimes and accidents, there are hundreds of millions of firearms and tens of millions of handguns in private possession, of which only a minute fraction are ever used unlawfully or involved in an accidental shooting. Most major American cities, unlike the District, have not taken the extreme and unconstitutional measure of banning the ownership of handguns by law-abiding citizens. The most significant effect of the District's handgun ban is to effectively deny *law-abiding* citizens the freedom to exercise their common law right to self-defense, a right exercised by millions of citizens annually and one that is sorely needed in the District.

ARGUMENT

I. The Second Amendment Guarantees an Individual Right to Keep and Bear Arms

1. Petitioners and their supporting *amici* argue that the Second Amendment protects a collective right—the right to keep and bear arms only in connection with service in an organized state militia—and that it does not protect an individual right to keep and bear arms for any private purpose. See Petitioners' Brief ("Pet. Br.") at 11–12 (Second Amendment protects "the right to keep and bear

arms as a part of a well-regulated militia, not to possess guns for private purposes"). Petitioners' reading of the Second Amendment, under which a government could disarm the people by the expedient of disbanding the organized militia, is at war with the Amendment's plain text and must be rejected.

By its terms, the Amendment protects the right "of the people" to keep and bear arms. The holder of the right is unambiguous: it is not the States, it is "the people" themselves. The Tenth Amendment, in which the Framers refer both to the "people" and to the States, demonstrates that the Framers were capable of distinguishing between individual rights and state power. See U.S. Const. amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Usage of the term "the people" elsewhere in the Bill of Rights further confirms that a right guaranteed to "the people" is an individual right. See *id.*, amend. I (guaranteeing "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"); *id.*, amend. IV (referring to "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

Had the Framers' intent been to protect state authority to organize militias, the Second Amendment could easily have been articulated differently. The Framers, for instance, could have adopted an amendment proposed by the Virginia ratifying convention, which stated: "each State respectively shall have the power to provide for organizing, arming and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same." Levy, Origins of the Bill of Rights 279 (1999). The Framers, however, rejected that proposal in favor of guaranteeing a right to "the people."

In light of the Amendment's text, it should be unsurprising that in *United States* v. *Miller*, 307 U.S. 174 (1939)—upon which Petitioners and their supporting *amici* attempt to rely for its *dicta* that the preamble of the Second Amendment informs the Amendment's scope—this Court operated from an assumption that there is an *individual* right to keep and bear arms.

As an initial matter, had the *Miller* Court concluded that there is not an individual right to keep and bear arms other than for use in service of an organized militia—the position advocated by Petitioners here—it might have said so. Instead, the Court reasoned:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees *the right to keep and bear such an instrument.*

307 U.S. at 178 (emphasis added). Hence, at most *Miller* held (based on the incomplete factual record before the Court) that short-barreled shotguns are not an "Arm" within the meaning of the Second

Amendment—it said nothing about *who* is permitted to keep and bear arms.[2]

Indeed, the *Miller* Court *nowhere* discussed the modern status of the "Militia" in 1939; it never even suggested, as do Petitioners, see *infra* at 12, that because Congress had separated the Militia into an organized militia (the National Guard) and an unorganized militia of able-bodied civilian males, the Second Amendment was irrelevant to members of the latter. See also Act of June 3, 1916, ch. 134, § 57, 39 Stat. 197, currently codified as amended at 10 U.S.C. § 311. Had *Miller* adopted Petitioners' position, it would not have considered whether short-barreled shotguns have "some reasonable relationship to the preservation or efficiency of a well regulated militia," as Miller was not in the National Guard and therefore would have had no right to keep and bear any firearm.

2. Petitioners argue that the Second Amendment's preamble—"A well regulated Militia, being necessary to the security of a free State"—necessarily limits the scope of the right found in the Amendment's operative clause—"the right of the people to keep and bear Arms, shall not be infringed." See, *e.g.*, Pet. Br. at 11–12. Under this reading of the text, the Second Amendment protects only "the right to keep and bear arms as a part of a

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[2] Thus, the brief of the American Bar Association as *amicus* in support of Petitioners, which urges a collective-right position based on adherence to *Miller*, is wholly misguided. *Miller* at most stated that the Second Amendment's reference to "Arms" is to firearms bearing "some reasonable relationship to the preservation or efficiency of a well regulated militia." Whatever the outer boundaries of that test, a handgun surely qualifies.

well-regulated militia, not to possess guns for private purposes." *Ibid.*

While, to be sure, the Second Amendment refers to the utility of an armed population in preventing government tyranny, the Framers did not consider the right limited to that purpose. The Framers were well aware that in late-18th century America a significant segment of the population depended upon private ownership of arms to provide food for their families and to defend themselves and their families from attack. Americans' personal right to possess such firearms for hunting or self-defense was part of the essence of the Framers' view of themselves as a free and democratic people. Had Americans in 1787 been told that the federal government could ban the frontiersman in his log cabin, or the city merchant living above his store, from keeping firearms to provide for and protect himself and his family, it is hard to imagine that the Constitution would have been ratified.

More importantly, Petitioners' argument confuses a goal of the Amendment with the means selected to achieve that goal. Even assuming for sake of argument that the Framers were contemplating only empowering the Militia as a check on the national government, they did not seek to achieve that goal by preserving for state governments the authority to organize and arm the Militia. Indeed, under the second Militia Clause of the Constitution it is the *federal* government that has the right to organize, arm, and discipline the Militia—state governments are limited to appointing Militia officers and training the Militia according to federal standards, and governing only such part of the Militia as is not "employed in the Service of the United States." See U.S. Const. Art. I, § 8, cl. 16.

In addition to providing some authority over the Militia to the States, the Framers sought to effectuate their purpose of guarding against federal overreaching by guaranteeing the right of the people to keep and bear arms. That they would approach the issue in this way was perfectly sensible. As an initial matter, while an oppressive federal government might seek to raid militia depots as the British attempted at Lexington and Concord, arms dispersed among the people would prove far more difficult to confiscate. Moreover, an individual accustomed, through everyday ownership and use, to the bearing of arms will obviously be a more effective militiaman than an individual who handles guns only during infrequent militia drills. Under the second Militia Clause, Congress can choose not to train the Militia, as is the case with the "unorganized militia" today. See 10 U.S.C. § 311. A militia that only practices with arms under conditions set by Congress can hardly be expected to serve either as an effective check to a national standing army, or as an effective adjunct to that army should the need arise.

Notably, the history of the NRA and its activities today illustrate the Framers' wisdom in assuring a "well-regulated Militia" by guaranteeing to "the people" the right to keep and bear arms. The NRA was formed in 1871 by two Union veterans dismayed by the lack of marksmanship shown by their troops during the war. In an effort to ensure a higher quality pool of military recruits for any future war, their goal was for the NRA to promote skilled firearms use among civilians along with recognition of the virtues and values inherent in firearms ownership.

Among the NRA's first actions was the establishment of a firing range for civilian practice, and the NRA continues to be the leader in firearms education for civilians. Over 50,000 NRA-certified instructors now train about 750,000 gun owners a year.[3] NRA courses include, among others, firearms marksmanship and safety training. Additionally, nearly 1,000 NRA-certified coaches are specially trained to work with young competitive shooters. Law enforcement firearms training has been another priority for the NRA. In 1960 the NRA became the premier national trainer of law enforcement officers with the introduction of its NRA Police Firearms Instructor certification programs. Today, there are more than 10,000 NRA-certified police and security firearms instructors training law enforcement officers across the entire nation.

Since 1903 the NRA has promoted shooting sports among America's youth. Today, youth programs remain a cornerstone of the NRA, with more than one million youth participating in NRA shooting sports events and affiliated programs with groups such as 4-H, the Boy Scouts of America, the American Legion, the Jaycees and others. High school and college students, including ROTC students, across the country compete in NRA-sponsored pistol and rifle competitions.

Consistent with the Framers' intent, the firearms expertise developed by the NRA and its members through civilian use has been made available to the country during times of crisis. Individual NRA members have brought their civilian firearms experience with them in the many conflicts fought by this nation since the NRA's founding. In World War II, the NRA opened its firing ranges to the government, developed training materials, and encouraged members to serve as plant and home guard members. After the war, President Truman expressed the nation's gratitude for the NRA's contributions, stating:

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[3] For a discussion of the NRA's educational and training activities, see generally http://www.nra.org/aboutus.aspx.

> During the war just ended, the contributions of the Association in the matter of small-arms training aids, the nation-wide pre-induction training program, the recruiting of experienced small-arms instructors for all branches of the armed services, and technical advice and assistance to the Government civilian agencies aiding in the prosecution of the war—all contributed freely and without expense to the Government—have materially aided our war effort.

Letter reprinted in Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency, S. Comm. on the Judiciary, 90th Cong. 484 (1967).

Thus, Petitioners' assertion that the supposed sole purpose of the Second Amendment (assuring a well-regulated militia) is only advanced by protecting the right of active members in an organized militia to possess firearms for militia-related purposes is patently wrong. An effective militia cannot spring forth fully-formed from a people unfamiliar with firearms. Widespread civilian familiarity with firearms from private ownership and use, on the other hand, greatly contributes to the efficacy of the militia when called upon.

3. Further illustrating the invalidity of Petitioners' reading of the Second Amendment, it would permit the federal government to wholly disarm the people and rely entirely on a federal standing army. This result, obviously at odds with one of the Framers' goals in enacting the Second Amendment, further confirms that the Amendment must protect an individual right.

Petitioners argue that, at most, the Second Amendment protects "the right to keep and bear arms as a part of a well-regulated militia." Pet. Br. at 11–12. Petitioners, noting that "since 1903, the militia has consisted of two parts, the National Guard and an 'unorganized militia,'" *id.* at 14 & n. 2, further insist that "[i]f language is to have meaning, membership in an unorganized militia is not membership in a 'well regulated' militia." *Ibid.* At the same time, however, Petitioners assert that a militia is only "well regulated" within the meaning of the Second Amendment if the *federal* government has exercised its authority under the second Militia Clause to organize, arm, and discipline that Militia. See *id.* at 21 ("Clause 16 makes clear that the federal government shall provide for 'organizing, arming * * * and disciplining, the Militia [so that they will be well-regulated]'" (bracketed material in original)). To summarize these various strands of Petitioners' argument, only federal legislation enacted under the second Militia Clause can make a militia "well regulated" within the meaning of the Second Amendment, and only members of a well-regulated militia have any right to keep and bear arms.

Congress, however, has *no* obligation to organize any militia. See, *e.g.*, *Perpich* v. *Dep't of Defense*, 496 U.S. 334, 350 (1990) ("It is by congressional choice that the available pool of citizens has been formed into organized units"). Under Petitioners' reading of the Constitution, in which only federal action can make a militia "well regulated," if Congress were to elect not to form the militia into organized units then *no* citizen would have a Second Amendment right to keep and bear arms. And if a State were to attempt to raise a body of men as a militia, that body would, lacking federal organization under the second Militia Clause, not be "well regulated," and its members would lack any Second Amendment rights.

Obviously the Framers, who indisputably were opposed to disarming the people in favor of a federal standing army, see Pet. Br. at 9, did not intend to leave the fox in charge of the henhouse. The risk of conditioning a right to keep and bear arms on federal regulation of the Militia was foreseen by George Mason, who warned "Congress may neglect to provide for arming and disciplining the militia * * * for Congress has an exclusive right to arm them * * *. Should the national government wish to render the militia useless, they may neglect them and let them perish." 3 Elliot, Debates in the Several State Conventions on the Adoption of the Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 379 (2d ed. 1836). Thus, the Second Amendment guarantees a *right* to *the people* for a reason. However Congress elects to organize the Militia at any given time, "the right of *the people* to keep and bear arms" was enshrined in the Constitution to ensure that the people would always remain a bulwark for "the security of a free State."

4. In addition to contending that the Second Amendment does not protect any individual right to keep and bear arms for private purposes, Petitioners assert that the Amendment simply does not apply to any regulation by the District or by state and local governments. See Pet. Br. at 35–40; see also, *e.g.*, Brief of Amici Curiae Major American Cities, *et al.*, in Support of Petitioners at 12–24 ("Pets' Cities Br."). This argument is meritless.

Petitioners' and their supporting *amici*'s argument is based primarily upon this Court's pre-incorporation holding in *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886), that the Second Amendment does not limit state authority. It is also based on the obvious point that, at the time of the Framing, the Bill of Rights, including the First Amendment, the Second Amendment, and the rest, was intended to protect against the abuse of federal authority. See, *e.g.*, Brief of the City of Chicago *et al.* in Support of Petitioners at 4–13 ("Chicago Br.").

The latter point is rendered moot by the incorporation of the Bill of Rights which occurred throughout the last century. While the Framers, in adopting the Second Amendment, were concerned (among other things) with the possibility of federal oppression, they also were concerned particularly with federal oppression in adopting, *e.g.*, the First Amendment's Establishment Clause ("*Congress* shall make no law respecting an establishment of religion"), which of course has been incorporated against the States. See, *e.g.*, *Elk Grove United School Dist.* v. *Newdow*, 542 U.S. 1, 8 & n. 4 (2004).

As to the pre-incorporation decision in *Presser*, while the Court did conclude that the Second Amendment was inapplicable to state legislation, the

Court simultaneously and unambiguously stated that States cannot deprive individuals of their right to keep and bear arms:

> It is undoubtedly true that *all citizens capable of bearing arms* constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, *the states cannot, even laying the constitutional provision in question* [*i.e.*, the Second Amendment] *out of view, prohibit the people from keeping and bearing arms*, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

116 U.S. at 584 (emphases added). While *Presser* explained that the restriction on States disarming the people was a structural constraint implicit in the Militia Clauses, following incorporation it makes more sense to ground that restriction in the Second Amendment. In either case, *Presser*, far from supporting Petitioners, instead confirms that state governments are not free to infringe the right of the people to keep and bear arms.

Petitioners go on to argue that the District's status as the seat of the national government somehow precludes the District's residents from enjoying Second Amendment rights. See Pet. Br. at 36–38. It has, however, long been held that residents of the District enjoy the same constitutional rights as every other American. As the Court explained in *O'Donoghue* v. *United States*, "[p]rior [to formation of the District] its inhabitants were entitled to *all the rights*, guaranties, and immunities of the Constitution * * *. We think it is not reasonable to assume that the cession stripped them of these rights." 289 U.S. 516, 540 (1933) (emphasis added). Thus, the Second Amendment rights of residents of the District, much like their First Amendment rights, are no less than those of persons living merely across an intersection in Bethesda or a bridge in Arlington.

5. All told, Petitioners' reading of the Second Amendment is inconsistent and incompatible with the text of the Amendment; is not even compelled by the singular purpose they identify; and would permit Congress to wholly abrogate the right to keep and bear arms by declining to organize the Militia. In light of the Amendment's text and history, the only sensible conclusion is that it protects an individual right to keep and bear arms that is enforceable against all levels of government.

II. Laws Infringing Second Amendment Rights Should Be Subject to Strict Scrutiny and Facial Invalidation Where Overly Broad

The Petitioners and their supporting *amici*, as well as the United States, argue that laws regulating firearms should not be subjected to strict scrutiny, but at most to intermediate-level scrutiny (as asserted by the United States) or possibly even a "reasonableness" review (as Petitioners and various other *amici* appear to prefer). See Pet. Br. at 41–48; Brief of the United States at 20–25; see also, *e.g.*, Brief of Law Prof. Chemerinsky *et al.* in Support of Petitioners ("Chemerinsky Br."). Petitioners further argue that laws regulating firearms should only be declared facially invalid if they are incapable of constitutional application. On each of these points, Petitioners are in error.

1. Traditionally, this Court has applied "strict scrutiny" to laws that regulate "fundamental" rights, such as the right to political speech. See generally *Burson* v. *Freeman*, 504 U.S. 191 (1992); *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007). Such a law may only be upheld if it is "necessary to serve a compelling state interest and * * * it is narrowly drawn to achieve that end." *Burson*, 504 U.S. at 198 (internal quotation marks and citation omitted).

In arguing that strict scrutiny should not be applied to laws infringing rights guaranteed by the Second Amendment, Petitioners assert that Second Amendment rights are not "fundamental." See Pet. Br. at 38–39 & n. 9, 43 & n. 11. In this, Petitioners could not be more mistaken.

As the Framers made clear in the *very text* of the Second Amendment, they considered the right to keep and bear arms "*necessary* to the security of a free State." Under this Court's First Amendment jurisprudence, this explicit connection between the right to keep and bear arms and the preservation of democratic self-government compels a conclusion that the Amendment guarantees a "fundamental" right.[4] For example, as the Court explained in *Schneider* v. *New Jersey*:

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[4] A "free State," in Framing-era parlance, referred to a polity free from government oppression. See Volokh, Necessary to the Security of a Free State, 83 Notre Dame L. Rev. 1, 5 (2007) ("In eighteenth-century political discourse, 'free state' was a commonly used political term of art, meaning 'free country,' which is to say the opposite of a despotism").

> This Court has characterized the freedom of speech and that of the press as *fundamental* personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights *lies at the foundation of free government by free men.*

308 U.S. 147, 161 (1939) (emphases added); see also *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940) ("The safeguarding of these [First Amendment] rights * * * is essential to *free government*" (emphasis added)). The link between rights "at the foundation of free government by free men" and strict scrutiny was expressed clearly by this Court in *United States v. Robel*, where it stated:

> Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms. The Constitution and *the basic position of First Amendment rights in our democratic fabric* demand nothing else.

389 U.S. 258, 267–68 (1967) (citation and footnote omitted) (emphasis added).

Just as the First Amendment, with its "basic position * * * in our democratic fabric," has always been deemed to guarantee "fundamental" rights, so too does the Second Amendment, with the right to keep and bear arms, alone among all the rights guaranteed by the Bill of Rights, singled out in the text of the Constitution as "necessary to the security of a free State." It would be fanciful to posit that the Framers, having recently fought a war of independence against oppressive British rule that relied upon the participation of citizen soldiers bearing personal arms, would not deem the right to keep and bear arms a right fundamental to democratic self-rule. Indeed, James Madison, in the Federalist No. 46, specifically relied upon an armed citizenry to discount the possibility of federal oppression. After noting that the armed body of the American people would greatly outnumber any possible federal standing army, Madison went on to observe:

> To [the federal army] would be opposed a militia of amounting to near half a million of citizens with arms in their hands, officered by men chosen among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility.

Federalist No. 46 at 299 (James Madison) (C. Rossiter ed. 1961). Madison then referred immediately to "the advantage *of being armed*, which *the Americans*"—not merely some select body of them—"possess over *the people*"—again, a reference to the general populace—"of almost every other nation * * *." *Ibid.* (emphases added).

Amici supporting Petitioners contend that not all laws restricting "fundamental" rights are subjected to strict scrutiny, and assert that laws burdening Second Amendment rights should, like some other "fundamental" rights, be examined under a lower standard of review. See Chemerinsky Br. at 25–30. The *amici* fail to note the distinction, however, between rights that are fundamental to democratic self-government, such as political speech and the right of the people to keep and bear arms, and those protections of the Bill of Rights that, in the course of being incorporated through the Fourteenth Amendment against the States, were deemed "fundamental" to the American system of justice.[5] Whatever the varying tests applied to laws touching on the criminal justice and due process provisions in the Bill of Rights, laws burdening rights fundamental to our democracy, such as political speech, are reviewed under strict scrutiny. See *Wisconsin Right to Life*, 127 S. Ct. at 2663–64; see also, *e.g.*, *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986) (analyzing law burdening First Amendment associational interest of political party members under strict scrutiny).

In summary, the Second Amendment guarantees a fundamental right as that term has always been used by this Court. Moreover, the Amendment protects not any fundamental right, but a right that is fundamental to our democratic self-government. For that reason, laws infringing the Second Amendment should be the subject of strict scrutiny by a reviewing court, not the lower levels of scrutiny sought by Petitioners, their supporting *amici*, and the United States.

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[5] See, *e.g.*, Chicago Br. at 16 (contending that the "fundamental to the American scheme of justice" test is the only test for recognizing "fundamental" rights).

2. In arguing against strict scrutiny for laws infringing Second Amendment rights, various *amici* supporting Petitioners contend that a lower standard of review is necessary in light of the scores of federal and state laws and regulations concerning possession of firearms such as sawed-off shotguns; the possession of firearms by felons, the insane, or minors; or the use of arms in the commission of a crime. See, *e.g.*, Chemerinsky Br. at 7–10; cf. Brief of the American Bar Association at 11–17 (listing various gun control laws and warning, without explanation, that "it is more than plausible" that "many" would be repealed or revised). The obvious *in terrorem* purpose of this argument is to suggest that if the Court holds that laws burdening the fundamental right to keep and bear arms are subject to strict scrutiny, governments may be powerless to stop insane convicted felons from using sawed-off shotguns to commit crimes in this very Court, or even to punish them in the aftermath.

Missing from these arguments on Petitioners' side is a listing of which, if any, of the many laws they have collected would fail to pass muster under strict scrutiny. That is to say, are Petitioners and their supporting *amici* truly concerned that longstanding laws barring the insane from owning firearms are at risk of being found not narrowly tailored to serve a compelling government interest? It seems clear that the real purpose of their cataloguing of firearms laws is to leverage a false concern regarding most such laws into support for application of a vague "reasonableness" test to such extreme laws as the

District's handgun ban. This effort to muddle the issue must be seen for what it is and rejected.

Amici in support of Petitioner also rely upon their roll call of firearms legislation, and this Court's decision in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), to argue that, because there are many valid restrictions on the right to keep and bear arms—bans on ownership by felons, the insane, et cetera—courts should not feel the need to examine firearms laws with any form of heightened scrutiny. See Chemerisnky Br. at 6. This argument by sheer number of valid laws is misguided: strict scrutiny is applied to laws burdening the right to political speech, even though that right is hedged about with a multitude of constitutionally-acceptable time, place, and manner restrictions. See, *e.g.*, *Wisconsin Right to Life*, 127 S. Ct. at 2663–64. The notion that *any* burdens on the exercise of a fundamental right, no matter how severe—indeed, in the instant case, a complete ban—may be approved under a reasonableness test simply because many less severe regulations exist is obviously not the law.

3. Petitioners, in arguing against application of strict scrutiny, suggest in an *ipse dixit* that "[u]nlike speech restrictions, gun regulations raise no risk of viewpoint discrimination and no specter of silencing the view of the opposition." Pet. Br. at 47. They provide no basis for their sanguine view and, in fact, their collective-right position would provide governments substantial opportunity to ban arms from the political opposition.

Petitioners insist that only members of a well-regulated militia have any Second Amendment right to keep and bear arms, and that only military organizations, such as the National Guard, count as such militias. See *supra* at 12. Under Petitioners' view of things, governments may, through their decisions concerning *how* to organize the militia and *who* to appoint as officers in the militia, decide who has any right to keep and bear arms. State governments could seek to disarm opponents by naming only supporters as militia officers; the federal government could focus the organization of militia units in regions of the country supporting the party in power. History and logic suggest that an oppressive regime will be at least as concerned with disarming its opponents as it will be with abridging their speech.

4. Petitioners argue that laws infringing Second Amendment rights only should be found facially invalid if they are incapable of constitutional application. See Pet. Br. at 57; see also generally, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739 (1987) (articulating the "no set of circumstances" test for facial invalidity). In this, again, Petitioners are mistaken.

While most laws are subject to facial invalidation only if they are incapable of constitutional application, this Court has long made an exception for laws burdening rights "fundamental to democracy," generally free-speech rights. For such fundamental democratic rights, this Court has employed facial invalidation whenever a law is "overly broad." See, *e.g.*, *Goodling* v. *Wilson*, 405 U.S. 518, 521 (1972) (allowing facial invalidation of laws burdening First Amendment rights if they are "overly broad"); *Robel*, 389 U.S. at 265 ("[i]t has become axiomatic that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms" (internal quotation marks and citation omitted).

This Court often also has premised the use of "overbreadth" analysis for First Amendment rights on the existence of a "chilling effect" with respect to free speech. Overbreadth review, the Court has said, "is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute capable of application to protected expression." *Goodling*, 405 U.S. at 521.

Each of these bases for application of overbreadth analysis is met with respect to the Second Amendment right to keep and bear arms. For the reasons given above, Second Amendment rights, like First Amendment rights, were deemed by the Framers to be fundamental to our democratic self-government. See *supra* at 17–19. Moreover, like speech, the decision whether to keep and bear an arm is subject to a substantial chilling effect. Law-abiding citizens wishing to keep a firearm for self-defense in their own homes may fear prosecution should they actually use their arms to protect themselves against violent criminals. For example, Petitioners argue that there is no Second Amendment right to possess firearms for "private purposes" and admit that on their face the D.C. Code provisions in question make the use of firearms for self-defense unlawful. See, *e.g.*, Pet Br. at 11–12 (arguing that Second Amendment does not protect right to possess firearms for "private purposes"); *id.* at 31 (arguing that the Pennsylvania antecedent to the Second Amendment "protects only a right to bear arms for communal (rather than personal) self-defense"); *id.* at 56 (conceding that a right to unlock firearms for use in self-defense is at best a "fairly implied" exception to the trigger-lock requirement). Given such uncertainty about their right to use firearms in self-defense, many D.C. residents, fearful of criminal prosecution, may hesitate to lawfully use a firearm at the very moment when their lives, and the lives of their loved ones, are most in danger.

Overly broad firearms regulations, such as each of the provisions at issue in this case, burden the exercise of fundamental rights and risk chilling the Constitutionally-protected activities of law-abiding citizens. This Court should strike down these, and other such overly broad laws, and require governments wishing to regulate firearms to use laws narrowly tailored to address any truly compelling government interests that Petitioners, and other government actors, identify.

III. The District's Handgun Ban and Licensing and Trigger-Lock Provisions Are Unconstitutional Infringements of Second Amendment Rights

Applying strict scrutiny to the District's handgun ban and licensing and trigger-lock provisions, and analyzing whether those laws are overly broad restrictions on the Second Amendment rights of law-abiding citizens, the only conclusion that can be drawn is that they are unconstitutional and must be struck down in their entirety.[6] The District can disarm criminals and punish the use of firearms in violent crime using already existing laws narrowly tailored toward achieving those ends, the same type of laws relied upon by nearly every other jurisdiction in America.

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[6] These laws should be struck down under any level of review, for the reasons given by Respondent. See Respondent's Brief at 41–42.

1. In seeking to justify the District's laws, Petitioners and their supporting *amici* assert that there is a compelling government interest in protecting citizens from the criminal misuse of handguns and from firearms accidents. The laws in question, however, are not narrowly tailored to meet either purpose. What Petitioners never even attempt to confront is the fact that the *vast* majority of handguns are owned by law-abiding citizens and the overwhelming majority of firearms are *never* used in the commission of a crime or involved in an accident.

Thus, Petitioners invoke "national statistics" gathered by the D.C. Council in 1976 showing that "handguns [were] used in 54% of all murders, 60% of robberies, 26% of assaults and 87% of all murders of law enforcement offers." Pet. Br. at 4–5. The total *number* of violent crimes committed with handguns is, however, far more analytically significant. In 2004, for example, according to the Centers for Disease Control's National Center for Health Statistics ("NCHS"), there were 11,624 murders committed with any firearm.[7] There are, on the other hand, an estimated 200 million firearms lawfully owned by private citizens in the United States, including approximately 60–65 million handguns. Thus, that handguns were used in some percentage of murders is no more analytically significant than the fact that ski masks or pantyhose are worn by criminals in the vast majority of bank robberies. The use of firearms for private purposes by law-abiding citizens vastly exceeds and outweighs their unlawful use by criminals.

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[7] For NCHS statistics on causes of death in 2004, see Deaths: Final Data for 2004, Table 12, available at http://www.cdc.gov/nchs/fastats/deaths.htm.

Petitioners also seek to paint the lawful possession of firearms as exceedingly dangerous, noting that firearms are involved in accidental deaths. See, *e.g.*, Pet. Br. at 5. According to NCHS, 649 deaths in 2004 were caused by the accidental discharge of firearms. By way of comparison, however, nearly 45,000 Americans died in automobile accidents that year and over 3,300 from drowning. Moreover, the 649 firearms-related deaths must be placed in the context of the 200 million privately-owned firearms in America; only an infinitesimally small percentage of firearms ever are involved in an accidental death. Comparatively speaking, the nation's 250 million vehicles are far more often involved in fatal accidents.[8]

All told, legislation barring wholesale the lawful possession and use of all functional firearms by law-abiding citizens cannot survive any level of scrutiny, let alone strict scrutiny. As this Court recently explained in the First Amendment context, "the desire for a bright-line rule * * * hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom," and "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech." *Wisconsin Right to Life*, 127 S. Ct. at 2672 (internal citations omitted; emphasis in original). Jurisdictions including the District already have the tools they needs to disarm criminals, including laws banning convicted felons from owning firearms and punishing the use of firearms in the commission of violent crimes. See, *e.g.*, 18 U.S.C. §§ 922(g), 924. The District cannot, however, bar law-abiding citizens from owning handguns, or prohibit them from maintaining and using functional firearms in their homes.

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[8] For statistics on the number of registered vehicles, see Bureau of Transportation Statistics, National Transportation Statistics Table 1-11, available at www.bts.gov/publications/national_transportation_statistics/#chapter_1.

2. If a complete handgun ban *were* a narrowly tailored means of addressing the crime and accidental deaths trumpeted by Petitioners, then one might expect States and other major American cities to have enacted similar bans. In fact, however, no State has a complete ban on the ownership of handguns akin to the District's, and of major cities, only San Francisco and Chicago have done so—and San Francisco's ban recently was struck down on state-law preemption grounds. See *Fiscal* v. *San Francisco*, 158 Cal. App. 4th 895 (2008).

To the extent the District's handgun ban was intended to reduce murder and other violent crime in the District it has been a complete failure, disarming law-abiding citizens while leaving criminals as dangerous as ever. In 1975, the year before the District enacted its handgun ban, there were approximately 1,774 violent crimes committed in the District for every 100,000 residents, including 32.8 murders. While the violent crime rate dipped from 1976 to 1979, it was greater than the 1975 rate in 14 of the following 18 years, peaking at 2,920 violent crimes per 100,000 in 1993—nearly 65% higher than in 1975. Likewise, the District's murder rate exceeded the 1975 rate each year from 1987 through

2005, and was commonly more than twice as high. In 1991—*fifteen years* after the handgun ban was enacted—the District's murder rate, at 80.6 per 100,000, was 146% higher than in 1975.[9]

Perhaps most revealing, in 2006—*three decades* after the handgun ban was enacted—the District's murder rate remained 29.1 per 100,000, only 11.3% lower than the 1975 rate of 32.8. The nationwide murder rate, on the other hand, fell from 9.6 to 5.7 per 100,000 during this period, a far greater decline of 40.6%. Murder rates in the District are not only far higher than in the nation as a whole (in 2006, the District's rate was more than five times the national average), they are also greater than in most other comparably-sized cities. The District's murder rate of 29.1 per 100,000 in 2006 was third highest among the 48 jurisdictions with more than 500,000 residents; only four other comparably-sized cities that year had a murder rate even as high as 20.

All told, whatever the District's expectations in enacting the handgun ban in 1976, three decades of evidence conclusively demonstrate that it has been an absolute failure. It has burdened the Second Amendment rights of the District's residents to very little, if any, effect. It is long past time for the District's experiment, at the expense of law-abiding citizens, to end.

3. To sidestep the fact that handguns and other functional firearms are overwhelmingly kept in the

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[9] For data concerning the District's violent crime rates over time and in comparison to other cities, see Bureau of Justice Statistics, Crime Trends, State and National Crime Trend Estimates and Large Local Agency Crime Trends, available at http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/Crime.cfm.

home for lawful purposes, Petitioners rely in part upon the statement by the D.C. Council that handguns "have no legitimate purpose in the purely urban environment of the District of Columbia." Pet. Br. at 6. Petitioners do not explain what, if any, support the Council had for this audacious statement, nor do they provide any of their own. That should, perhaps, be unsurprising, because of course handguns and other firearms, kept in a functional state free from trigger locks, have substantial legitimate uses in the District.

To take one salient example, the flipside of the violent crimes upon which Petitioners place so much stock is the hoary right of individuals to defend themselves in their own home. And there are no better tools to aid that right than firearms, including handguns.

The Framers were familiar with the right of individuals to employ deadly force in self-defense, particularly within the home. The "castle doctrine" was firmly established in the common law at the time of the founding. See, *e.g. Semayne's Case*, 5 Co. Rep. 91a (K.B. 1603) ("The house of every one is his castle, and if thieves come to a man's house to rob or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is no felony and he shall lose nothing").

A corollary to the castle doctrine was the right to keep firearms in the home in order to repel invaders. Coke, for instance, wrote that "in some cases a man may use force and *arms* * * * for a man's house is his castle * * * for where shall a man be safe if it be not his house? And the laws allow *arms* to be taken against an armed foe." 3 Coke, Institutes of the

Laws of England (2d ed. 1648), at 161–62 (emphases added).

The essential right to self-defense, including defense of the home, has always been engrained in American jurisprudence. In *Beard* v. *United States*, 158 U.S. 550, 564 (1895), for instance, this Court concluded that a person who is attacked "[i]s entitled to stand his ground and meet any attack made upon him with a deadly weapon." And state courts continue to this day to refer to the individual's right to employ deadly arms in self-defense. See, *e.g.*, *Moseby* v. *Devine*, 851 A.2d 1031, 1043 n.7 (R.I. 2004) (declaring that there is no "duty to retreat before one may employ deadly force to repel an attack" in one's home); *State* v. *Hamdan*, 264 Wis. 2d 433, 443 (2003) (ruling unconstitutional a state statute outlawing the carrying of a concealed weapon as applied to a defendant storeowner who kept a concealed handgun near the cash register).

The right to home defense using deadly force would be illusory if one was not entitled to keep functional firearms, including handguns, in the home. This Court has previously acknowledged the suitability of handguns for self-defense. See *Patsone* v. *Pennsylvania*, 232 U.S. 138, 143 (1914) (in upholding conviction of an alien for owning a shotgun, finding statute constitutional in part because it did "not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense"). This observation has also been made by various state courts, see, *e.g.*, *Matthews* v. *State*, 237 Ind. 677, 686–87 (1958) (upholding provision of state licensing law on the ground that the Act did not "prohibit * * * [anyone] from having a pistol in his home or 'fixed place of business' for the defense of himself"), and by commentators, see, *e.g.*, Dorfman & Koltonyuk, When The Ends Justify The Reasonable Means, 3 Tex. Rev. L. & Pol. 381 (Spring 1999).

Overwhelming evidence shows that firearms, including handguns, are the most effective and safe means of deterring burglars and other home invaders. See Ikeda *et al.*, Estimating Intruder-Related Firearm Retrievals in U.S. Households, 1994, 12 Violence and Victims 4, 363 (Winter 1997) (according to CDC, an estimated 497,646 homeowners believed that they scared away an intruder using a firearm in 1994); Kopel, Lawyers, Guns, and Burglars, 43 Ariz. L. Rev. 345, 346 (Summer 2001). Victims who resist with a firearm are less likely than other victims to lose their property to a burglar. See Kleck & Gertz, Armed Resistance To Crime: The Prevalence and Nature of Self-defense with a Gun, 86 J. Crim. L. & Criminology 150, 151 (Fall 1995); Tark & Kleck, Resisting Crime, 42 Criminology 861, 882 (Nov. 2004). In the majority of cases, the burglar flees as soon as he discovers the victim is armed, and before a shot is ever fired. See Kleck & Gertz, *supra*, at 164 (explaining survey data showing 2.2 million to 2.5 million defensive gun uses annually in the United States, most without firing a shot, and the vast majority are handgun uses).

Notably, aware of high rates of home ownership of firearms, burglars in the United States have a strong tendency to forego intrusion when homeowners are likely to be present. See Kopel, *supra*, at 346. By contrast, British and other European homeowners, who are generally subject to stricter gun control laws, are three times as often as

American homeowners to be home when burglaries occur. See Dorfman & Koltonyuk, *supra*, at 395; Kopel, *supra*, at 346.

Because they are easy to handle effectively, firearms, especially handguns, are proven defensive arms. See Caplan & Wimmershoff-Caplan, Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—And the Castle Privacy Doctrine in the Twenty-First Century, 73 UMKC L. Rev. 1073, 1105 (2004–2005) (arguing that, "in modern times, effective self-defense implies a handgun; long-guns can also be very effective * * * but in some homes they may be unwieldy or awkward to use."); Dorfman & Koltonyuk, *supra*, at 392 (observing that handguns function as the "great equalizer," because of their small size, effectiveness, and relative simplicity). For many people, including especially many women, a handgun, which is smaller, lighter and causes less recoil than a rifle or shotgun, may be the safest and most effective means of self-defense.

The need for functional firearms, including handguns, to defend oneself in one's own home is no less today than when the right to self-defense was first articulated centuries ago. The threat of home invasion, for example, is ever present in the District and has become a problem of pressing concern. See, *e.g.*, McLaughlin, Death-Penalty Deliberations to Begin, Washington Times, 6/5/07, at B01 (trial involving double murder in home invasion); Knott, Slain Journalist's Family Gives City Wake-Up Call, Washington Times, 1/18/07, at B02 (city is accustomed to home invasions in broad daylight). In the face of such threats, and the lack of an enforceable duty under District law for the police to actually protect District residents, the need for firearms for self defense is even more important. See, *e.g.*, *Morgan* v. *District of Columbia*, 468 A.2d 1306, 1308 (D.C. 1983) (police have no duty "to protect individual citizens from crime"); cf. *Riss* v. *City of New York*, 22 N.Y.2d 579, 584–85 (1968) (Keating, J., dissenting) ("What makes the city's position particularly difficult to understand is that, in conformity, to the dictates of the law, Linda did not carry any weapon for self-defense (former Penal Law, s 1897). Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her").

In summary, the notion that handguns can serve "no legitimate purpose" in the District is simply wrong. Law-abiding citizens in the District, like citizens nearly everywhere else in our nation, have a substantial legitimate need for functional firearms, including handguns, for self-defense. The District's handgun ban and use and trigger-lock restrictions, on the other hand, serve no legitimate purpose and must be struck down.

CONCLUSION

For the foregoing reasons, the holding of the D.C. Circuit should be affirmed.

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DISTRICT OF COLUMBIA and ADRIAN M. FENTY,
Mayor of the District of Columbia,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL SHOOTING SPORTS FOUNDATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE* [1]

The *amicus curiae* is the National Shooting Sports Foundation, Inc. ("the NSSF"), the trade association for the firearms, ammunition, hunting, and shooting sports industry. Formed in 1961, the NSSF is a Connecticut non-profit tax-exempt corporation with a membership of more than 4,200 firearms manufacturers, distributors, and retailers; sportsmen's organizations; shooting ranges; gun clubs; publishers; and individuals. The NSSF provides trusted leadership in addressing industry challenges; advances participation in and understanding of hunting and the shooting sports; reaffirms and strengthens its members' commitment to the safe and responsible use of their products; and promotes a political environment that is supportive of America's traditional hunting heritage and firearms freedoms.

The NSSF's interest in this action derives principally from the fact that the NSSF's firearms manufacturer, distributor, and retailer members provide the lawful commerce in firearms that makes the exercise of Second Amendment rights possible. Members of the industry, for example, supply the United States armed forces and federal, state, and local law enforcement with the firearms they use to protect America's national security and keep our communities safe, and also supply hunters, sportsmen, and gun owners with the firearms they use for lawful purposes. More generally, as a guardian of our nation's rich hunting and shooting heritage and traditions, the NSSF believes that any interpretation of the Second Amendment must be informed by that heritage – particularly the history of firearms in colonial America before and during ratification of the Second Amendment. Because that history demonstrates that the Second Amendment protects an *individual* right to "keep and bear arms," the NSSF submits this brief in support of Respondent and urges this Court to affirm the decision below of the United States Court of Appeals for the District of Columbia Circuit.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Second Amendment to the Constitution provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Notwithstanding today's overheated environment, the meaning of this amendment does not present a political issue; it presents a simple question of what the Framers intended when they crafted its language.

The Framers' intent regarding the Second Amendment is obvious from the central role that firearms played in Americans' lives before and during ratification of the Constitution and the Bill of Rights. Personal ownership of firearms was, of course, often critical to survival in the 17th and 18th centuries (and long thereafter) – providing food before there were supermarkets and safety before there were police forces.

More importantly, late 18th century Americans deemed firearms to be their principal protection against tyranny – first from the British crown and then from the new national government they were creating in the Constitution. Today, one takes for granted that we have national and state governments with overlapping jurisdiction. In the late 18th century, however, this was an unprecedented concept that was being added to what was then still a radical experiment in republican government. Many Americans at the time of the Constitution's ratification feared that this national government – to be run by an equally unprecedented office of "President" – would become a new source of tyranny, replacing the British crown they had just overthrown. Accordingly, they sought protections from potential tyranny, including freedom of religion, freedom of speech, and the right "to keep and bear arms." While, to some, the notion may seem quaint today, the Second Amendment's guarantee of the individual right to bear arms ensured that the new national government would not be able to oppress the American people. That guarantee cannot now be read out of the Bill of Rights simply because times have changed.

ARGUMENT

It is no accident that firearms are the only product protected by the Bill of Rights. Having relied upon firearms for basic survival in the colonies, 18th century Americans found themselves well armed to fight a Revolution against Great Britain – then the world's premier military power. The colonists won that Revolution, in part, because they had successfully resisted Britain's multiple attempts to disarm the colonists. Having learned that lesson, Americans ratifying the Constitution then insisted upon a provision to protect the right of individuals to "keep and bear arms." Because this history makes clear that the Second Amendment was intended to protect an individual right, the decision below should be affirmed.

I. Firearms Were A Principal And Ubiquitous Tool Of Survival In Colonial America

In the colonial era leading up to the drafting of the Constitution and Bill of Rights, firearms played a prominent role in America. No longer a privilege shared only by noblemen and the wealthy, as in Britain, firearms in America were an important means of assuring self-preservation for all classes.[2] Firearms were commonly viewed as essential to protecting colonists from attacks by Native Americans, insurrections by slaves, and harm from wild animals. Firearms also proved superior to other weapons in hunting, for both food and trade, the vast numbers of wild game and fowl that inhabited the New World – so much so that Native Americans, when possible, abandoned their traditional weaponry for the new firearms.[3]

Although it is impossible to quantify with certainty the prevalence of firearms in colonial America, academicians have been able to extrapolate estimates from probate inventory reports and contemporary accounts of observers. One recent such study estimates firearms ownership in 1774 at over fifty percent, compared with roughly seventy-seven percent clothes ownership and thirty percent money and coin ownership.[4] According to a review of over 5,000 probates from 1636 through 1810, "[a]pproximately 50-79% of itemized male inventories contained guns." [5] These are likely conservative estimates, and firearms ownership was likely substantially higher.[6]

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[2] *See* LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA 41 (1975); ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA 17 (2001).

[3] KENNETT & ANDERSON, *supra* note 2, at 41-42, 51.

Numerous observers of life in the colonies reported the commonplace use of firearms. An Anglican minister of the era, for example, noted that "the great quantities of game, the many kinds, and the great privileges of killing make the Americans the best marksman [*sic*] in the world." [7] Another commentator reported that "there is not a Man born in America that does not understand the Use of Firearms and that well. . . . It is almost the First thing they Purchase and take to all the New Settlements and in the Cities you can scarcely find a Lad of 12 years That [does not] go a Gunning." [8] Yet another noted: "[W]hen a boy was twelve 'he then became a fort soldier, and had his port-hole assigned him. Hunting squirrels, turkeys, and raccoons, soon made him expert in the use of his gun.'"[9] Even non-citizens had access to firearms. Slaves, for a time, in some areas had access to firearms for hunting, although armed slave insurrections subsequently led to the disarmament of slaves and, in some regions, freed blacks as well.[10] Native Americans, dependent on firearms for food and defense, also came to possess significant quantities of firearms.[11]

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[4] *See* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1835-36 (2002).

[5] *Id.* at 1838.

[6] The probate reports are admittedly incomplete and imperfect sources of information; however, as the authors explain, the incompleteness indicates that probate reports tend to understate, rather than overstate, items possessed. For example, "unless nudity was . . . widely practiced," one would expect clothing to be reported on every probate, which it is not. *Id.* at 1836-37. It is also possible that firearms were passed on to others before death.

[7] KENNETT & ANDERSON, *supra* note 2, at 42 (citation omitted).

[8] *Id.* (citation omitted).

Laws in effect in the colonies encouraged, even required, the carrying and use of firearms. Inhabitants in at least six colonies were required to carry firearms to church, public meetings, or while traveling, in order to repel sudden attacks by Native Americans.[12] More ubiquitous, however, were "militia laws," which appeared beginning in the mid-17th century and required colonists to bear arms in common defense against Native Americans and Britain's European enemies.[13] The militia laws generally required persons between specified ages (usually between sixteen and sixty) to bear arms, often at their own expense, and to provide arms for servants living within their households.[14] Laws encouraging hunting emerged in order to hone marksmanship skills at private expense.[15] By the time of the American Revolution, every colony had its own militia of private citizens,[16] and firearms were ingrained in the American experience. [17]

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[9] *Id.* (citation omitted).

[10] *See* CLAYTON E. CRAMER, ARMED IN AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE 33-36 (2006) (citing South Carolina laws and customs).

[11] *See id.* at 46-50; KENNETT & ANDERSON, *supra* note 2, at 51.

[12] *See* CRAMER, *supra* note 10, at 9-11.

[13] *See, e.g.*, *id.* at 3-11.

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[14] *See id.* at 3-9 (describing various militia laws and exemptions from militia service).

[15] *See* KENNETT & ANDERSON, *supra* note 2, at 46.

[16] *See* CRAMER, *supra* note 10, at 3.

[17] The firearms-dependent society of late 18th century America, of course, gave birth to a vibrant firearms manufacturing industry. By 1800, John Adams wrote that: "Those who recollect the distress and danger to this country in former periods from the want of arms, must exult in the assurance from their representatives, that we shall soon rival foreign countries, not only in the number, but in the quality of arms, completed from our own manufactories." JOHN ADAMS, 9 WORKS 149 (C. Adams ed. 1854). Around the same time, Thomas Jefferson wrote that: "Our citizens have always been free to make, vend and export arms. It is the constant occupations and livelihood of some of them." THOMAS JEFFERSON, 6 WRITINGS 252-53 (P. Ford ed. 1895). *See* S. DYKE, THOUGHTS ON THE AMERICAN FLINTLOCK PISTOL 7 (1974).

Today, the manufacture and sale of firearms in America remain in private hands. Indeed, as there is no government-owned arsenal, private manufacturers, most of whom are members of the NSSF, supply small arms used by the American military, law enforcement, and consumers. Moreover, because, as discussed below, the Second Amendment protects an individual right to "keep and bear arms," the commerce that makes exercise of that right possible is necessarily cloaked in some degree of Constitutional protection. *Cf. Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 866-867 (1982) (plurality

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II. The British Tried And Failed To Disarm The Colonists During The American Revolution

Colonial life, of course, entered a new phase in 1767, with the British Parliament's passage of the Townshend Acts. As the dispute between the colonies and the Crown escalated, the colonists' widespread possession of firearms quickly became an issue – and one that the colonists defended immediately.

A. At the Earliest Hostilities, Colonists Asserted Their Pre-Existing Individual Right to Keep and Bear Arms

The Townshend Acts imposed customs duties on items commonly imported into the colonies. This "taxation without representation" sparked outrage among many colonists, and led to petitions to the Crown and Parliament for redress. Because Boston was seen as the hotbed of civil unrest in the colonies, British General Thomas Gage was instructed to send military forces into the city.[18] When riots then erupted in Boston

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opinion) (noting, in the context of First Amendment rights, that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom") (emphasis in original); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (without the "peripheral rights" to distribute, receive, read, inquire, think, and teach, the specific rights of freedom of speech and press would be less secure).

[18] 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY, 1763-1775, at 68-69 (Clarence E. Carter ed., Yale University Press 1931-33).

in 1768, the British Ministry responded by seeking to disarm the inhabitants of Boston.[19]

Bostonians became alarmed, and passed a resolution advising every man to arm himself "in Case of Sudden Danger."[20] Although Massachusetts law had already required inhabitants to keep arms, the assembly now found compliance with this law to take on a sudden urgency.[21] When King George III denounced this resolution as an illegal act, Samuel Adams defended the resolution by declaring that, as "subjects of England," the Bostonians were "entitled . . . to the right of having and using arms for self-preservation and defence." Adams argued that the right to bear arms constituted what British jurist William Blackstone had called "'auxiliary subordinate rights, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property.'"[22]

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[19] *See* Boston Gazette, September 26, 1768, at 3, cols. 1-2 (reporting that the Ministry had instructed the Governor to disarm the people); Virginia Gazette, October 27, 1768, at 2, col. 3 (same); Maryland Gazette (Annapolis), October 20, 1768, at 3, col. 1 (same); Georgia Gazette (Savannah), November 2, 1768, at 1, col. 1 (same).

[20] Boston Chronicle, September 19, 1768, at 363, col. 2; *see also* Boston Post Post-Boy & Advertiser, September 19, 1768, at 1, col. 3; New York Journal, or General Advertiser, Supplement, September 24, 1768, at 1, col. 3.

[21] The act of May 14, 1645, provided, in relevant part:

> That all inhabitants, as well seaman as others, are to have armes in their houses fit for service, with powder, bullets, match, as other souldiers, & the fishermen, shipcarpenters, (the deacons) are hereby exempted from watches & wards,) & others, not exempted by lawe, shall watch or provide a sufficient man in their roome, & to traine twice a year, according to the order.

2 Records of the Governor and Company of the Massachusetts Bay in New England 119 (Nathaniel B. Shurtleff ed., W. White 1853-54).

As tensions continued to rise, skirmishes between the colonists and the Redcoats culminated in the Boston Massacre on March 5, 1770. During the ensuing criminal trial of the British soldiers, both the prosecution and defense agreed that Bostonians had the right to arm themselves for self-defense.[23] Indeed, successfully representing the soldiers, John Adams asserted this right as follows: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence."[24]

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[22] 1 THE WRITINGS OF SAMUEL ADAMS 317-18 (Harry Alonzo Cushing ed., G.P. Putnam's Sons 1904). Adams quoted *verbatim* from WILLIAM BLACKSTONE, 1 COMMENTARIES 140-41, 143-44.

[23] *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS (Ivan R. Dee Publishers, forthcoming 2008) (manuscript at 23-25, on file with The Independent Institute).

[24] JOHN ADAMS, 3 LEGAL PAPERS 248 (Belknap Press/Harvard Univ. Press 1965).

B. Britain Tried to Subdue Boston by Disarming its Residents

Three years of relative calm thereafter came to an abrupt end on December 16, 1773, with the Boston Tea Party.[25] Parliament responded by, among other things, revoking the Massachusetts Province Charter; appointing General Gage as governor of Massachusetts, with authority to declare martial law and suppress rebellion by force; and establishing a Massachusetts Council appointed by the Crown.[26]

The British were aware, however, that because Massachusetts residents were well armed, the British would have great difficulty controlling them. In the words of Lord Percy:

> What makes an insurrection here always more formidable than in other places, is that there is a law of this Province, wh[ich] obliges every inhabitant to be furnished with a firelock, bayonet, & pretty considerable quantity of ammunition. Besides wh[ich] every township is obliged by the same law to have a large magazine of all kinds of military stores.

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[25] Recently passed legislation had been designed to give the British East India Company a monopoly on the trade by suppressing the trade in Dutch tea and waiving import taxes on English tea. *See* HALBROOK, *supra* note 23, manuscript at 29.

[26] *See id.* at 29-30; DAVID RAMSAY, 1 THE HISTORY OF THE AMERICAN REVOLUTION 99 (R. Aitken 1789) *reprinted by* (Liberty Classics 1990); BERNHARD KNOLLENBERG, GROWTH OF THE AMERICAN REVOLUTION, 1766-1775, at 136-39 (Free Press 1975), *reprinted by* (Liberty Fund 2003).

> They are, moreover, trained four times in each year, so that they do not make a despicable appearance as soldiers, tho' they were never yet known to behave themselves even decently in the field.[27]

Accordingly, Lord Dartmouth, secretary of state for America, recommended that General Gage disarm the colonists:

> Amongst other things which have occurred on the present occasion as likely to prevent the fatal consequence of having recourse to the sword, that of disarming the Inhabitants of the Massachusetts Bay, Connecticut and Rhode Island, have been suggested. Whether such a Measure was ever practicable, or whether it can be attempted in the present state of things you must be the best judge; but it certainly is a Measure of such a nature as ought not to be adopted without almost a certainty of success, and therefore I only throw it out for your consideration.[28]

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[27] Percy to the Duke of Northumberland (his father), September 12, 1774, *in* HUGH PERCY, LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774-1776, at 37-38 (Charles Knowles Bolton ed., Charles E. Goodspeed 1902).

[28] Dartmouth to Gage, October 17, 1774, in 2 CORRESPONDENCE OF GENERAL GAGE, *supra* note 18, at 175. Moderates in Parliament, such as the Duke of Manchester also cautioned "the House to proceed with deliberation, as America had now three million people, and most of them were trained to arms, and he was certain they could now produce an army stronger than Great Britain." PENNSYLVANIA REPORTER, April 17, 1775, at 2, col. 3.

General Gage agreed that disarmament would be prudent, but he knew it had to be implemented gradually because there were simply too many armed citizens.[29] Accordingly, the British began their disarmament policy by prohibiting gunpowder deliveries from, and seizing the gunpowder at, the Massachusetts powder houses.[30]

The king and his ministers then tried to constrict the supply of munitions by banning the export of all arms and ammunition into the colonies.[31] The governors were

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[29] Gage responded: "Your Lordship's Idea of disarming certain Provinces would doubtless be consistent with Prudence and Safety, but it neither is nor has been practicable without having Recource to Force, and being Masters of the Country." Gage to Dartmouth, December 15, 1774, 1 CORRESPONDENCE OF GENERAL GAGE, *supra* note 18, at 387. It was also reported in the newspaper that "the Governor [Gage] is determined not to risk any Troops in the Country, till he is reinforced, being apprehensive of their loss, from the amazing number and fury of our People, who are all provided with Arms and Ammunition, & c." VIRGINIA GAZETTE, September 22, 1774, at 3, col. 1.

[30] *See* HALBROOK, *supra* note 23, manuscript at 32, 36-38.

[31] The enactments provided, in part:

> [W]hereas an Act of Parliament has passed in the Twenty Ninth Year of the Reign of his late Majesty King George the Second, intitled, 'An Act to empower his Majesty to prohibit the Exportation of Saltpetre, and to enforce the Law for impowering his Majesty to prohibit the Exportation of Gunpowder, or any sort of Arms or Ammunition, and also to empower his Majesty to restrain the carrying coastways of Saltpetre, Gunpowder, or any sort of Ammunition.'

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instructed to "take the most effectual Measures for arresting, detaining & securing any Gunpowder, or any Sort of Arms or Ammunition, which may be attempted to be imported into the Province under [their] Government," unless the master of the ship could produce a license for the shipment.[32]

The final step in the British disarmament plan was the direct confiscation of arms and ammunition from the citizens. Although there had been intermittent seizures

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> And His Majesty judging it necessary to prohibit the Exportation of Gunpowder, or any sort of Arms or Ammunition, out of this Kingdom, doth therefore, with the advice of his Privy Council, hereby order, require, prohibit and command that no Person or Persons Whatsoever (except the Master General of the Ordnance for his Majesty's Service) do, at any time during the space of Six Months from the date of this Order in Council, presume to transport into any parts out of this Kingdom, or carry coastways any Gunpowder, or any sort of Arms or Ammunition, on board any Ship or Vessel, in order to transporting the same to any part beyond the Seas or carrying the same coastways, without Leave and Permission in that behalf, first obtained from his Majesty or his Privy Council, upon Pain of incurring and suffering the respective Forfeitures and Penalties inflicted by the aforementioned Act.

5 Acts Privy Council 401, *reprinted in* CONNECTICUT COURANT, December 19, 1774, at 3, cols. 2-3. The decree was renewed from time to time until 1783. *See* JAMES TRUSLOW ADAMS, REVOLUTIONARY NEW ENGLAND 1691-1776, at 412 (Atlantic Monthly Press 1923).

[32] Dartmouth to Gage, October 19, 1774, *in* 2 CORRESPONDENCE OF GENERAL GAGE, *supra* note 18, at 176.

of private arms throughout this period, General Gage decided in 1775 that the time was ripe for disarming the populace in earnest. One such search-and-seizure mission led to the first military engagements of the war, the Battles of Lexington and Concord.[33]

Fearing rebellion at his back, General Gage then tried to disarm all inhabitants of Boston. On April 23, 1775, Gage promised a committee of Selectmen

> that upon the inhabitants in general lodging their arms in Faneuil Hall, or any other convenient place, under the care of the selectmen, marked with the names of the respective owners, that all such inhabitants as are inclined, may depart from the town. . . . And that the arms aforesaid at a suitable time would be return'd to the owners.[34]

Given the escalation of hostilities, the military occupation, and the scarcity of provisions, many inhabitants had wanted to depart Boston. Accordingly, the committee recommended "that the town accept his excellency's proposal, and will lodge their arms with the Selectmen accordingly."[35] The town unanimously accepted the report, and "the people delivered to the selectmen 1778 fire-arms [muskets], 634 pistols, 973 bayonets, and 38 blunderbusses [short-barreled shotguns]."[36]

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[33] *See* HALBROOK, *supra* note 23, manuscript at 73-74. In April of 1775, General Gage learned from informants that the Massachusetts colonists had hidden arms and ammunition at roughly thirty homes and farms in Concord. On April 18th, "[h]aving received Intelligence, that a Quantity of Ammunition, Provision, Artillery, Tents and small Arms, [had] been collected at Concord," he ordered Lieutenant Colonel Francis Smith to "March with the Corps of Grenadiers and light Infantry, put under [his] Command, with the utmost expedition and Secrecy to Concord where [he would] seize and destroy" the munitions. KNOLLENBERG, *supra* note 26, at 231-32.

[34] Attested Copy of Proceedings Between Gage and Selectmen, April 23, 1775, *in* CONNECTICUT COURANT, July 17, 1775, at 4, col. 2.

Having seized the weapons, however, General Gage then reneged on his promise to let the inhabitants leave. The Boston residents thus were held hostage in their own town.[37]

On June 17, 1775, Bostonians fought the Battle of Bunker Hill. This proved to General Gage that his previous attempt at disarmament had been unsuccessful and led him on June 19, 1775, to renew his call for the colonists to surrender their arms:

> Whereas notwithstanding the repeated assurances of the selectmen and others, that all the inhabitants of the town of Boston had *bona fide* delivered their fire arms unto the persons appointed to receive them, though I had advices at the same time of the contrary, and whereas I have since had full proof that many had been perfidious in this respect, and have secreted great numbers: I have thought

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[35] *Id.*

[36] Richard Frothingham, History of the Siege of Boston 95 (Little, Brown, & Co. 1903).

[37] *See* Halbrook, *supra* note 23, manuscript at 85-89.

> fit to issue this proclamation, to require of all persons who have yet fire arms in their possession immediately to surrender them at the court house, to such persons as shall be authorized to receive them; and hereby declare that all persons in whose possession any fire arms hereafter be found, will be deemed enemies to his majesty's government.[38]

Stated otherwise, General Gage had declared the mere possession of arms and ammunition in Boston to be an act of treason.

C. Colonists Outside Massachusetts Successfully Resisted Disarmament

Not surprisingly, colonists elsewhere feared that the disarmament of Boston was only the first step in a general plan to disarm all Americans. In his famed "liberty or death" speech to the Convention of Delegates of Virginia, for example, Patrick Henry proclaimed: "They tell us . . . that we are weak—unable to cope with so formidable an adversary. But when shall we be stronger? . . . Will it be when we are totally disarmed, and when a British guard shall be stationed in every house?"[39] Likewise, a New Hampshire patriot wrote: "Could [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and

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[38] NEW YORK JOURNAL, August 31, 1775, at 1, col. 4. *See also* 2 AMERICAN ARCHIVES, 4th series, at 1027 (Force ed.).

[39] JOURNAL OF PROCEEDING OF CONVENTION HELD AT RICHMOND 34 (J. Dixon 1775); *see also* VIRGINIA GAZETTE, April 1, 1775, at 2, cols. 1-2.

Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies?"[40] South Carolina's General Committee, meanwhile, found that, "by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them."[41]

This widespread fear of disarmament precipitated renewed calls for armed self-defense throughout the colonies.[42] Josiah Warren of the Massachusetts Provincial Congress, for example, warned New York about Gage's "breach of a most solemn treaty with respect to the inhabitants of Boston when they had surrendered their arms and put themselves wholly in the power of a military commander." He recommended that New Yorkers secure their weapons for themselves or "within a few days you should behold these very materials improved in murdering you, and yourselves perishing for the want of them." [43] The South Carolina General Committee, meanwhile, "recommended, to all persons, to provide themselves immediately, with at least twelve and a half pounds of powder, with a proportionate quantity of bullets." [44] Typical of the entreaties was the message of the North Carolina contingent of the Continental Congress:

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[40] NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, January 13, 1775, at 1, col. 1, *reprinted in* 1 AMERICAN ARCHIVES, *supra* note 38, 4th series, at 1065.

[41] JOHN DRAYTON, 1 MEMOIRS OF THE AMERICAN REVOLUTION ... AS RELATING TO SOUTH CAROLINA 166 (Charleston 1821).

[42] By way of example, the New York General Committee resolved "that it be Recommended to every Inhabitant, to perfect himself in Military Discipline, and be provided with Arms, Accoutrements, and Ammunition as by Law directed." NEW YORK JOURNAL, May 4, 1775, at 2, col. 3. Similarly, the freeholders and inhabitants of Morris County, New Jersey, advised "to the inhabitants of this country, capable of bearing arms, to provide themselves with arms and ammunition, to defend their country in case of invasion." NEW YORK JOURNAL, May 11, 1775, at 1, cols. 2-3. And the Provincial Congress of South Carolina declared: "solely for the Preservation and in Defense of our Lives, Liberty, and Properties we have been impelled to associate, and to take up Arms. . . . Our taking up Arms is the Result of Dire Necessity, and in compliance with the first Law of Nature." NORTH CAROLINA GAZETTE, July 14, 1775, at 1, col. 1.

> It is the Right of every English Subject to be prepared with Weapons for his Defense. We conjure you . . . to form yourselves into a Militia. . . . Carefully preserve the small quantity of Gunpowder which you have amongst you, it will be the last Resource when every other Means of Safety fails you; Great-Britain has cut you off from further supplies. . . . We cannot conclude without urging again to you the necessity of arming and instructing yourselves, to be in Readiness to defend yourselves against any Violence that may be exerted against your Persons and Properties.[45]

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[43] 2 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK: 1775-1776-1777, at 10 (Thurlow Weed 1842).

[44] DRAYTON, *supra* note 41, vol. 1, at 166.

[45] NORTH CAROLINA GAZETTE (Newbern), July 7, 1775, at 2, col. 3.

Lest there be any doubt about how significantly the colonists viewed Britain's attempts to disarm them, the Continental Congress included disarmament in its July 6, 1775 Declaration of Causes of Taking Up Arms. Drafted by Thomas Jefferson and John Dickinson, the Declaration stated, in relevant part:

> The inhabitants of Boston being confined within that town by the General their Governor, and having, in order to procure their dismission, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honor, in defiance of the obligation of treaties, which even savage nations esteem sacred, the Governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.[46]

This Declaration was made known throughout the colonies,[47] making clear that Britain's policy of disarmament was one of the leading causes of the American Revolution.

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[46] 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1779, at 151 (Worthington Chauncey Ford ed., Government Printing Office 1905).

[47] *E.g.*, CONNECTICUT COURANT, July 17, 1775, at 2, col. 1. *See also* HALBROOK, *supra* note 23, manuscript at 100-02.

III. Because The Second Amendment Derives From The Americans' Refusal To Be Disarmed, It Must Be Read To Protect An Individual's Right To Keep And Bear Arms

Having successfully resisted disarmament, the Americans were able to defeat Great Britain in 1783. Suspicious of government, however, Americans of that era retained their fear of disarmament. Indeed, as Americans considered the ratification of a new Constitution, their refusal to permit disarmament led directly to the inclusion of an individual right to bear arms in the Second Amendment of the Bill of Rights.

A. The Constitution's "Militia Clause" Renewed Fears of Disarmament

The forces that led to the Constitutional Convention are well documented. One overarching theme, however, was the perceived need to standardize certain activities among the States – such as currency and international and interstate trade. When the Framers proposed a clause to standardize militia units across the States, however, it renewed the Americans' fear of disarmament.

During the colonial period, there were, of course, no foundries for the mass production of firearms. Rather, firearms were manufactured locally by craftsmen, who focused upon local terrain and habits.[48] This led to great variability in the firearms used in different geographical areas of the colonies. Frontiersmen and backwoodsmen in the South used long-range rifles, for example, while

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[48] *See* HALBROOK, *supra* note 23, manuscript at 174.

New Englanders favored medium-range muskets.[49] One result of this variability in firearms was that ammunition was not uniform or interchangeable among individual firearms owners, except within a given locale.[50]

To promote uniformity and the interchangeability of firearms and ammunition across the various States, George Mason proposed a "militia clause," which would permit Congress to "make laws for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed."[51] James Wilson, a leading delegate to the Constitutional Convention, described the need for the militia clause as follows:

> I believe any gentleman, who possesses military experience, will inform you that men without a uniformity of arms, accoutrements, and discipline, are no more than a mob in a camp; that, in the field, instead of assisting, they interfere with one another. If a soldier drops his musket, and his companion,

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[49] *See* STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 26, 32, 46 (Greenwood Press 1989).

[50] *See* HALBROOK, THE FOUNDERS' SECOND AMENDMENT, *supra* note 23, manuscript at 174.

[51] DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA . . . VOL. V. SUPPLEMENTARY TO ELLIOT'S DEBATES 464 (Jonathan Elliott ed., J.B. Lippincott 1845).

> unfurnished with one, takes it up, it is of no service, because his cartridges do no fit in. By means of this [federal] system, a uniformity of arms and discipline will prevail throughout the United States.[52]

Rufus King of Massachusetts explained "that by *organizing*, the committee meant, proportioning the officers and men – by *arming*, specifying the kind, size, and calibre of arms – and by *disciplining*, prescribing the manual exercise, evolutions, &c." [53]

Despite the benign purpose of standardization, the militia clause generated numerous objections following the same theme: the Antifederalists opposed federalizing the militia because they feared it would give the central government power to disarm the people. Thus, for example, John DeWitt of Massachusetts predicted that Congress "at their pleasure may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties." [54] Pennsylvanian John

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[52] 2 DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 521 (Jonathan Elliot ed., J.B. Lippincott 1836).

[53] DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 51, at 464-65. James Madison also observed that "the '*arming,*' as explained, did not extend to furnishing arms; nor the term '*disciplining,*' to penalties, and courts martial for enforcing them." *Id.*

[54] THE FREEMAN'S JOURNAL (Philadelphia), January 16, 1788, *reprinted in* THE ANTIFEDERALIST PAPERS 75 (Morton Borden ed., Michigan State Univ. 1965).

Smilie objected that "Congress may give us a select militia which will, in fact, be a standing army – or Congress, afraid of a general militia, may say there shall be no militia at all. When a select militia is formed; the people in general may be disarmed."[55] In Maryland, Luther Martin protested that the proposed federal government was given power "to increase and keep up the standing army as numerous as it would wish, and, by placing the militia under its power, enable it to leave the militia totally unorganized, undisciplined, and even to disarm them."[56]

Even George Mason himself, the Virginian Antifederalist who had proposed the militia clause, argued as follows:

> Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man [Sir William Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. . . . Why should we not provide against the danger of having our militia, our real and natural strength destroyed?[57]

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[55] 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 508-09 (Merrill Jensen ed., State Historical Society of Wisconsin 1976).

[56] 1 DEBATES IN THE SEVERAL STATES CONVENTIONS, *supra* note 52, at 372.

[57] *Id.*, vol. 3, at 380.

And someone writing under the *nom de plume* "Common Sense" wrote "To the People of North Carolina" in the *Wilmington Centinel* that, under the proposed Constitution, "a citizen may be deprived of the privilege of keeping arms for his own defense,"[58] while William Lenore, a North Carolina delegate, agreed that under the proposed Constitution, Congress "can disarm the militia."[59]

B. Seeking to Allay Fears of Disarmament, Federalists Argued that the Constitution Would Not Permit Disarmament of "The People"

The Federalists dismissed these arguments as unfounded, because the militia comprised "the people" themselves, whom Congress had no power to disarm. In his pamphlet, *An Examination of the Leading Principles of the Federal Constitution*, for example, Noah Webster explained that, because the armed populace would remain sovereign, there was no need to fear a standing army:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power

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[58] *From the Wilmington Centinel, To the People of North Carolina*, NEW YORK JOURNAL, April 21, 1788, at 2, col. 2. This issue of the *Wilmington Centinel* is not extant. *See* 20 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1185 (John P. Kaminski *et al.* eds., Wisconsin Historical Society Press 2004) (App. of "Antifederalist Newspaper Articles").

[59] 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 52, at 203.

> in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.[60]

And Tench Coxe, writing under the name "A Pennsylvanian," made the same argument:

> Who are the militia? are they not ourselves. Is it feared, then, that we shall turn our arms each man against our own bosom. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. . . . [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.[61]

Zachariah Johnson, meanwhile, observed that the new Constitution could not result in oppression because "[t]he people are not to be disarmed of their weapons. They are left in full possession of them."[62]

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[60] NOAH WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia 1787).

[61] PENNSYLVANIA GAZETTE, February 20, 1788, *reprinted in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 55, (microfilm supplement), at 1778-1780.

[62] 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 52, at 646.

Finally, and perhaps most authoritatively, during the ratification process, James Madison wrote that "the advantage of being armed, which the Americans possess over the people of almost every other nation" formed "a barrier against the enterprises of ambition."[63]

These debates surrounding the militia clause reflect fundamental differences over which governmental body should be permitted to "arm" the militia. Significantly, however, both sides to the debate agreed that the government did not have the power to "disarm" the people. Indeed, in 18th century America, it is difficult to conceive how anyone could have seriously advocated such a position.

C. The Second Amendment Was Proposed and Designed to Guarantee Individuals Their Right to Keep and Bear Arms

Notwithstanding the arguments of the Federalists, the Antifederalists remained concerned about even the possibility of disarmament. Accordingly, the Antifederalists ensured that what became the Second Amendment – guaranteeing the pre-existing right of an individual to keep and bear arms – be included within the Bill of Rights.

The drafting of the Second Amendment – like the history that preceded and informed it – strongly supports the view that the Amendment guarantees an *individual* right to keep and bear arms. Pennsylvania's

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[63] 15 Documentary History of the Ratification of the Constitution, *supra* note 58, at 492-93.

Dissent of the Minority, for example, had proposed that the guarantee be worded as follows:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals. . . .[64]

Samuel Adams proffered the following language: "And that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."[65] The New Hampshire ratifying convention, meanwhile, recommended this language: "12th. Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[66]

In the Congressional debates over the final form of the Second Amendment, the fear of a power to disarm the populace is again obvious. The House committee, for example, had considered the following language: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."[67] Elbridge Gerry opposed the inclusion of the "conscientious objector clause," however, because he believed it would permit the government to disarm the people:

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[64] 2 Documentary History of the Ratification of the Constitution, *supra* note 55, at 623-24.

[65] *Id.*, vol. 6, at 1453.

[66] *Id.*, vol. 18, at 188; *see also* 1 Debates in the Several States Conventions, *supra* note 52, at 326.

> Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.
>
> . . . .
>
> Whenever Government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward. The assembly of Massachusetts, seeing the rapid progress that administration were making to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the crown.[68]

Following this debate, Congress ultimately approved the Second Amendment in its current form.

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[67] THE COMPLETE BILL OF RIGHTS 169 (Neil H. Cogan ed. 1997).

[68] 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1285-86 (Bickford *et al.* eds.). *See also* 1 ANNALS OF CONGRESS 750 (Gales and Seaton 1834).

The NSSF will leave it to others to dissect the language of the Second Amendment as ratified. There can be no question, however, that the Amendment was ratified by members of an 18th century society that had i) relied upon firearms for their day-to-day existence, ii) possessed and used firearms in a widespread and common manner we would not recognize today, iii) resisted attempts by the world's greatest military power to disarm them, and iv) used their firearms to achieve their freedom from a tyrannical government. Their history and experiences gave them a profound fear of disarmament, and they had their pre-existing common law right to keep and bear arms guaranteed and enshrined in the Second Amendment of the Bill of Rights. This history proves strongly that the Second Amendment was intended to protect an *individual* right to "keep and bear arms" and, for that reason, this Court should affirm the decision below.

CONCLUSION

In accordance with the intent of the Framers that the Second Amendment protect an individual right to "keep and bear arms," this Court should affirm the decision below of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR NEW YORK, HAWAII, MARYLAND, MASSACHUSETTS, NEW JERSEY, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Interest of the Amici States

Amici States file this brief in support of their traditional authority to protect the safety of their residents by enacting laws governing the possession and use of firearms. While the Amici States do not defend the specific handgun ban at issue in this case and do not as a matter of public policy endorse it, preserving state sovereignty in this area is of paramount importance to the States. For more than two centuries, as contemplated by the Constitution's Framers, the States have been the primary regulators of firearms. Preserving that role was a fundamental purpose of the Second Amendment. Accordingly, this Court has consistently held that the Second Amendment limits only the authority of the federal government to regulate weapons in the States. If that rule were now called into question, the States would confront federal litigation over every detail of their statutory schemes, depriving them of authority over policy decisions that have always been reserved to them.

Summary of Argument

As this Court, the lower federal courts, and the state courts have consistently and correctly stated for more than a century, the Second Amendment has no application to state laws. This Court so held more than a century ago, and there is no reason for it to change course now.

The Second Amendment was drafted and ratified to ensure that the federal government would not disarm state militias and thereby strip States of a critical component of their reserved sovereignty. It was intended to protect state sovereignty by restricting the federal government's ability to regulate gun ownership in ways that would interfere with state militias. To transform the Second Amendment into a limitation on the police power of the States, thus *reducing* state autonomy vis-a-vis the federal government and the federal courts, would dramatically alter the Amendment's meaning and turn its federalism-grounded purpose on its head. Moreover, the settled constitutional understanding of this point is consistent with numerous other decisions of this Court recognizing that the Framers left the primary responsibility for firearms regulation with the States.

For these reasons, while the Amici States do not endorse the handgun ban at issue — indeed, neither New York (or its subdivisions) nor any of the other Amici States has enacted a law banning handguns — they urge this Court to reaffirm its long-standing and correct interpretation of the Second Amendment as imposing restrictions only on the federal government.

ARGUMENT

I. The Second Amendment Does Not Apply to State Laws.

This Court has made clear that, even after the passage of the Fourteenth Amendment, the Second Amendment remains "a limitation only upon the power of Congress and the National government, and not upon that of the States." *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *accord United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (Second Amendment "has no other effect than to restrict the powers of the national government").

This rule has been in place for more than a century, and this Court has declined numerous times to revisit it.[1] Adhering to a prior decision is "the preferred course." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Accordingly, any departure from the doctrine of stare decisis "demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1983).

No such special justification exists to revisit *Presser* and *Cruikshank*. Although these cases were decided prior to this Court's incorporation of other rights into the Due Process Clause of the Fourteenth Amendment, they have not had their "underpinnings eroded, by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). That is because the Second Amendment simply is not susceptible to being incorporated against the States in the same manner as the rights that have been so incorporated.

Many other provisions in the Bill of Rights simply state individual rights against governments. In such cases, it makes sense to consider whether, although the Framers created a right only against the federal government, the right is fundamental to ordered liberty and was therefore made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968).

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[1] *See, e.g.*, *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-71 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *Burton v. Sills*, 53 N.J. 86, 100, 248 A.2d 521, 528 (1968), *dismissed for want of a substantial federal question*, 394 U.S. 812 (1969).

The Second Amendment, by contrast, has a distinctive federalism-based purpose, and therefore it cannot be applied against the States without a fundamental change in its purpose and meaning. Rather than simply recognizing a right to keep and bear arms in isolation, the Amendment links that right to a "well regulated Militia," which in turn is deemed "necessary to the security of a free State." U.S. Const. amend. II. A principal purpose of the Second Amendment is to function as a bulwark against federal intrusion into state sovereignty over militias. That purpose would be undermined, rather than supported, by interpreting the Amendment to authorize federal judicial review of state laws regulating weapons.

As this Court has recognized, the Second Amendment's "obvious purpose" is "to assure the continuation and render possible the effectiveness" of state militias, and so the right it confers "must be interpreted and applied with that end in view." *United States v. Miller*, 307 U.S. 174, 178 (1939). The amendment was ratified in response to fears that the new Constitution, which authorized the federal government to form a standing army under exclusively federal control, would lead to the demise of state militias. This increased reliance on a federal standing army, some feared, would dramatically increase the federal government's military and political power vis-a-vis the States and their people. The Second Amendment's guarantee of a right to bear arms was meant, at least in part, to prevent this scenario from unfolding.

The Constitution represented a "compromise" between proponents and opponents of a federal standing army, authorizing such a federal army while also providing a continuing role for state militias. *See Perpich v. Dep't of Defense*, 496 U.S. 334, 340 (1990). Specifically, the Constitution granted Congress the powers to "raise and support Armies," U.S. Const. art. I, § 8, cl. 12, to "call[] forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions," *id.* cl. 15, and to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," *id.* cl. 16. Meanwhile, the Constitution reserved to the States the appointment of militia officers "and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.*

While the Constitution provided for the continued existence of the state militias, it also placed those militias under certain specified forms of federal control. As a result, questions arose as to whether the States retained the authority necessary to maintain the militias adequately and to prevent them from being either neglected or coopted into the standing army.[2] As George

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[2] Exactly how much, and under what circumstances, the federal government could control the state militias remained controversial throughout the nineteenth century. For example, during the War of 1812, two States refused to allow the federal government to call up their militias, and even those militias that reported for duty refused to follow orders that they regarded as beyond the federal government's authority, such as venturing beyond United States borders into Canada. *See* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 188-89 (1940). Not until the early Twentieth Century did Congress organize the state militias into the National Guard. *Id.* at 193-203.

Mason pointedly told the Virginia Convention, "[t]here are various ways of destroying the militia." *See* Debates of the Virginia Convention, June 14, 1788, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 401 (David E. Young ed., 2d ed. 1995).

Were the States thus to lose access to an effective armed force under their own control, military power would be centralized in a way that, it was contended, could lead to monarchy and would greatly diminish the States' reserved sovereignty. *See* Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 985-89 (1975). Accordingly, "to anti-federalists, the continued viability of the militia was the only means of rendering an army palatable." H. Richard Uviller & William G. Merkel, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 90 (2002). Moreover, States' recent experience with internal insurrections such as the Shays Rebellion gave them reason to believe that the maintenance of strong state militias that were fully controlled by state authority was essential to their security. *See* David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 148-50 (2004).

Thus, the Second Amendment was drafted and ratified in response to intense debate over whether the States or the federal government should have the responsibility for arming the militia. This debate included requests by the Virginia Convention (and then other States' ratifying conventions) for an amendment to the body of the Constitution that would explicitly clarify that "each State respectively shall have the power to provide for organizing, arming and disciplining it's [sic] own Militia, whensoever Congress shall omit or neglect to provide for the same." Amendments Proposed by the Virginia Convention, June 27, 1788, *reprinted in* Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 279 (1999). In this context, it is clear that the Second Amendment's text was drafted to reflect a focus on preserving state sovereignty.[3]

The brief public debate over the wording of the Second Amendment further demonstrates that the drafters were concerned primarily with restricting the power of the federal government and federal courts to control the militias of the several States. Most of the debate was confined to the question of whether the Amendment should contain a provision exempting those with religious scruples from military service. *See* House of Representatives Debates, Aug. 17, 1789 and Aug. 20, 1789, *reprinted in* THE ORIGIN OF THE SECOND

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[3] This was recognized by the Second Amendment's staunchest supporters in the years immediately after its ratification. *See* Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1125, 1130 (2006) (describing views of St. George Tucker, who first described the Second Amendment as "the true palladium of liberty"); *id.* at 1131 (Joseph Story also "recognized that originally the Second Amendment had been part of a compromise between Federalists and Anti-Federalists designed to reaffirm state control of the militia and neutralize the fear that the militia might be disarmed").

AMENDMENT, *supra*, at 695-98, 702-03. Madison's original proposal contained such a provision, but it was removed after fears were expressed that it would (1) permit the federal government, under guise of religious exemption, to exclude a vast number of citizens from state militia service, and (2) result in endless litigation "on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not." *Id.* at 696-97; *see* Uviller & Merkel, *supra*, at 98-99. Thus, by deleting the provision the drafters of the Second Amendment sought to protect state militias from federal interference.

This understanding of the Second Amendment is consistent with other decisions of this Court observing that the Framers left the primary responsibility for firearms regulation with the States. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Bass*, 404 U.S. 336 (1971).

II. The States Have Established Workable Rules to Protect an Individual Right to Bear Arms.

Interpreting the Second Amendment to restrict state as well as federal laws would not only subvert the Amendment's purpose and require overruling longstanding precedent, but also unnecessarily entangle the federal courts in the minutiae of state and local firearms regulation. States and their courts have long been the protectors of an individual right to own firearms for private purposes, and have proven fully capable of protecting the legitimate interests of firearms owners while leaving room for reasonable regulation of weaponry. For over two centuries, state judicial and political processes have balanced these competing interests, in the process developing a coherent and consistent doctrine. The principle established by *Presser* and *Cruikshank* — that the Second Amendment limits the authority of the federal government only — has not proven "unworkable" in any way, and therefore there is no occasion to revisit that ruling. *See Payne*, 501 U.S. at 827. To overrule it now would merely invite the federal courts to substitute their judgments for those of the States.

Most States have constitutional or statutory provisions pertaining to the right to bear arms. *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, http://www.law.ucla.edu/volokh/beararms/statecon.htm (collecting text of all forty-four state constitutional provisions); N.Y. Civ. Rights Law § 4. Unlike the Second Amendment, many of these provisions explicitly guarantee an individual right to own a gun for specified private purposes. *See, e.g.*, Wisc. Const. art. I, § 25 ("The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."); W. Va. Const. art. III, § 22 ("A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."). Moreover, and also unlike the Second Amendment, many of these provisions contain explicit reservations on the individual right conferred to ensure that the State in question retains the necessary regulatory authority. *See, e.g.*, Utah Const. art. I, § 6 ("The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."); Tenn. Const. art. I, § 26 ("That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.").

It is unsurprising that these state provisions speak more clearly than the Second Amendment to the kinds of questions that arise in evaluating the constitutionality of state firearms regulations. Many of them were drafted far more recently or have been updated in recent years. *See* David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 827, 828 (2002) (observing that twenty States had enacted or modified these constitutional provisions since 1963).[4] Moreover, unlike the Second Amendment, these provisions were drafted with judicial review of state regulations in mind, and so more clearly articulate the necessary balancing of an individual right and state police power that such review entails. Indeed, some of them explicitly address specific questions that are relevant to contemporary public policy disputes in the State, allowing judges to resolve such disputes through

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4. For example, the Maine Constitution of 1819 originally provided: "Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned." Art. I, § 16. In 1987, after the Supreme Judicial Court of Maine held that this provision did not establish an individual right to bear arms, the people of Maine adopted an amendment to their constitution that deleted the words "for the common defence" from the provision. *See State v. Friel*, 508 A.2d 123, 125 (Me. 1986); *State v. Brown*, 571 A.2d 816, 816 (Me. 1990).

conventional textual analysis and examination of drafting history, with less resort to judicial guesswork and discretion. *See, e.g.*, Idaho Const. art. I, § 11 ("The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm."); *State v. Cole*, 2003 WI 112, P35-P42, 264 Wis. 2d 520, 547-53, 665 N.W.2d 328, 341-44 (2003) (discussing drafting history of Wisconsin's amendment, which made clear that amendment was not meant to repeal existing concealed-weapons laws).

These state constitutional provisions are thus superior vehicles for determining whether a particular state law adequately respects an individual right to own a firearm. They also have benefitted from years of judicial interpretation and application, and that experience should not lightly be discarded in favor of developing a new federal-court jurisprudence. State courts largely have coalesced around a "reasonable regulation" standard for evaluating the constitutionality of gun regulations. *See Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (collecting cases from various States); *Robertson v. City & County of Denver*, 874 P.2d 325, 329-30 (Colo. 1994) (same). In applying this standard, state courts "balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State to exercise its police power to protect the health, safety, and welfare of its citizens." *State v. Hamdan*, 2003 WI 113, P45, 264 Wis. 2d 433, 463, 665 N.W.2d 785, 800 (2003). For example, while courts may uphold laws that restrict the means or manner by which the right to bear arms is exercised, they stand ready to strike down or give narrowing interpretations to laws that leave individuals with no "realistic alternative means to exercise the right," *id.* at 808, or that "sweep unnecessarily broadly," *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 149 (W. Va. 1988).

Interpreting the Second Amendment as a check on state as well as federal legislation would subject to intensive federal-court review state licensing regimes, safe-storage requirements, and other regulations that go to the heart of state police power authority. *Cf. Sandin v. Conner*, 515 U.S. 472, 482 (1995) (overturning as unworkable precedent that resulted in "the involvement of federal courts in the day-to-day management of [state] prisons, often squandering judicial resources with little offsetting benefit to anyone"). Federal courts are well suited to police the federal government's compliance with the federalism concerns inherent in the Second Amendment, particularly given the relatively small volume of federal firearms legislation.[5] But they have no special competence to review the day-to-day practicality, local need, or effectiveness of the laws enacted by the several States. *Cf. United States v. Rybar*, 103 F.3d 273, 294 n.6 (3d Cir. 1996) (Alito, J., dissenting) (federal judges "are not experts on firearms, machine guns, . . . or crime in general").

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[5] Most federal law in this area "may be traced to two enactments," the National Firearms Act of 1934, ch. 757, 48 Stat. 1236, 1240, and the Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250, now repealed, the provisions of which, as amended and supplemented, have been carried forward to chapter 44 of Title 18, 18 U.S.C. §§ 921 et seq. *See United States v. Lopez*, 2 F.3d 1342, 1348 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995); *id.* at 1348-60

(Cont'd)

The state courts and political systems have proven themselves eminently capable of protecting an individual right to own and use a weapon for private purposes. An additional layer of federal-court review would be redundant if federal courts simply adopted the established state-court jurisprudence; if they did not, then federal judicial review would introduce massive uncertainty into the law. Moreover, it would "foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

(Cont'd)
(discussing at length the history of federal firearms legislation). Until 1934, the federal government had never regulated firearms at all, and even now "the general control of simple firearms possession by ordinary citizens" remains "a state responsibility." *Id.* at 1364.

CONCLUSION

This Court should reaffirm the principle that the laws of the several States are outside the domain of the Second Amendment.

Respectfully submitted,

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Supreme Court of the United States

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DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

◆

BRIEF OF *AMICAE CURIAE* 126 WOMEN STATE LEGISLATORS AND ACADEMICS IN SUPPORT OF RESPONDENT

◆

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INTEREST OF THE *AMICAE CURIAE*[1]

Amicae Curiae, listed in the Appendix, are an ad hoc group of over one hundred twenty-six women state legislators and academics. *Amicae* have diverse academic backgrounds and, in many cases, disparate political ideologies and divergent views on particular women's issues. What all *Amicae* share, however, is their devotion to the ability of women to legally and effectively defend themselves in situations that pose serious and immediate bodily injury.

The case now before the Court directly implicates women's capacity for self-defense and is therefore of particular interest to *Amicae*. *Amicae* wish to ensure that the Court takes into consideration how the current handgun restrictions in Washington, D.C. not only effectively abrogate women's right to defend themselves, but indeed prevent women from achieving the same autonomy available to many men. It is therefore with aspiration of further advancement for women that *Amicae* now submit this Brief for the Court's consideration.

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[1] Rule 37.6 notice. No counsel for any party authored this brief in whole or in part. No counsel for a party or party made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided by NRA Civil Rights Defense Fund. This brief is filed with the written consent of all parties, reflected in letters filed by the parties with the clerk. *Amicae* complied with the conditions of those consents by providing seven day advance notice of its intention to file this brief.

SUMMARY OF ARGUMENT

This case provides the Court an opportunity to advance the ability of women to free themselves from being subject to another's ill will and to counter the commonly-held prejudice that women are "easier targets" simply because of their gender characteristics. Violence against women in the United States is endemic, often deadly, and most frequently committed by men superior in physical strength to their female victims.

The District's current prohibition against handguns and immediately serviceable firearms in the home effectively eliminates a woman's ability to defend her very life and those of her children against violent attack. Women are simply less likely to be able to thwart violence using means currently permitted under D.C. law. Women are generally less physically strong, making it less likely that most physical confrontations will end favorably for women. Women with access to immediately disabling means, however, have been proven to benefit from the equalization of strength differential a handgun provides. Women's ability to own such serviceable firearms is indeed of even greater importance given the holdings of both federal and state courts that there is no individual right to police protection.

Washington, D.C.'s current firearms regulations are facially gender-neutral, and according to Petitioners, were intended to decrease the incidents of firearms violence equally among both men and women.

Whether those regulations have been effective is a question discussed in other Briefs submitted to the Court. What the District's current firearms laws do is manifest "gross indifference" to the self-defense needs of women. Effectively banning the possession of handguns ignores biological differences between men and women, and in fact allows gender-inspired violence free rein. Those biological differences should, under these limited circumstances, be influential to the Court's decision.

Amicae therefore urge the Court to "Remember the Ladies"[2] and to find the District's current firearms restrictions unconstitutional.

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ARGUMENT

I. THE TIME HAS LONG PASSED WHEN SOCIAL CONDITIONS MANDATED THAT ALL WOMEN EQUALLY DEPEND UPON THE PROTECTION OF MEN FOR THEIR PHYSICAL SECURITY.

For centuries the concept of women's self-defense was as nonexistent as the idea that women were to, and could, provide their own means of financial support. That women themselves could possibly have some responsibility for their own fates was not only not a topic for debate, but would have been deemed a foolish absurdity. Observable gender differences in physical aptitude[3] and temperament seemed to establish a natural order that was not significantly disturbed until the mid-20th century. Later legal and social advances, however, have led courts to recognize that gender-based differences do indeed matter and should sometimes be considered.

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[2] Letter from Abigail Adams to John Adams (March 31, 1776), *in The Feminist Papers: From Adams to De Beauvoir* 10 (Alice S. Rossi ed., Northeastern Univ. Press 1st ed. 1988) (1973).

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[3] *See, e.g.*, Michael Levin, *Feminism and Freedom* 210 (Transaction Publishers 1987) (explaining that women only have 55-58% of the upper body strength of men, and, on average, only 80% as strong as a man of identical weight.) *See* U.S. Dep't of Health and Human Servs., CDC, National Center for Health Statistics; 2004), http://iier.isciii.es/mmwr/preview/mmwrhtml/mm5431a5.htm (reporting that in 2002, the average height and weight for men 20+ years of age was 5'9" and 190 pounds, respectively, while for women aged 20+ years and older the average height was 5'4" and 163 pounds). *See* U.S. Army Training Requirements (Feb. 8, 2006), http://www.armybasic.org/portal/modules.php?name=Content&pa=showpage&pid=9 (listing basic physical standards requiring approximately 40 push-ups for males aged 17-21 and fewer than 20 push-ups for women of the same age). *See* U.S. Marines Training Requirements, http://www.usmarines.com/basic-training2.html (describing that to pass the Basic Training Initial Strength Test, men are required to finish 2 dead-hang pull-ups, while women must perform a flexed-arm hang for 12 seconds.) *See* Brief of *Amici Curiae* Second Amendment Sisters, *et al.*, in Support of Respondent at section II.A. (discussing the differences between men and women's muscular capacity.)

A. The Defense of Women as Men's Sole Prerogative and Responsibility

Such paternalism reflected widely-accepted views of men's physical prowess vis-a-vis women generally and the roles women were expected to play in society. Few women expected to leave the confines of their families before marriage. Women seldom attended college, especially at schools distant from their families. Women largely stayed at home while waiting to be married, and after marriage were expected to remain homemakers with no outside employment or social pursuits. More importantly to the issue of self-defense, however, there was little understanding that women could be anything but helpless in the face of a serious threat.

> Behold these smiling innocents, whom I have graced with my fairest gifts, and committed to your protection; behold them with love and respect; treat them with tenderness and honor. They are timid and want to be defended. They are frail; oh do not take advantage of their weakness! Let their fears and blushes endear them. Let their confidence in you never be abused. But is it possible, that any of you can be such barbarians, so supremely wicked, as to abuse it? Can you find in your hearts to despoil the gentle, trusting creatures of their treasure, or do anything to strip them of their native robe of virtue?[4]

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[4] Dr. James Fordyce, D.D., *The Character and Conduct of the Female Sex and the Advantages to be Derived from the Society of*

(Continued on following page)

Such sentiments are now risible given our understanding that women are not children, do have the capacity to protect their lives and best interests, and that some men may be anything but tender caregivers. They are especially inappropriate given the current number of single mothers who often have sole responsibility for the protection of their children.

Before the legal and social advances of the latter half of the 20th century, equal protection for women therefore meant that women could depend upon the protection of men for their defense and that of their children. All women would have a husband, father, brother, or, if they were remarkably fortunate, some type of social or church organization there to provide for their most basic needs. Women were viewed as largely helpless, and laws precisely differentiated the opportunities and responsibilities for men and women. *E.g., Goesart v. Cleary*, 335 U.S. 464, 466 (1948) (legislatures may draw "a sharp line between the sexes.") *See also Hoyt v. Florida*, 368 U.S. 57 (1961).

B. Changing Demographics Heighten the Need for Many Women to Provide their Own Physical Security

Throughout history, family and household demographics reinforced the expectation that men would

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Virtuous Women; A Discourse in Three Parts Before the Congregation of Monkwell Street Chapel (January 1, 1776), quoted in *Mary Wollstonecraft, Vindication of the Rights of Woman* 192-193 (Miriam Brody ed., Penguin Classics 1983) (1792).

be available to provide protection to women and children. Extended families were the norm across all cultural backgrounds, providing women the immediately available support of fathers, brothers, and husbands. In 1900, only 5% of households in the United States consisted of people living alone, while nearly half the population lived in households of six or more individuals.[5] Fewer than one percent of women in 1900 were divorced and women were expected to be married by their late teens or early twenties.[6]

Widespread demographic changes now make it far less likely that women will live in households with an adult male present to provide the traditionally-expected protection. In 2000, slightly more than 25 percent of individuals lived in households consisting only of themselves.[7] Between 1970 and 2000, the proportion of women aged 20 to 24 who had never married increased from 36 to 73 percent; for women aged 30 to 34, that proportion tripled from 6 to 22 percent.[8] While these statistics do not reflect the increasing percentage of women who choose to cohabit without marriage, it should be noted that these percentages of women living alone are likely higher in metropolitan areas of the Northeast and Mid-Atlantic.

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[5] Frank Hobbs *et al.*, U.S. Census Bureau, *Demographic Trends in the 20th Century*, Series CENSR-4, 141, 139 (Nov. 2002).

[6] Press Release, U.S. Census Bureau, *A Century of Change: America 1900-1999*, CB99-FF.17 (Dec. 20, 1999), http://www.census.gov/Press-Release/cb98-228.html.

[7] *See supra* note 5 at 140.

[8] U.S. Census Bureau, *Living Together, Living Alone*, 5 *Population Profile of the United States: 2000*, p. 5-2, www.census.gov/population/www/pop-profile/2000/chap05.pdf.

These statistics do not emphasize the rapidly increasing number of single mothers in the District. According to a 2005 survey, there are over 46,000 single mothers living within Washington, D.C. Of those single mothers, almost half live in poverty.[9] These women are the most immediate and often sole source of protection of their children against abusive ex-husbands, ex-boyfriends, or unknown criminals who prey on the District's most vulnerable households. Many do not have the resources to choose neighborhoods in which their children face few threats or to install expensive monitoring systems and alarms. Moreover, many will not have the knowledge or social network to access those violence prevention services available. An inexpensive handgun, properly stored to prevent access to children, could therefore very well be the sole means available for these women to protect themselves and their children. *See* also Brief of *Amici Curiae* International Law Enforcement Educators and Trainers Association, *et al.*, in Support of Respondent ("Int'l L. Enf.

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[9] Women Work!, *Status Report: Displaced Homemakers and Single Mothers in the District of Columbia* (1994), http://www.womenwork.org/pdfresources/cl_states/cl_dc.pdf.

Educ. & Trainers Assoc. Br.") at section II.D. (discussing the increasingly rare incidents of gun accidents).

In addition to young women and those who are single mothers, there is an increasing number of elderly women who live alone and feel highly vulnerable to violent crime. Greater improvements in female than in male mortality rates have increased the percentage of women aged 65 and older who live alone. From 1960 to 2000, women aged 65 and over accounted for a single digit percentage of the total population but more than 30 percent of households consisting of only one person.[10] This population of older women living alone will only increase as baby boomers age and fewer children are capable of caring for aging parents. Some 40 percent of elderly and mid-life women have below-median incomes, leaving them with little or no choice of neighborhoods and expensive security measures. Edward R. Roybal, *The Quality of Life for Older Women: Older Women Living Alone*, H.R. Rep. No. 100-693, at 1 (2d Sess. 1989).

Jean-Jacques Rousseau once noted that:

> This peculiar cleverness given to the fair sex is a very equitable compensation for their lesser share of strength, a compensation without which women would be not man's companion but his slave. It is by means of this superiority in talent that she keeps herself his equal and that she governs him

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[10] See *supra* note 5 at 137.

> while obeying him. Woman has everything against her – our defects, her timidity, and her weakness. She has in her favor only her art and her beauty.[11]

Such sentiments bring to mind a knight-errant defending against all foes his lady before a castle moat and never thinking of using his sword against her. Whatever truth this may have had in previous centuries, today women face the question of what they are to do when there is no man available to provide protection, when it is a man himself providing the threat, or when "subtility" and "beauty" just will not prevail against a much larger attacker. *Amicae* suggest that a workable firearm may be the only effective tool a woman has in such situations.

Women may therefore not depend upon male relatives, an often inadequate and unaccountable police force, or tools of self-defense that are currently prohibited under Washington, D.C. gun laws. While women have made advances in their ability to participate fully in political life through greater choices of professions, husbands, and child-rearing, the prevalence of violence against women and their constant fear continue to exist.

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[11] Jean-Jacques Rousseau, *Emile, or on Education* 371 (Allan Bloom trans., Basic Books 1979) (1762).

II. EQUAL PROTECTION IN WASHINGTON, D.C. NOW MEANS THAT WOMEN ARE EQUALLY FREE TO DEFEND THEMSELVES FROM PHYSICAL ASSAULT WITHOUT THE MOST EFFECTIVE MEANS TO TRULY EQUALIZE GENDER-BASED PHYSICAL DIFFERENCES.

The Court has already rejected any disparate impact standard as the basis for gender discrimination. Writing in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979), the Court noted that the "Fourteenth Amendment guarantees equal laws, not equal results" and that "uneven effects upon particular groups within a class are ordinarily of no constitutional concern."[12] The practical results of laws passed with no discriminatory intent are simply "a legislative and not a judicial responsibility."[13] *Id.* at 272.

It is not the place of this *Amicus* to dispute the Court's jurisprudence of Equal Protection and discriminatory intent versus impact. The only purposes of this Brief are to: (1) raise the Court's awareness of how firearms may help women achieve the full place in society they so deserve, and (2) to place the District's firearms restrictions as they relate to women in parallel with scholarly thought regarding women's rights in other areas.

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[12] *But cf.* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 966 (1984) ("An assimilationist vision that ignores differences between men and women does not help us to reconcile the ideal of equality with the reality of difference.")

[13] *But cf.* David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935, 941 (1989) ((describing the subordination principle as a road not taken by the Court in *Washington v. Davis*, 426 U.S. 229 (1976) but noting that "the distinctive characteristic of a subordinated group is that its members are systematically subject to violence at the hands of members of another group, or must systematically yield to the command of members of another group."))

Violence against women is predominately gender-based, most often perpetrated by men against the women in their lives. Men who react with violence against women in the domestic sphere often seek to reassert their control over those whom the men believe should be held as subordinates. Since 1976, approximately 30% of all U.S. female murder victims have been killed by their male, intimate partners.[14]

Both international and U.S. commentators recognize that this violence is fomented by gender differences. United Nations' documents declare that "women and girls are victims because they are female," and that such violence against women is a "form of discrimination that prevents women from participating fully in society and fulfilling their potential as human beings."[15] According to feminist legal scholar, Catherine A. MacKinnon, "[s]exual assault is a sex-based violation," explained partly by the "observation that sexual atrocities are inflicted on those who have less social power by those who have more, among whom gender is the most significant cleavage of stratification."[16] When violence against women is indeed viewed in this light, D.C.'s current firearms regulations barring women from the possession of the most effective means of self-defense reflects a form of complicity in sex-based discrimination or, at the very least, gross indifference to such discrimination.

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[14] Callie Marie Rennison, Ph.D. *et al.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Intimate Partner Violence* (Special Rep. May 2000, revised on July 14, 2000 and January 31, 2002), www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf.

[15] UNIFEM, *Issue Brief on Violence*, p. 1, *United Nations Dev. Fund for Women*, http://www.womenwarpeace.org/node/19.

A. Violence against Women in the District of Columbia and the District's Response

In 2005, the Metropolitan Police Department (MPD) received over 11,000 calls reporting a domestic violence crime or about 30 calls per day.[17] There were 51 murders attributed to domestic violence between 2001 and 2004, counting only those cases in which the so-called victim-offender relation could be proven.[18] These statistics of course cannot convey the number of women who live in perpetual fear that an abuser will return and escalate the violence already experienced. As to those women who are able to report domestic violence-related crimes or who choose to do so, the MPD is often simply unable to take any proactive measures to protect their safety. In 2004, the MPD's Civil Protection and Temporary Protection Unit was able to locate and serve only 49.6% of those against whom a protection order had been issued.[19]

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[16] Catherine A. MacKinnon, *A Sex Equality Approach to Sexual Assault*, in 989 *Sexually Coercive Behavior: Understanding and Management* 265, 265 (Robert A. Prentky *et al.* eds., Ann. N.Y. Acad. Sci. 2003).

[17] Washington, D.C. Metro. Police Dep't, 2004-2006, quoted in *Domestic Violence Statistics*, D.C. Coalition Against Domestic Violence, http://www.dccadv.org/statistics.html.

[18] Washington, D.C. Metro. Police Dep't, UCR Report, 2005.

Such statistics are even more alarming when it is understood that domestic batterers who ultimately take the lives of women are repeat offenders, most likely those with both a criminal background and repeated assaults against the women they eventually murder. Murray A. Straus, Ph.D., *Domestic Violence and Homicide Antecedents*, 62 Bull. N.Y. Acad. Med. 457 (No. 5 June 1986). These are not men who inexplicably react violently one day and then never again present a threat. One study found that a history of domestic violence was present in 95.8% of the intrafamily homicides studied.[20] In 2004, the District's

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[19] *See supra* Washington, D.C. Metro. Police Dep't, 2004-2006, quoted in *Domestic Violence Statistics*, D.C. Coalition Against Domestic Violence.

[20] Paige Hall-Smith *et al.*, *Partner Homicide in Context*, 2 Homicide Studies 400 at 410 (1998). *See also*, Gerald D. Robin, *Violent Crime and Gun Control* 47 (Cincinnati, Acad. of Crim. Justice Sciences: 1991) (studies in Detroit and Kansas City indicate that 90% of all family homicides were preceded by previous disturbances at the same address, with a median of 5 calls per address.) *Compare* Linda Langford, *et al.*, *Criminal and Restraining Order Histories of Intimate Partner-Related Homicide Offenders in Massachusetts, 1991-95* in Paul H. Blackman

(Continued on following page)

Police Department reported that of the 7,449 homes from which domestic violence was reported, almost 13% had three or more calls that year alone.[21] These numbers cannot account for the violence that is never reported, or for which only some incidents are reported.[22]

Women who eventually face life-threatening dangers from a domestic abuser or stalker are therefore well aware of the specific threat presented. In fact, Petitioners' *Amici* may well be correct in their claim that "female murder victims were more than 12 times as likely to have been killed by a man they knew than by a male stranger" and that "[o]f murder victims who their knew their offenders, 62% were killed by their husband or intimate acquaintance."

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et al., *The Varieties of Homicide and its Research* (F.B.I. Acad., 2000) (23.6% of intimate-partner murderers were under an active restraining order at the time of the homicide; 40% had been under a restraining order at some time prior to the killing, taken out by the victim or some other person.)

[21] D.C. Metro. Police Dep't, *Metro Police Dep't Domestic Violence Fact Sheet*, received by the National Coalition Against Domestic Violence, the District of Columbia on October 28, 2005 from Lieutenant Angela Cousins of the Metropolitan Police Dept., http://www.ncadv.org/resources/FactSheets_221.html.

[22] Callie Marie Rennison, Ph.D., U.S. Dep't of Justice, Bureau of Justice Statistics, Selected Findings, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, p. 3 (August 2002), http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf (estimating that three-quarters of completed rapes, attempted rapes, and sexual assaults are not reported to law enforcement when the offender is a current spouse, ex-spouse, or boyfriend).

Brief of *Amici Curiae* National Network to End Domestic Violence, *et al.*, in Support of Petitioners at 23 ("Pets' Network Br."). Such knowledge of an individualized threat should allow women to more easily prepare the best defenses they can employ, using their ability to weigh the threat against their ability to protect themselves should the threat ever become one of serious bodily injury or death. Current D.C. gun restrictions on handguns and serviceable firearms in the home simply eliminate that option for women altogether.

Those women who are attacked by strangers or whose children are in danger should also be provided the option of choosing a firearm if they would feel safer having one in their home. Other women who live alone, particularly the elderly who are more likely to be of lower incomes, may not have choices as to where they must live, nor the ability to relocate if stalked. These women too should be able to weigh the threat of an unknown assailant against their ability to defend themselves should they ever be attacked in the privacy of their own homes.

Without the freedom to have a readily available firearm in the home, a woman is at a tremendous disadvantage when attempting to deter or stop an assailant should her attacker allow her no other option. Reflecting upon one of the most notorious tragedies of domestic abuse turned murder, Andrea Dworkin stated directly the stakes involved:

> Though the legal system has mostly consoled and protected batterers, when a woman is being beaten, it's the batterer who has to be stopped; as Malcolm X used to say, "by any means necessary" – a principle women, all women, had better learn. A woman has a right to her own bed, a home she can't be thrown out of, and for her body not to be ransacked and broken into. She has a right to safe refuge, to expect her family and friends to stop the batterer – by law or force – before she's dead. She has a constitutional right to a gun and a legal right to kill if she believes she's going to be killed. And a batterer's repeated assaults should lawfully be taken as intent to kill.[23]

It must be added, however, that it is not just the physical cost of violence against women that must be considered. A woman who feels helpless in her own home is simply not an autonomous individual, controlling her own fate and able to "participate fully in political life."[24] While possessing a handgun or a serviceable long gun in the home will of course not erase all incidents of sex-based violence against women, denying women the right to choose such an option for themselves does nothing but prevent the independent governance women must be afforded.[25]

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[23] Andrea Dworkin, *In Memory of Nicole Brown Simpson*, in *Life and Death: Unapologetic Writings on the Continuing War Against Women* 41, 50 (Free Press 1997).

[24] *See* Sarah B. Lawsky, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 Yale L. J., 783, 786 (2000) ("[F]or a person to be a political citizen, she must be able to participate, free from domination, as a self-determined equal, in the deliberation that is essential to a republican form of government. But self-determination and equality are difficult, if not impossible, in the face of an omnipresent threat of violence.")

Self-defense classes, particularly those involving training women to use handguns, often help to provide women the sense of self-worth necessary for them to feel equals in civil society. *See* Martha McCaughey, *Real Knockouts: The Physical Feminism of Women's Self-Defense* (N.Y. Univ. Press 1997). Women who take such classes no longer see themselves as powerless potential victims, but as individuals who may demand that their rights be respected. There is some evidence that men recognize this transformation and alter their conduct toward those women. As one study noted, "[t]he knowledge that one can defend oneself – and that the self is valuable enough to merit defending – changes everything." Jocelyn A. Hollander, *"I Can Take Care of Myself": The Impact of Self-Defense Training on*

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[25] *E.g.,* Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 Rutgers L. Rev. 97, 98 (1997) ("[O]ur generation, amidst much controversy, has continued to tolerate both abortion rights and gun rights and their costs . . . [T]his is due substantially to our recognition that these liberties allow what might be crucial private choices in extreme personal crises. However we come down politically, in truly desperate circumstances many of us might want for ourselves or someone we love the option offered by these two most controversial rights."). Inge Anna Larish, Note, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. Ill. Law F. 467, 475-479 (1996).

Women's Lives, 10 *Violence Against Women* 205, at 226-227 (2004). Therefore, even if women are never placed in a position to defend themselves with a firearm or their own bodies, there are less material but no less compelling justifications for allowing them that ability. *E.g.*, Mary Zeiss Stange, *From Domestic Terrorism to Armed Revolution: Women's Right to Self-Defense as an Essential Human Right*, 2 J. L. Econ. & Pol'y 385-391 (2006).

B. The Benefits of Handguns for Women Facing Grave Threat

For years women were advised not to fight back and to attempt to sympathize with their attackers while looking for the first opportunity to escape. Well-meaning women's advocates counseled that such passivity would result in fewer and less serious injuries than if a woman attempted to defend herself and angered the perpetrator. More recent, empirical studies indicate, however, that owning a firearm is one of the best means a woman can have for preventing crime against her. The National Crime Victimization Survey ("NCVS") indicates that allowing a woman to have a gun has a "much greater effect" on her ability to defend herself against crime than providing that same gun to a man. In fact, the NCVS and researchers have concluded that women who offer no resistance are 2.5 times more likely to be seriously injured than women who resist their attackers with a gun.[26] While the overall injury rate for both men and women was 30.2%, only 12.8% of those using a firearm for self-protection were injured.[27] Subjective data from the 1994 NCVS reveals that 65 percent of victims felt that self-defense improved their situation, while only 9 percent thought that fighting back caused them greater harm.[28]

Studies of the effects of concealed carry legislation offer additional proof. Although the case now before the Court involves keeping a firearm only in the home, studies looking specifically at women granted concealed carry handgun permits have shown that each additional woman carrying a concealed handgun reduces women's murder rate by between three to four times more than an additional man carrying a concealed handgun reduces the male murder rate. John Lott, Jr., *More Guns, Less Crime*, 62, 161 (2d ed., Univ. of Chicago, 2000) (1998). Providing women handguns simply increases their ability to defend themselves far more than does providing handguns to generally more physically able men. *See also* Paxton Quigley, *Armed and Female* (E.P. Dutton 1989).

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[26] John R. Lott, Jr. and David B. Mustard, 26 Journal of Legal Studies 1, 23 (No. 1, Jan. 1997).

[27] Gary Kleck and Jongyeon Tark, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes,* 42 Criminol. 861, 902 (2005).

[28] *Id.* at 2001a.

Given relative size disparities, men who threaten women and children can easily cause serious bodily injury or death using another type of weapon or no weapon at all. Between 1990 and 2005, 10% of wives and 14% of girlfriends who fell victim to homicide were murdered by men using only the men's "force" and no weapon of any type.[29] It should also be noted that a violent man turning a gun on a woman or child announces his intent to do them harm. A woman using a gun in self-defense does so rarely with the intent to cause death to her attacker. Instead, a woman in such a situation has the intent only to sufficiently stop the assault and to gain control of the situation in order to summon assistance. This simple brandishing of a weapon often results in the assailant choosing to discontinue the crime without a shot having been fired.[30]

The value of widespread handgun ownership lies not only in the individual instances in which a violent criminal is thwarted while attempting to harm someone, but in the general deterrent effects created by criminals' knowledge of firearms ownership among potential victims. Women alarmed by a series of savage rapes in Orlando, Florida in 1966 rushed local gun stores to arm themselves in self-defense. In a widely publicized campaign, the Orlando Police Department trained approximately 3,000 in firearms safety. According to the FBI Uniform Crime Report for 1967, the city then experienced over an 88% reduction in rapes, while rape throughout Florida continued to increase by 5% and nationwide by 7%. Similar crime reduction efforts involving well-publicized firearms ownership in other U.S. cities saw comparable reductions in the rates of armed robbery and residential burglaries. *See also* Don B. Kates, Jr., *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 Am. J. of Crim. L. 113, 153-156 (1991) (describing the deterrent effects handguns create for crimes requiring direct confrontation with a victim such as rape and robbery and for non-confrontational crime such as car theft and the burglary of unoccupied locations); Int'l L. Enf. Educ. & Trainers Assoc. Br. at sections I.B., I.G. (discussing the crime deterrence value of victim armament).

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[29] James Alan Fox, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Intimate Homicide* (last revised on July 11, 2007), http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm#intweap.

[30] *See also* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Crimon. 150 (1995); Gary Kleck, *Policy Lessons From Recent Gun Control Research*, 49 Law and Contemporary Problems 35, 44 (No. 1 Winter 1986) (noting that only a small minority, 8.3% of defensive gun uses, resulted in the assailant's injury or death).

Violent criminals who may view women as easy targets find their jobs far less taxing in communities such as Washington, D.C. Researchers conducting the Institute of Justice Felon Survey confirm the common-sense notion that those wishing to do harm often think closely before confronting an individual who may be armed. According to this survey, some 56% of the felons agreed that "[a] criminal is not going to mess around with a victim he knows is armed with a gun." Over 80% agreed that "[a] smart criminal always tries to find out if his potential victim is armed," while 57% admitted that "[m]ost criminals are more worried about meeting an armed victim than they are about running into the police." Some 39% said they personally had been deterred from committing at least one crime because they believed the intended victim was armed, and 8% said they had done so "many" times. Almost three-quarters stated that "[o]ne reason burglars avoid houses when people are at home is that they fear being shot during the crime." James D. Wright and Peter H. Rossi, 145 *Armed and Considered Dangerous, a Survey of Felons and Their Firearms* (Aldine de Gruyter, 1986). Some 34% said they had been "scared off, shot at, wounded, or captured by an armed victim" at some point in their criminal careers, while almost 70% had at least one acquaintance who had a similar previous experience. *Id.* at 154-155.

Stalkers and abusive boyfriends, spouses, or ex-spouses may be even more significantly deterred than the hardened, career felons participating in this survey. Under current Washington, D.C. gun regulations, stalkers and violent intimate partners may be confident that their female victims have not armed themselves since the threats or violence began. Many of these men have already been emboldened by women's failure to report such threats and previous violence, or by the oftentimes inadequate resources available to help such women. Allowing women the option to purchase a serviceable handgun will not deter all stalkers and abusive intimate partners willing to sacrifice their own lives. However, the fact that men inclined toward violence will know that women have that choice and may well have exercised it will no doubt inhibit those less willing to pay that price.

The District would like to restrict women's choice of firearm to those it gauges most appropriate rather than to allow rational women the ability to decide whether a handgun is more suited to their needs. Petitioner's Brief cites two articles from firearms magazines in which a shotgun is mentioned as appropriate for home defense. Pet. Br. at 54-55. An assembled shotgun is certainly better than nothing and could provide deterrence benefits provided it is accessible to a woman. However, most women are best served by a handgun, lighter in weight, lighter in recoil, far less unwieldy for women with shorter arm spans, and far more easily carried around the home than a shotgun or rifle. Moreover, women who are holding a handgun are able to phone for assistance, while any type of long gun requires two hands to keep the firearm pointed at an assailant. *See also* Int'l L. Enf. Educ. & Trainers Assoc. Br. at section III. The fact that two articles in firearms magazines suggest a long gun for home defense should not impinge upon the constitutional right for a woman to select the firearm she feels most meets her needs.

Petitioner's *Amici* claims that allowing firearms in the home will only increase women's risk of being murdered. In fact, Petitioners' *Amici Curiae* opens its argument by stating that, when a gun is in the home, an abused woman is "6 times more likely" to be killed than other abused women. Pets' Network Br. at 20. However, this statistic has some verifiable basis only when particular adjustments for other risk factors are weighed. Most importantly, any validity that statistic holds is only for battered women who live with abusers who have guns. The odds for an abused woman living apart from her abuser, when she herself has a firearm, are only 0.22, far below the 2.0 level required for statistical significance. The presence of a firearm is simply negligible compared to obvious forewarnings such as the man's previous rape of the woman, previous threats with a weapon, and threats to kill the woman. Moreover, the "most important demographic risk for factor for acts of intimate partner femicide," is the male's unemployment. Jacquelyn C. Campbell, Ph.D., RN, *et al.*, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study* in 93 Am. J. Pub. Health 1090-1092 (No. 7 July 2003). Programs that help women leave an already terribly violent situation and that decrease unemployment should therefore be keys to the abatement of femicide, not laws that serve only to disarm potential victims.

It must also be noted that allowing women handguns will not increase the type of random, violent crime that causes such uneasiness among District residents. Women are far less likely to commit murder than are men. Despite being roughly half of the

U.S. population, women comprised only 10% of murder offenders in 2006 and 2004, only 7% in 2005.[31] Even more important to note are the circumstances under which women kill. Some estimates indicate that between 85% and 90% of women who commit homicides do so against men who have battered them for years. Allison Bass, *Women Far Less Likely to Kill than Men; No One Sure Why*, Boston Globe, February 24, 1992, at 27. *See also* Int'l L. Enf. Educ. & Trainers Assoc. Br. at Section II.A. One 1992 study by the Georgia Department of Corrections reported that of the 235 women serving jail time for murder or manslaughter in Georgia, 102 were deemed domestic killings. Almost half those women claimed that their male partners had regularly beaten them. The vast majority of those who claimed previous beatings had repeatedly reported the domestic violence to law enforcement. Kathleen O'Shea, *Women on Death Row* in *Women Prisoners: A Forgotten Population* 85 (Beverly Fletcher *et al.* eds., Praeger, 1993). *See also* Angela Browne, *Assault and Homicide at Home: When Battered Women Kill*, in 3 Advances in Applied Soc. Psych. 61 (Michael Saks & Leonard Saxe, eds., 1986) (including FBI data that 4.8% of all U.S. homicides are women who have killed an intimate partner in self-defense.) While these deaths are of course tragic, their occurrences do not indicate that women with access to handguns will commit the random acts of violence law-abiding residents most fear.

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[31] F.B.I., Uniform Crime Reports, Murder – Crime in the United States, multiple years, http://www.fbi.gov/ucr/cius_04/offenses_reported/violent_crime?murderhtml, http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_03.html, http://www.fbi.gov/ucr/cius2006/offenses/expended_information/data/shrtable_03.html.

Men and women with a history of aggression, domestic violence, and mental disturbance are already prohibited from possessing firearms under both federal and District of Columbia law. Federal law bars possession to any individual who has been convicted of a "crime punishable by imprisonment for a term exceeding one year," who is an "unlawful user of or addicted to any controlled substance," who has been "adjudicated as a mental defective or who has been committed to a mental institution," who is under an active restraining order, or who has been "convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C §§ 922(g)(1), (3), (4), (8), (9) Washington, D.C. law contains similar provisions, but adds as prohibited persons chronic alcoholics and those who have been "adjudicated negligent in a firearm mishap causing death or serious injury to another human being." D.C. Code §§ 7-2502.03(a)(5), (a)(8). Rigorous enforcement of existing law should therefore minimize the risk that both men and women with histories of violence, mental instability, or negligence with a firearm will have a firearm in their homes.

C. Women May Not Depend upon the District's Law Enforcement Services

The situation now in Washington, D.C. is that women can no longer depend upon the men in their lives to provide protection against violent crime, nor do women themselves have access to handguns that equalize the inherent biological differences between a woman victim and her most likely male attacker. The traditional emphasis of men's duty to protect women not only increases this defenselessness, but in fact has proved of less worth as increasingly more women live alone. Women in the District have therefore been compelled to rely upon the protections of a government-provided police force.

Courts have found that such reliance is unfounded. *See,* Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R.5th 273 (2001). Despite women's expectations, courts across the nation have ruled that the Due Process Clause does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Soc. Servs.*, 489 U.S. 189, 194 (1989). Women simply have no legal right to law enforcement protection unless they are able to prove special and highly narrow circumstances. Just how special and highly narrow those circumstances are were proven in this Court's *Castle Rock v. Gonzales* decision. 545 U.S. 748 (2005) In *Castle Rock*, the Court found that a temporary restraining order, a mandatory arrest statute passed with the clear legislative intent of ensuring enforcement of domestic abuse restraining orders, and Jessica Gonzalez's repeated pleas for help were insufficient for her to demand protection. *Castle Rock* therefore left open the question of just what a woman and a well-meaning legislature would have to do to create such a right to expect police protection from a known and specific threat.

There is no case that better illustrates both how little individual citizens may demand of their local police forces and the utility of a serviceable firearm than Washington, D.C.'s own *Warren v. District of Columbia*. 444 A.2d 1 (D.C. 1981). One morning two men broke down the door and climbed to the second floor of a home where a mother and her four-year-old daughter were sleeping. The men raped and sodomized the mother. Her screams awoke two women living upstairs, who phoned 911 and were assured that help would soon arrive. The neighbors then waited upon an adjoining roof while one policeman simply drove past the residence and another departed after receiving no response to his knock on the door. Believing the two men had fled, the women climbed back into the home and again heard their neighbor's screams. Again they called the police. This second call was never even dispatched to officers.

After hearing no further screams, the two women trusted that that police had indeed arrived and called down to their neighbor. Then alerted to the presence of two other victims nearby, the men proceeded to rape, beat, and compel all three women to sodomize each other for the next fourteen hours. Upon their seeking some compensation from the District for its indifference, the women were reminded that a government providing law enforcement services "assumes a duty only to the public at large and not to individual members of the community." *Id.* at 4. The District thus simultaneously makes it impossible for women to protect themselves with a firearm while refusing to accept responsibility for their protection.

D. Congress Speaks: The Violence Against Women Act of 1994

The Congressional history behind the passage of the 1994 Violence Against Women Act shows the introduction of study after study showing the prevalence of gender-based violence and its human toll. Pub. L. No. 103-322, 108 Stat. 1796 (1994) Eleanor Smeal, representative of the Fund for the Feminist Majority, testified that Title III of the Act was to "provide women federal civil remedies to compensate in part for the inefficient, ineffective, and often unsympathetic police response at state and local levels." *Violence Against Women Act: Hearing on H.B. 3355 before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary House of Representatives*, 103 Cong. 51 (November 16, 1993) (Testimony by Eleanor Smeal, President, Fund for the Feminist Majority). The creation of these federal civil remedies indicates one of Congress' first and most powerful acknowledgments that, at least within the goals of the 1994 VAWA, women should be given some greater legal protection because of their gender.

Although the Act was expanded in 2006 to include male victims of sexual assault and domestic violence, the title of the original act and its text make evident that Congress was originally concerned only with the special dangers facing women and so offered federal protection only to them. Rather than viewing any existing bias or discrimination in state and local courts as a matter to erode over time, Congress deemed it necessary to guarantee equal protection of the laws to women disadvantaged under existing law. The Court should view this legislative precedent not as justification to find constitutional the District's firearms laws as applied to all but women, but as the judgment of a coequal branch that the disparities between male and female should not be overlooked.

III. GENDER CHARACTERISTICS SHOULD AT LEAST BE CONSIDERED BEFORE BARRING LAW-ABIDING WOMEN HANDGUNS, THE MOST SUITABLE MEANS FOR THEIR SELF-PROTECTION

Women are at a severe disadvantage when confronting a likely stronger male assailant. In general, women simply do not have the upper body strength and testosterone-driven speed to effectively defend themselves without help. A firearm, particularly an easily manipulable handgun, equalizes this strength differential and thereby provides women the best chance they have of thwarting an attacker. Even more statistically likely, a firearm in the hands of a threatened woman offers the deterrence empty hands and an often unavailing 911 call do not. *E.g.*, Int'l L. Enf. Educ. & Trainers Assoc. Br. at section I.E. (noting that in 2003, Washington, D.C.'s average police response time for the highest-priority emergency calls was almost 8 and a half minutes.) Even in cases in which a 911 response would be effective, an attacker in control of the situation will not allow a woman to pick up the phone to make that call.

Women have made such advances in equality under the law that it is altogether too easy to disregard the innate gender-based biological inequality when it comes to self-defense. Television provides countless examples of strong women standing toe-to-toe against male evildoers and emerging with only minor cuts and bruises. Our invariably gorgeous heroines manage to successfully defend themselves without so much as smudging their make-up or breaking a heel off their stilettos. Women with children are commonly depicted imploring their children to be silent until a caravan of police cars arrives with sirens blaring to finally arrest the assailant. Such images do not conform with most people's experiences and do nothing to decrease the level of violence actual women often suffer.[32]

---

[32] There are occasional cases in which women are able to successfully defend themselves without a firearm against a male attacker. Self-defense training for women has provided countless women the physical know-how to use their bodies effectively against assailants and has no doubt contributed to women's self-confidence and esteem. However, self-defense training that does not involve the use of a firearm is of little avail to a woman facing a much stronger male armed with some type of weapon. Such training is of even less avail to a woman who has taken a self-defense course in the distant past but who has not maintained her skills.

gender characteristics. A handgun simply is the best means of self-defense for those who generally lack the upper body strength to successfully wield a shotgun or other long gun. To therefore deny half the population a handgun, as the District and the Office of the Solicitor General urge, evinces the “blindness or indifference” to women that only perpetuates women’s vulnerability to physical subordination.[35]

CONCLUSION

Upholding the lower court’s decision will not eliminate sexual discrimination as it manifests itself most forcefully in violence against women. No ruling from this Court or any legislation should be expected to accomplish that. Moreover, many women will choose not to exercise the right to own a

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[35] *See* Laurence H. Tribe, *American Constitutional Law* 1520 (The Foundation Press 2d ed., 1988). (applying racial discrimination and antisubjugation principles to those involving gender, “[t]he antisubjugation principle thus does not argue for adopting disparate impact as a *per se* rule; strict judicial scrutiny would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group.”) *See* Paul Brest, *Forward: In Defense of the Anti-Discrimination Principle*, 90 Harv. L. Rev. 1, 14 (1976) (suggesting that “selective indifference” and the antidiscrimination principle apply to both race and gender.)

firearm. Even fewer will be presented the agonizing decision to actually use a handgun in the defense of themselves or their children. A large segment of women were likewise averse, moderately supportive or even downright indifferent to female suffrage and women's reproductive choice. However, the fact that only some will choose to exercise their right to self-defense should in no way prove a legal impediment to those women for whom owning a firearm is necessary to their ability to determine the course of their lives and consequently their place in society.

The Court should therefore consider the effect the District's handgun ban has on women who have no other significant options when facing a life and death situation. While the basis of the Court's decision should of course revolve around its determination that the Second Amendment guarantees for all D.C. residents the ability to own a handgun in their own homes, this case presents a special opportunity for the Court to advance its gender-related jurisprudence. *Amicae* therefore pray that the Court upholds the decision of the Court of Appeals for the District of Columbia.

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No. 07-290

In The
Supreme Court of the United States

◆

DISTRICT OF COLUMBIA, *et al.*,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

◆

BRIEF AMICUS CURIAE OF ORGANIZATIONS AND SCHOLARS CORRECTING MYTHS AND MISREPRESENTATIONS COMMONLY DEPLOYED BY OPPONENTS OF AN INDIVIDUAL-RIGHTS-BASED INTERPRETATION OF THE SECOND AMENDMENT IN SUPPORT OF RESPONDENT

◆

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INTERESTS OF AMICUS CURIAE[1]

The Citizens Committee for the Right to Keep and Bear Arms, a non-profit organization, seeks to preserve Second Amendment rights through education and advocacy. It strives to ensure that the Amendment is not misinterpreted in derogation of the people's right to keep and bear arms for self-defense and other constitutional purposes.

The Evergreen Freedom Foundation is a non-partisan, public policy research, 501(c)(3) organization, based in Olympia, Washington. The foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. Its efforts focus on state budget and tax policy, labor policy, welfare reform, education, citizenship, and governance.

David T. Beito, Ph.D., is an Associate Professor of History at the University of Alabama. Douglas B. Rasmussen, Ph.D., is a Professor of Philosophy at St. John's University. Steve Russell, J.D., M.L.S., is an Associate Professor of Criminal Justice at Indiana University. Lynn D. Wardle, J.D., is a Professor of Law at Brigham Young University Law School. Robert E. Wright, Ph.D., is a clinical associate professor of economics at New York University.[2] All amici wish to expose common historical myths about the Second Amendment and the efficacy of arms prohibitions perpetuated by the District of Columbia ("District") and its amici.

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[1] The parties were notified of the intention to file this brief seven days prior to its due date as per the consent letters filed in this matter. No counsel for a party authored this brief in whole or in part. No person other than *amici curiae*, their members, or counsel made a monetary contribution to its preparation or submission.

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INTRODUCTION

This brief endeavors to correct common misconceptions about the Second Amendment and gun control that persist in the media and academia and to expose how the District of Columbia ("District") and its amici misstate and decontextualize history and contemporary research to perpetuate such myths. These common myths are numerous, but generally fall under two headings: (1) that the right to keep and bear arms pertains only to the National Guard (the collective rights theory); and (2) that gun ownership is dangerous and owners are more likely to be injured in accidents or have their guns used against them than to successfully defend themselves. This brief cannot address all popular misconceptions or every misstatement in this case. Rather, it focuses on the most egregious and specific errors presented by the District and its amici.

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[2] Institutional affiliations of professors are provided only for identification.

ARGUMENT

I. The District Falsely Claims That The Right To Keep And Bear Arms Is Only For Militia

A. The District Takes *United States v. Cruikshank* Out Of Context To Argue That The Right To Keep And Bear Arms Is Not Constitutionally Protected

The District cites *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), to argue that the right to bear arms "is not a right granted by the Constitution" and, therefore, does not protect private uses enjoyed during the founding era. (Brief for Petitioners ("Pet.Br.") 19-20.) That statement is taken out of context to support principles contrary to those embraced by the Court. *Cruikshank*'s statement was in the context of holding that "[t]his is one of the amendments that has no other effect than to restrict the powers of the national government." *Id. Cruikshank* treated the rights of assembly and petition in the same way and added that they pre-exist the Constitution:

> It is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. ***It was not, therefore, a***

> ***right granted to the people by the Constitution.***

Id. at 551 (emphasis supplied). Thus, *Cruikshank* means that certain rights are not granted by the Constitution because they pre-existed it in natural law. *Cruikshank* does not take the untenable position implied by the District that the right to keep and bear arms is not constitutionally protected or that it may be legislatively defined out of existence. This Court treated the rights of assembly and petition and the right to keep and bear arms the same way in *Logan v. United States*, 144 U.S. 263, 286-87 (1892).

B. The Brady Brief Turns The 1181 Assize Of Arms And The English Bill Of Rights On Their Heads

The Brady Brief incorrectly insists that the 1181 Assize of Arms and the English Bill of Rights included a right of arms only for soldiers. (Brief for Brady Center to Prevent Gun Violence, et al., ("Brady Brief") 17-18 n.6.) The Assize required "every free layman" and "the whole community of freemen" to have armor and weapons. The Assize of Arms (1181), *reprinted in Sources of English Constitutional History* 85-87 (Carl Stephenson & Frederick George Marcham, eds., 1937). The Assize did not initially treat the "villata" as an organized entity. 1 Sir Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I* 565 (Legal Classics Library 1982) (1895). Thus, the concept of a people armed for the defense of self and community predates any formal organization. The ordinances of 1252, 1253, and the Statute of Winchester formally organized the militia. *Id.* The Statute of Winchester required that "every man shall have in his house arms for the keeping of the peace according to the ancient assize." Statute of Winchester (1285), *reprinted in Sources of English Constitutional History*, *supra,* at 174.

The English Bill of Rights provided:

> [T]hat raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law; that the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law[.]

1 W. & M., 2 c. 2 (1689). The suggestion that the English Bill vested the right to "have arms" only in the military is patent nonsense. The English Bill resulted from the revolution that overthrew King James II and declared him guilty of "keeping a standing army within this kingdom in time of peace without consent of parliament" and "causing several good subjects being Protestants to be disarmed[.]" *Id.* As the eminent English historian, G.M. Trevelyan, wrote:

> The root of all [King James'] errors in method was the complete reliance placed by him on his soldiers. Monmouth's rebellion enabled him to become a military despot. The regulars in England were raised from 6,000 to nearly 30,000. A great camp of 13,000 was formed at Hounslow and Heath

> to overawe the capitol. . . . In the neighborhood of London, robberies and murders were plentifully laid at their door. Reports were readily believed against them, for civilians of all parties hated the camp at Hounslow, rightly regarding it as a menace to their liberties and their religion.

G.M. Trevelyan, *A History of England Under the Stuarts* 359 (19th ed. Meuthen & Co. 1947); *see* Winston S. Churchill, *The New World* 383, 391, 398 (Barnes & Noble 1956).

The Brady Brief incorrectly claims that the right to have arms was merely for Protestants to serve in the army. (Brady Brief 17-18 n.6.) The concern of the English Bill, however, was that a Catholic King, in an overwhelmingly Protestant country, disarmed Protestants while developing a "great standing army, largely officered by Catholics[.]" Trevelyan, *supra*, at 360; Churchill, *supra*, at 391. The Peers' invitation to William of Orange to remove King James and assume the throne explained that the plan relied on rallying non-military people and forming them into an insurgent force:

> ***[T]he people*** are so generally dissatisfied with the present conduct of the government, in relation to their religion, liberties and properties (all of which had been greatly invaded) and they are in such expectation of their prospects being daily worse, that your Highness may be assured there are ***nineteen parts of twenty of the people*** throughout this kingdom who are desirous of a change;

> and who we believe, would willingly contribute to it if they had such protection to countenance their rising, as would secure them from being destroyed, before they could get in a posture to defend themselves. . . . if such a strength could be landed as were able to defend itself and them, ***till they could be got together into some order***, we make no question but that ***strength would quickly be increased to a number double to the army*** here, although all their army should remain firm to them[.]

The Invitation to William (1688), *reprinted in The Eighteenth Century Constitution* 8 (E.N. Williams, ed., 1977) (emphasis supplied). After William landed in England, his army swelled daily. 2 Simon Schama, *A History of Britain* 318 (2001). The District's claim that the right to have arms was for Protestants to serve in the King's army misunderstands the history. It was mistrust of the army in the context of a popular revolution that spawned the English Bill. The framers of the Bill directly considered whether to provide that the subjects' right to have arms was for "their common defence" and, instead, used the language "for their defence," supporting the right of self-defense and the right of rebellion. Joyce Lee Malcolm, *Guns & Violence: The English Experience* 59-60 (Harvard Univ. Press 2002).

> rights, which serve principally as *barriers* to protect and maintain inviolate the three primary rights of *personal security, personal liberty* and *private property*": And that of *having arms for their defence* he tells us is "a public allowance, under due restrictions, of **the natural right of resistance and self-preservation** when the sanctions of society and laws are found insufficient to restrain the *violence of oppression*."

Samuel Adams, *Untitled Article*, Boston Gazette, Feb. 27, 1769, *reprinted in The Essential Bill of Rights* 150 (Gordon Lloyd & Margie Lloyd, eds., 1998) (bold emphasis added; italics original). Adams was clear that these rights were not purely military, writing that "[e]very one knows that the exercise of military power is forever dangerous to civil rights; and we have had recent instances of violences that have been offered to private subjects[.]" *Id.*

C. The District Falsely Claims That The Right To Keep And Bear Arms Is Exclusively For The Common Defense

The District asks this Court to embrace the common misconception that the right to keep and bear arms is only for the "common defense." (Pet.Br. 9, 14, 30.) However, the first Senate explicitly considered and rejected a proposal to insert the words "for the common defense" after the words "bear arms." 1 Journal of the Senate 77 (1789) (*see also* Pet.Br. 29).

D. The District Falsely Claims That The Right To Keep And Bear Arms Is Only For The Military, Ignoring The Original Definition Of The "Militia" As The Body Of The People

The District strenuously argues that the Second Amendment's right to keep and bear arms is limited to the National Guard. (Pet.Br. 11-35.) In keeping with English tradition, the Virginia Declaration of Rights, adopted less than a month before The Declaration of Independence, defines the term "militia" as "composed of the body of the people." Virginia Declaration of Rights art. 13 (1776). John Adams similarly called for "[a] militia law, requiring all men, or with very few exceptions[.]" John Adams, *Thoughts on Government* (1776), *reprinted in* 1 *American Political Writing During the Founding Era* 1760-1805 401 (Charles S. Hyneman & Donald S. Lutz, eds., 1983). Thomas Jefferson noted that, in Virginia, "[e]very able-bodied freeman, between the ages of 16 and 50, is enrolled in the militia," even though not all participated. Thomas Jefferson, *Notes on the State of Virginia* 88 (U. of North Carolina Press 1982) (1787). Joel Barlow similarly wrote that "every citizen is a soldier and every soldier will be a citizen[.]" Joel Barlow, *Letter to His Fellow Citizens* (1801), *reprinted in* 2 *American Political Writing During the Founding Era, supra,* at 1124.

One revolutionary pamphleteer wrote that "armies should always be composed of the militia or body of the people[.]" Theophilus Parsons, *The Essex*

Result (1778), *reprinted in* 1 *American Political Writing During the Founding Era*, *supra*, at 501. Several documents from state ratifying conventions utilized the clause:

> That the people have a right to keep and bear arms; that a well-regulated militia, ***including the body of the people*** capable of bearing [or trained to] arms, is the proper, natural, and safe defence of a free state.

Ratification of New York (1788), 1 *Elliot's Debates* 328 (J.B. Lippincott 1901); Ratification of Rhode Island (1790), 1 *Elliot's Debates, supra,* at 335; Ratification of Virginia (1787), 3 *Elliot's Debates, supra*, at 659; Proposed Declaration of Rights in North Carolina Convention (1788), 4 *Elliot's Debates, supra*, at 244.

When the Bill of Rights, including the Second Amendment, refers to "the people" it is a term of art, signifying members of the national community. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The "right of the people" in the Second Amendment refers to all members of the national community. *Id.* This is consistent with the definition of the militia as composed of the body of the people, rather than a military organization.

E. The District Falsely Claims That Congress Can Change The Constitution By Adopting A Limited Definition Of The Term "Militia" And That Congress Did So

Notwithstanding the history of the terms "militia" and "the people," the District contends that because Mr. Heller is not a member of the National Guard, he is not part of the "militia" and does not have Second Amendment rights. (Pet.Br. 14 n.2 and text.) In other words, the District suggests that Congress can use a statute to re-define the words of the Constitution and limit the scope of our rights. As this Court held in *Boerne v. Flores*, 521 U.S. 507, 519 (1997), "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." If Congress adopted a more limited definition of the term "militia" than historically applied, it has no impact on the meaning of the Second Amendment. Furthermore, Congress has not re-defined the term "militia." The National Guard is not the constitutional militia. It was organized under the Army Clause and not the Militia Clause of the Constitution, because the Militia Clause authorizes activities only within the United States. David T. Hardy, *Armed Citizens, Citizen Armies*, 9 Harv. J. of L. & Pub. Pol'y 559, 625-26 (1986).

F. The District Falsely Claims That The Pennsylvania Declaration of Rights Does Not Include Keeping Arms For Self-Defense

The District claims that the Pennsylvania Declaration of Rights includes an "example of the dominant focus of these provisions on communal defense[.]" (Pet.Br. 31.) However, the Declaration states that "the people have a right to ***bear arms for the defense of themselves*** and the state[.]" Pennsylvania Declaration of Rights art. 13 (1776). James Wilson, a delegate to the Federal Convention and Pennsylvania Supreme Court Justice, stated that the right to bear arms was related to "the great natural law of self preservation," and that it "is one of our many renewals of the Saxon regulations. 'They were bound,' says Mr. Selden, to ***keep arms for the preservation*** of the kingdom, and ***of their own persons***.'" James Wilson, *The Works of the Honourable James Wilson* 84-85 (Lorenzo Press 1804) (emphasis supplied). Far from suggesting that the right to bear arms was primarily military, the text and history of the Pennsylvania Declaration embraced the familiar purpose of self-defense.

At the Pennsylvania Ratifying Convention, the dissenters proposed a bill of rights, including a provision likely based on the Pennsylvania Declaration:

> That the people have a right to ***bear arms for the defense of themselves*** and their own state, or the United States, ***or for the purpose of killing game; and no law***

> ***shall be passed for disarming the people or any of them***, unless for crimes committed, or real danger of public injury from individuals[.]

Dissent of the Minority (December 18, 1787) Pennsylvania Ratifying Convention (emphasis supplied), *reprinted in The Essential Bill of Rights, supra,* at 309. This provision envisioned an individual right, with a self-defense component and a military component, and was intended to prevent laws from disarming the people "or any of them."

During America's founding era, in both America and England, the idea of helplessly waiting for the police to come to the rescue was not familiar. There were no professional police. It was the duty of free people to arm and defend themselves and their communities. Don B. Kates, *The Second Amendment and the Ideology of Self-Protection* 9 Constitutional Comment. 87, 92 (1992).

G. The District Misuses *The Oxford English Dictionary* To Support An Artificially Narrow Definition Of "Arms"

The District quotes selectively from definition 2.a. of the word "arm" in the *Oxford English Dictionary* ("*OED*") to suggest that the term "arms" only includes war weapons. (Pet.Br. 15.) The full definition is:

> Instruments of offence used in war; weapons. ***fire-arms***: those for which gunpowder is

> used, such as guns and pistols, as opposed to swords, *spears*, or *bows*. ***small-arms***: those not requiring carriages, as opposed to artillery. ***stand of arms***: a complete set for one soldier.

1 *OED* 634 (2d ed. 2000). This definition includes the term "weapons" as well as "fire-arms," which makes no reference to military uses, and "small-arms" which defines small weapons "as opposed to artillery," contrasting a military weapon. While war weapons are covered by the definition, two of its subparts require no military context.

The District quotes a 1794 reference in the *OED* mentioning arms used in war. (Pet.Br. 15.) However, this is only one of several references. A reference prior to the Bill of Rights was, "1650 T. B. *Worcester's Apophth.* 97 They were come to search his house for Armes." 1 *OED*, *supra*, at 634. While a military application of the term "arms" is one possibility, it is not the exclusive meaning. The District's argument ignores several general definitions. For example, definition III.10, from a 1641 reference: "Arms, ***in the understanding of law*** is extended to any thing that a man, in his anger or fury, **takes** in his hand to cast at or strike another." *Id.* (emphasis supplied).

H. The Linguist's Amicus Brief Misuses Webster's 1828 Dictionary To Project A Military Meaning On The Second Amendment

The Linguist's Brief cites two definitions in Webster's 1828 dictionary, for "arms" and "keep" in order to project an exclusively military meaning onto the Second Amendment. (Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners 20 n.18, 27.) However, Webster also defines the term "arms" more generally and includes a broad legal definition:

> 1. Weapons of offense, or armor for defense and protection of the body.
>
> . . . .
>
> 4. ***In law***, arms are any thing which a man takes in his hand in anger, to strike or assault another.

1 Noah Webster, *American Dictionary of the English Language* 13 (1828) (emphasis supplied). None of the definitions of "keep" suggests a military context. 2 *id.* at 2. Noah Webster understood that the role of arms was not only military. During the Constitution ratification debates, Webster said:

> Before ***a standing army*** can rule, ***the people*** must be ***disarmed***; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole ***body of the***

> ***people are armed***, and constitute a force superior to any ***band of regular troops*** that can be, on any pretence, raised in the United States.

Noah Webster, *Examination into the Leading Principles of the Federal Constitution* (1787), *reprinted in Pamphlets on the Constitution of the United States* 24, 55-56 (Paul Leicester Ford, ed., 1888) (emphasis supplied). The principle of "the people" being "armed" to counterbalance a "standing army" was well-understood in the founding era.

I. The District Denies The Sovereignty Of The People By Falsely Claiming That The Second Amendment Permits Them To Be Disarmed In Favor Of An Exclusive Military Class

The broad distribution of arms among "the great body of the people" served the democratic purpose of preventing an undue concentration of armed power in an exclusive military class, making the people vulnerable to tyranny. As founding era writer Joel Barlow observed:

> If it be wrong to trust the legislative power of the state for a number of years, or for life, to a small number of men; it is certainly more preposterous to do the same thing with regard to military power. Where the wisdom resides, there ought the strength to reside, in the ***great body of the people***; and neither the one nor the other ought ever to be

> delegated, but for short periods of time, and under severe restrictions. This is the way to preserve a temperate and manly use of both; and thus, by trusting only to themselves, ***the people*** will be sure of a perpetual defence against the open force, and the secret intrigues of all possible enemies at home and abroad.

Joel Barlow, *A Letter to the National Convention of France on the Defects in the Constitution of 1791* (1792), *reprinted in* 2 *American Political Writing of the Founding Era*, *supra,* at 837 (emphasis supplied). The use of the term "the people" is unmistakable and repeatedly teaches that an armed citizenry is necessary to ensure that power ultimately remains in them. Tench Coxe explained, ten days after the Bill of Rights was proposed in the House of Representatives, that the right to keep and bear private arms existed to protect the people against tyranny:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed . . . in their right to keep and bear their private arms[.]

Federal Gazette, June 18, 1789, at 2, col. 1 (*quoted in* Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 Geo. Mason U. Civ. Rts. L.J. 105, 123 (1995)). While arguing for majority rule at the 1788 Virginia

Constitutional Convention, James Madison said that "[a] government resting on a minority is an aristocracy and not a Republic . . . and could not be safe with a numerical and physical force against it, without ***a standing army***, an enslaved press, ***and a disarmed populace***." Ralph Ketcham, *James Madison: A Biography* n.94, at 640 (U. of Virginia Press 1995) (emphasis supplied) (quoting James Madison, *James Madison's Autobiography*, 2 Wm. & Mary Q. 208 (1945)). A "disarmed populace" serves the interests of tyranny as Justice Story described:

> One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by ***disarming the people, and making it an offence to keep arms***, and by substituting a regular army in the stead of a resort to the militia.
>
> . . . .
>
> ***The right of the citizens to keep and bear arms*** had justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpations and arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Joseph Story, *A Familiar Exposition of the Constitution of the United States*, 319 (Regenery 1986) (1859) (emphasis supplied). The District's statute makes it an offense to keep arms and attempts to disarm the people. The idea that the Second Amendment is merely a right for the army, but permits the disarmament of the people, turns the Second Amendment on its head.

The District claims that the framers did not craft the Second Amendment to undo all of their hard work by sanctioning insurrection. (Pet.Br. 15 n.3.) This betrays a fundamental misunderstanding of the founding era. Like the Declaration of Independence itself, on June 2, 1784, the New Hampshire Constitution embraced a right of revolution as a last resort:

> Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

N.H. Const. part. 1, art. X (1784). The District unwisely trusts that the founders established a government so foolproof that it could never succumb to tyranny.

In the Declaration of Independence, Jefferson wrote that revolution should not be undertaken lightly because "[p]rudence, indeed, will dictate that governments long established should not be changed for light and transient causes." The Declaration of Independence para. 3 (U.S. 1776). Thus, the people should not foment revolution over minor disagreements about policy. History has proven that an armed populace in America does not attempt to overthrow the government over minor issues. However, as Jefferson eloquently wrote:

> [W]hen a long train of abuses and usurpations begun at a distinguished period and pursuing invariably the same object, evinces a design to reduce [the people] under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security.

Id. In the end, the only statistic that matters in Second Amendment discussions is that at least sixty million (and perhaps over one hundred million) people were murdered by their own governments during the twentieth century. Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995, 1025 (1995) (book review). In America today, the necessity of exercising the last resort of revolution appears remote. But a Constitution is not for the moment – it is for the ages. The people's right to alter or abolish a despotic government is fundamental to their sovereignty. The means to exercise that right should not be entrusted to an exclusive military class, any more than the freedom of speech should be entrusted only to government spokespersons.

II. The District Makes Numerous Historical, Legal, And Statistical Misrepresentations In Attempting To Justify Disarming Its People

A. The District Falsely Claims That Its Law Permits People To Assemble And Load Long Guns For Self-Defense

The District falsely claims that its prohibition of handguns is reasonable because it allows the people to keep long guns for self-defense (Pet.Br. 49) and suggests that its trigger-lock and storage requirement is not an unreasonable infringement of the right to keep and bear arms. (Pet.Br. 55-57.) There is no exception in D.C. Code § 7-2507.02 permitting a weapon to be loaded and unlocked for self-defense.

The District argues, without citing a single example, that a self-defense exception may be "implied" and that there may be judicial lenience in self-defense cases. (Pet.Br. 56.) However, there is an explicit exemption in the statute for firearms at a place of business. D.C. Code § 7-2507.02. Thus, in a future case, the District may well rely on the rule articulated by the District's Court of Appeals that "the express inclusion of one (or more) thing(s) implies the exclusion of other things from similar treatment." *Castellon v. United States*, 864 A.2d 141, 149 (2004) (citations omitted). In *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. App. 1978), where the District's Court of Appeals upheld the exception for places of business against an equal protection challenge, there was no mention of a self-defense exception for assembling and loading a weapon.

Based on the foregoing analysis, it is not at all clear that the District's courts would be lenient in excusing the loading and enabling of a weapon for self-defense. Even when the District has applied statutory self-defense exceptions in other arms-related statutes, it has applied the exception only during the act of self-defense and not before or after. *Logan v. United States*, 402 A.2d 822, 826 (D.C. 1979). This has permitted courts to excuse the use of the firearm for self-defense, but then convict the person for carrying the weapon in the first place. *Cooke v. United States*, 275 F.2d 887, 888 (D.C. Cir. 1960). The court recognized the irrationality of that result, writing that "[t]here does appear to be an inconsistency between acquitting a man of assault on grounds of self-defense, and convicting him for carrying the instrument used in that defense[.]" *Id.* However, the court upheld the conviction because the statute did not provide a self-defense exception to the prohibition against carrying. *Id.* In another case, the District prosecuted an individual for possession of an unlicensed firearm after the individual shot an intruder. The District contended that, while the self-defense was excused, the possession of the weapon was not:

> The government acknowledges that this case presents a difficult sentencing decision for the Court. On the one hand, the defendant fired his gun at a burglar. The safety of his home had been violated. Certainly, if the burglar were inside the home there would be no question that the defendant had the right to defend himself (although he would still

> face the current charge of CWPL because ***self-defense would only excuse the use of the weapon, not the possession of the weapon***).

Government's Memorandum in Aid of Sentencing, *United States v. Plesha*, Criminal No. F-5775-07, at 3 (Sup. Ct. D.C., October 29, 1997) (emphasis supplied). Despite the District's promises to the contrary, it is likely that the District would prosecute the loading or assembly of a weapon prior to self-defense.

If a person threatened to kill an estranged spouse, it is doubtful that the spouse could legally load a weapon, even if a self-defense exception applied. This concern is compounded because carrying an unloaded and disassembled weapon is prohibited. *Rouse v. United States*, 391 A.2d 790 (D.C. 1978). One may be prosecuted for a self-defense use, even when s/he is carrying the arm for a lawful purpose. *Cooke v. United States*, 275 F.2d 887, 889 n.3 (D.C. Cir. 1960) (holding that a violation of D.C. Code § 22-4504 does not require the defendant to intend to use the arm unlawfully); *Carey v. United States*, 377 A.2d 40, 43 (D.C. 1977). There is no exception for a weapon to be made operational for self-defense. Even if the court created a self-defense exception, it is unlikely that the exception would protect the unlocking or loading of the weapon prior to self-defense. The District's so-called support of the common law right of self-defense is disingenuous when it simultaneously denies law-abiding citizens the means of protecting themselves.

B. The District Falsely Asserts That Other Jurisdictions' Laws Are Comparable To The District's Law

Using only the example of Chicago, the District asserts that "[m]any cities, states and nations regulate or ban handguns based on the unique dangers of those deadly weapons[.]" (Pet.Br. 50.) However, D.C. Code § 7-2502.02 is not a gun regulation – it is an outright prohibition. When arguing that its regulations are "reasonable," the District cannot compare its outright prohibition to handgun regulations in other jurisdictions. The District's examples at the petition stage included Europe and Canada. (Petition for Writ of Certiorari 23, 27.) The District's own source material reveals that at least fifty of the sixty-nine countries studied (seventy-one percent) permit handguns for the defense of persons and property. Wendy Cukier & Victor W. Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47's* 144 (2006). "District of Columbia [firearm laws] are stricter than almost any European state." James B. Jacobs, *Can Gun Control Work?* 35 (Oxford U. Press 2003). In Canada, a permit is required but may be issued to any law abiding adult. Safe storage is required, but any "lawful excuse," including home defense, is a valid reason for loading a handgun in the home.[4]

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[4] "Every person commits an offence who, without lawful excuse, uses . . . transports or stores a firearm . . . or any ammunition . . . in a careless manner or without reasonable

(Continued on following page)

C. The District Relies On Deeply Flawed Research And Evidence Taken Out Of Context To Claim That Its Handgun Ban Has Reduced Homicide Rates

The District inaccurately claims that its gradual handgun ban caused an abrupt decline in firearm-related homicides. (Pet.Br. 49, 53.) In support of that conclusion, the District cites the discredited study by Colin Loftin et al., *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991). The Loftin study is the only data cited by the petitioner that is specific to the District, and it has been thoroughly discredited by two subsequent studies, described as follows by Professor Kleck:

> Consider, for example, a study of D.C.'s gradual ban on handguns in 1976. The study's authors, Loftin, et al. (1991), compared trends in gun homicide and nongun homicide in D.C. with trends in the city's suburbs, and concluded, using very strongly worded terms, that the law caused an abrupt decrease in the gun homicide rate. Kleck, Britt, and Bordua requested their data for reanalysis and were flatly refused by Loftin. We obtained the data independently, performed the reanalysis, and found that the authors' conclusions collapsed as soon as any of three improvements were made: (1) extending the

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precautions for the safety of other persons." Criminal Code, R.S.C., ch. C-46, § 86(1) (1985) (Can.).

> time period studied to include more postintervention time points, (2) comparing D.C. with a control area, Baltimore, that was far more similar to D.C. than its suburbs, and (3) use of a more theoretically appropriate statistical model that assumed that a slow-motion handgun ban should have a gradual effect rather than an abrupt one. Any one of these changes reversed the Loftin et al. conclusions, supporting the hypothesis that the D.C. handgun ban had no impact on homicide[.]

Gary Kleck, *Targeting Guns: Firearms and Their Control* 355 (1997); Chester Britt III et al., *A Reassessment of the D.C. Gun Law: Some Cautionary Notes On the Use of Interrupted Time Series Designs For Policy Impact Assessment*, 30 Law & Soc'y Rev. 361 (1996)).

If disarming law abiding people was effective, one would expect that, after thirty years of the most restrictive handgun prohibition in America, the District would have a below average murder rate. In fact, in 2006 the District's murder rate was more than double that of comparable cities and five times the national average. Federal Bureau of Investigation, *Crime in the United States 2006* (2007), *available at* http://www.fbi.gov/ucr/cius2006/data/table_01.html (national data), http://www.fbi.gov/ucr/cius2006/data/table_08_dc.html (D.C. data), http://www.fbi.gov/ucr/cius2006/data/table_16.html (data on cites with populations between 500,000 and one million) (statistics compiled by Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms:*

One Hard Question? scheduled for publication in Geo. Mason U. Civ. Rts L.J.).

The District cited Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1095-98 (2001), for the proposition that "a 10% increase in handgun ownership increases the homicide rate by 2%." (Pet.Br. 52.) The Brief of the Claremont Institute exposes many flaws in this research, which need not be repeated here. It is interesting to note that, like Loftin, Mr. Duggan has repeatedly refused to share his data for verification. Florenz Plassman & John R. Lott, Jr., *More Readers of Gun Magazines, But Not More Crimes*, Soc. Sci. Research Network 3 (July 2, 2002), *available at* http://ssrn.com/abstract=320107; John R. Lott, *The Bias Against Guns* 233, 246 (2003).

The District cites Cynthia Leonardatos et al., *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 Conn. L. Rev. 157, 169-70, 178-80 (2001), for the proposition that "[s]afety mechanisms, while helpful, do not always work as designed, and compliance, even with mandatory safety laws, is imperfect." (Pet.Br. 54.) While this citation is technically accurate, it is taken out of context and ignores the well-supported conclusions of the article, which are that the District's measures are ineffective in reducing the misuse of arms and interfere significantly with self-defense:

> Legislative mandates for gun storage, and legislative mandates for gun personalization

> initially seem attractive because they promise to reduce gun misuse by unauthorized persons. But when these mandates are closely examined, their practical ability to reduce unauthorized use seems rather small, and is outweighed by the increased dangers that result from interference with lawful defensive uses, and by the widespread resistance that will be encountered, from both police and civilians.

Id. at 219. Thus, far from concluding that the District's trigger-lock and storage requirements are reasonable, the Leonardatos article actually suggests that they are unreasonable.

D. The District Falsely Asserts That Handguns Are Deadlier Than Long Guns

The District claims that handguns are the most common weapons in street crimes. (Pet.Br. 51.) However:

> 54-80% of homicides occur in circumstances in which long guns could be substituted for handguns, that most surveyed felons say would carry a sawed-off long gun if they could not get a handgun, and that the deadliness of the substituted long guns would almost certainly be at least 1.5-3 times greater than that of handguns.

Gary Kleck, *Point Blank: Guns and Violence in America* 92 (1991). Even if a handgun ban could be perfectly enforced, it would not make a significant difference. Making the realistic assumption that substituted long guns would be twice as lethal as handguns, the substitution rate would have to be less than forty-four percent in order for the ban to provide any improvement. *Id.* The conclusion of this analysis is that "controls aimed solely at handguns or at small, cheap handguns are a mistake because they encourage substitution of more lethal types of guns." Kleck, *Targeting Guns, supra,* at 139, 303.

E. The District Incorrectly Asserts That Handguns Are Dangerous In The Hands Of Ordinary Citizens

It is important to confront the persistent falsehood that a privately-owned firearm is more dangerous to the law abiding owner than a potential intruder. In reality, "[a] fifth of the victims defending themselves with a firearm suffered an injury, compared to almost half of those who defended themselves with weapons other than a firearm or who had no weapon." U.S. Dep't of Justice, Bureau of Justice Statistics, *Crime Data Brief* (April 1994, revised Sept. 24, 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/hvfsdaft.txt. Similarly, "[r]esistance with a gun appears to be the most effective in preventing serious injury" to the victim. Jungyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Actions on the Outcomes of Crimes*, 42 Criminology 861, 902 (2004). It strains reason and ignores statistics to claim that an unarmed victim is safer than an armed one. It is also insulting to the character of a free people to suggest that they surrender to the demands of violent criminals in the timid hope of appeasing them, rather than arming themselves to resist.

The District further claims that prison inmates prefer handguns. (Pet.Br. 51.) However, law-abiding citizens purchasing weapons for self-protection also prefer handguns. U.S. Dep't of Justice, Nat'l Inst. of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms* 3, 4, 7 (May 1997), *available at* http://www.ncjrs.gov/pdffiles/165476.pdf. Unlike law-abiding citizens, inmates report that if they could not get a handgun they would resort to highly lethal sawed-off shotguns. Gary Kleck, *Point Blank, supra,* at 92.

The District cites Arthur L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993), for the proposition that people in households with guns are more likely to die in a homicide. (Pet.Br. 52.) As Professor Kleck stated:

> This finding was a largely or entirely spurious association that failed to control for risk factors that increase the likelihood both of owning guns for self-protection and of becoming homicide victims, including being a drug dealer (as distinct from a mere user) and being a member of a street gang. The association also becomes insignificant if one adjusts for a level of error which Kellerman has acknowledged affects surveys Further, the finding was also confined to the high homicide

> areas of just three urban counties, and thus could not be generalized to any larger population.

Kleck, *Targeting Guns*, *supra*, at 22, 57, 60, 216-18, 244-47.

F. The District Falsely Asserts That Accidental Handgun Deaths Of Children Are Frequent

The District claims that handguns frequently cause accidents involving children and that "dozens" are killed annually. (Pet.Br. 53.) The mental picture of a child shooting himself or a playmate with an improperly stored gun is wrenching. However, Americans are extremely careful when it comes to safeguarding children against such accidents. Each year, approximately forty-eight children under thirteen years old die from reported handgun accidents in the United States. Kleck, *Targeting Guns*, *supra*, at 299. This statistic is likely overstated, because some of these are almost certainly extreme abuse incidents where the abuser claims that the death was an accident. *Id.*

Compared to other hazards of daily life, gun ownership is relatively safe. For example, swimming pools annually account for 350-500 deaths of children under five years old and 2,600 injuries, some resulting in permanent brain damage. Consumer Product Safety Commission, *Backyard Pool: Always Supervise Children, Safety Commission Warns*, CPSC Document

#5097, *available at* http://www.cpsc.gov/cpscpub/pubs/5097.html. This is so, even though there are only five-million home swimming pools compared to forty-three million households with guns. Kleck, *Targeting Guns, supra,* at 296. Thus, the risk of fatal accidents is over one hundred times greater for a household with a pool than a household with a handgun. Each year in America there are approximately one thousand deaths related to bicycles, and approximately one million emergency room visits. Consumer Product Safety Commission, *Bicycle Study*, CPSC Document #344 at 1, *available at* http://www.cpsc.gov/cpscpub/pubs/344.pdf. These casualties cause losses of approximately eight billion dollars annually. *Id.*

The Brief of the American Academy of Pediatrics relies on U.S. Dep't of Justice, Nat'l Inst. of Justice, *High School Youths, Weapons and Violence: A National Survey* 6 (1998), *available at* http://www.ncjrs.gov/pdffiles/172857.pdf, for the proposition that "there is simply no way to make guns 'safe' for children – gun safety programs have little effect in reducing firearms death and injury." (Brief of the American Academy of Pediatrics, et al., at 7). In fact, the cited report says no such thing. U.S. Dep't of Justice, Nat'l Inst. of Justice, *supra*, at 6. While every accidental loss of a child is tragic, the small number lost in handgun accidents demonstrates that Americans are conscientious about their safety.

G. The District Overstates The Impact Of Handguns In The Schools

The District claims that a significant percentage of middle school students in some areas claim to have carried a gun to school. (Pet.Br. 53.) There are approximately seven school shooting deaths per year in the United States. Gary Kleck, *Targeting Guns, supra,* at 203-04 (1997). While each one of these deaths is a tragedy, a greater number of deaths occur annually as a result of high school football. Frederick O. Mueller et al., *Catastrophic Injuries in High School and College Sports*, 8 HK Sport Science Monograph Series 42, 47 (1996).

H. The District Falsely Claims That State Law Permitted Significant Gun Control In An Early Period

The District suggests that restrictive gun control was tolerated in an early period to infer that such controls must be constitutional. (Pet.Br. 42.) However, each of the example statutes is regulatory and not prohibitive of the possession of arms or the loading and use of arms for self-defense. None of these statutes prohibited carrying a weapon, although two prohibited carrying it concealed.

1. Massachusetts

The District cites a 1783 Massachusetts statute to suggest a tradition of firearm regulation. (Pet.Br. 42; *see also* Brief for Amici Curiae DC Appleseed

Center for Law & Justice, et al. ("Appleseed Brief"), 12.) However, the District's Statute is a prohibition and not a regulation. The prefatory clause indicated that it was intended to protect firefighters:

> *WHEREAS the depositing of loaded Arms in the Houses of the Town of* Boston, *is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out in the said Town:*

An Act in Addition to the several Acts already made for the Prudent Storage of Gun-Powder within the town of Boston, Act of Mar. 1, 1783, ch. 8, 1783 Mass. Acts 218-19. To that end, the statute made it illegal to:

> take into any dwelling House, Stable, Barn, Out-house, Ware-House, Store, Shop, or other building, within the town of *Boston*, any Cannon, Swivel, Mortar, Howitzer, or Cohorn, or Fire-Arm, loaded with, or having Gun Powder in the fame, or shall receive into any Dwelling-House, Stable, Barn, Out-house, Store, Warehouse, Shop, or other Building, within the said Town, any Bomb, Granade, or other Iron Shell, charged with, or having Gun-Powder in the same[.]

Id. The foregoing did not prohibit the loading, carrying or use of pistols or other arms for self-defense. It was intended to prevent fire hazards resulting from storing explosives inside buildings.

2. Alabama

The District cites Act of Feb. 1, 1839, no. 77, 1839 Ala. Laws 67 ("Alabama Statute"), as an example of an early gun control law. (Pet.Br. 42.) This statute makes it a crime to "carry concealed about his person any species of firearms[.]" It has nothing to do with outlawing handguns or preventing the loading of a gun for self-defense or having a loaded gun in one's home.

3. Indiana

The District cites the Act of Feb. 10, 1831, ch. 26, § 58, 1831 Rev'd Laws of Ind. 180, 192 ("Indiana Statute"), as another example of an early gun control law. (Pet.Br. 42.) It prohibits "wearing" certain weapons "concealed[.]" It does not outlaw handguns or prevent loading or using a gun for self-defense and, in fact, exempts "travellers" from its requirements. *Id.*

4. Tennessee

The District cites Act of Jan. 27, 1838, ch. 137, 1837-1838 Tenn. Pub. Acts 200 ("Tennessee Statute"), as a further example of early gun control. (Pet.Br. 42.) The Chicago Brief claimed that it "banned the sale of any concealable weapon, including all pistols, 'except such as are used in the army and navy of the United States, and known as the navy pistol.'" (Brief of the City of Chicago and the Board of Education for the City of Chicago ("Chicago Brief") 13-14.) No portion of this quote appears in the Tennessee Statute, nor does it contain any reference to the army or navy. It banned the sale of "any Bowie knife or knives, or Arkansas toothpick," or other knives resembling these. It is revealing that to support its thin historical claims, the District cited a narrowly tailored knife regulation.

5. Georgia

Several amici supporting the District cited the Georgia Act of Dec. 25, 1837, 1837 Ga. Laws 90, banning pistols, in order to imply that handgun prohibitions do not violate the Constitution. (Chicago Brief 14; Brief of Law Professors Erwin Chemerinsky and Adam Winkler 18; Appleseed Brief 13.) However, these amici inexplicably failed to disclose that Georgia's pistol ban was held unconstitutional as violating the natural right of self-defense and the Second Amendment's right to bear arms, which included, "[t]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description[.]" *Nunn v. State*, 1 Ga. 243, 251 (1846) (state could constitutionally prohibit concealing a pistol but not prohibit carrying it).

I. The Appleseed Brief Mis-Cites State Cases To Argue That It Is Constitutional To Ban An Entire Class Of Weapons

The Appleseed Brief cites a series of state cases to argue that it is constitutional to ban an entire class of weapons. (Appleseed Brief 26.) Seven of these eight cases are severely over-claimed, and at least two cases directly contradict the principles for which they are cited.

In *State v. Swanton*, 629 P.2d 98, 99 (Ariz. App. 1981), the Arizona Court of Appeals held that "nunchakus" were not "arms" under Arizona's Constitution, let alone a class of arms. *Id.* Even if nunchakus were arms, the "class" would be blunt weapons, not one anachronistic blunt weapon. The court specifically refused to apply the Second Amendment. *Id.*

In *Benjamin v. Bailey*, 662 A.2d 1226, 1235 (Conn. 1995), the Connecticut Supreme Court upheld a ban on certain assault weapons. However, this was based, in part, on holding that "there are many firearms [that] fit the general designation of 'assault weapons,' and [that] are virtually identical to the banned weapons, but [that] do not appear on the list [of proscribed weapons]." *Id.* Thus, notwithstanding the Appleseed Brief, *Benjamin* did not countenance banning of a class of arms.

In *Robertson v. Denver*, 874 P.2d 325, 329-30 (Colo. 1994), the Colorado Supreme Court upheld an assault weapons ban, but found that the subcategory of banned weapons was infinitesimally small and affected weapons that were not for self-defense:

> Denver has sought to prohibit the possession and use of approximately forty firearms. The evidence also established that currently there are approximately 2,000 firearms available

> for purchase and use in the United States. Given the ***narrow class of weapons regulated*** by the ordinance, we have no hesitancy in holding that the ordinance does not impose such an onerous restriction on the right to bear arms as to constitute an unreasonable or illegitimate exercise of the state's police power: there are literally hundreds of alternative ways in which citizens may exercise the right to bear arms in ***self-defense***. While carving out a ***small category of arms*** which ***cannot be used for purposes of self-defense*** undoubtedly limits the ways in which the right to bear arms may be exercised, the barriers thereby created do not significantly interfere with this right. To the contrary, as the evidence plainly shows, there are ample weapons available for citizens to fully exercise their right to bear arms in ***self-defense***.

Id. (emphasis supplied). Unlike the present case, where the prohibition covers a very large class of weapons ideally suited for self-defense, the Denver ordinance affected a narrowly tailored subclass within the larger class (rifles) and represented a tiny fraction of that class.

In *Commonwealth v. Davis*, 343 N.E.2d 847, 848-50 (Mass. 1976), the Massachusetts Supreme Court upheld a prohibition on short-barreled shotguns, a small subclass within a larger class (shotguns).

In *People v. Brown*, 235 N.W. 245, 246-47 (Mich. 1931), the Michigan Supreme Court held that every individual had a right to possess a "revolver" for self-defense, but upheld a narrow prohibition of a single revolver, the blackjack, and not all handguns. This holding is directly at odds with a general ban on handguns.

In *State v. LaChapelle*, 451 N.W.2d 689, 690-91 (Neb. 1990) (quoting *State v. Fennell*, 382 S.E.2d 231 (1989)) (emphasis supplied), the Nebraska Supreme Court held that a prohibition against sawed off shotguns was constitutional, in part, because:

> Although Fennell argued that the statute absolutely prohibited possession of any "short-barreled shotguns," the court observed that the questioned statute "***does not completely ban a class of weapons*** protected by the Constitution"; rather, the statute allowed possession of any shotgun with a barrel length of 18 inches or greater.

The court also held that short-barreled rifles, short barreled shotguns and machine guns were weapons of crime and would not ordinarily be possessed by law abiding citizens and, therefore, could be banned. *Id.* at 691. This ruling is directly at odds with the claim that banning an entire class of arms is constitutional.

In *Morrison v. State*, 339 S.W.2d 529, 531-32 (Tex. Crim. App. 1960), the court held that a "machine gun is not a weapon commonly kept, according to the customs of the people and appropriate for open and manly use in self defense" and is "ordinarily used for criminal and improper purposes." *Id.* This ruling cannot justify a ban on a "commonly kept" class of weapons with numerous legal purposes, including self-defense.

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CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

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BRIEF OF THE PARAGON FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

◆

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INTEREST OF AMICUS CURIAE

The Paragon Foundation, Inc. is a New Mexico 501(c)(3) non-profit organization created to support and advance the fundamental principles set forth in the Declaration of Independence and Constitution of the United States of America.[1] The Paragon Foundation, Inc. advocates for individual freedom, private property rights, and limited government controlled by the consent of people. The Paragon Foundation, Inc. provides for education, research and the exchange of ideas in an effort to promote and support Constitutional principles, individual freedoms, private property rights and the continuation of rural customs and culture, all with the intent of celebrating and continuing the Founding Fathers' vision for America. The Paragon Foundation, Inc. has several thousand current or former members nationwide; its constituents include ranchers and rural landowners. Consistent with its mission, Amicus is well positioned to bring to the Court's attention relevant material that will assist in the disposition of this case.

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[1] This brief is submitted and filed with the consent of the parties pursuant to S. Ct. R. 37.3(a) with written notice having gone to counsel for petitioners and respondent more than seven days prior to the filing of this brief. Pursuant to S. Ct. R. 37.6, Amicus affirms that no party or their counsel authored, or paid for, this brief in whole or in part.

SUMMARY OF ARGUMENT

The court of appeals' judgment should be affirmed. The court of appeals correctly applied the Second Amendment in declaring unconstitutional various District of Columbia statutory prohibitions, bans, and requirements concerning firearms. In reaching its decision, the court of appeals properly found an individual right to keep and bear arms under the Second Amendment independent of militia service. That right flows from pre-existing natural rights and is grounded in the historical and textual contexts from which it arose. To hold otherwise – that the Second Amendment does not confer an individual right to keep and bear arms – would be inconsistent with the Founding Fathers' vision of the Bill of Rights.

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ARGUMENT

I. "THE RIGHT OF THE PEOPLE" TO KEEP AND BEAR ARMS EXISTED BEFORE THE FORMATION OF ANY GOVERNMENT AND EXISTS NOT BECAUSE OF GOVERNMENT BUT IS PRESERVED BY IT.

The Declaration of Independence, stating that "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," is the finest example of natural rights theory applied to public policy. Every individual has "unalienable

Rights" that exist not because of government but spring wholly from the human condition itself. It is our humanity that is the fountainhead of those natural rights.

The Declaration identifies three such rights – Life, Liberty, and the pursuit of Happiness. The Declaration suggests only that those three rights are "among" the "unalienable Rights" we all share, not that they are exclusive. As the Founders of this country moved from the Declaration of Independence to other formal organizing documents, numerous natural rights were carried forward and enshrined in the Bill of Rights.

At a speech given on June 8, 1789, James Madison proposed certain amendments to the Constitution that would later become the Bill of Rights.[2] His speech and notes from that speech reflect that the proposed amendments preserved and protected certain natural rights and retained the same for individuals.[3] Among those natural rights was a right to keep and bear arms that is substantively similar to the present Second Amendment.[4]

---

[2] House of Representatives, Debates, June 8, 1789, reprinted in David E. Young, The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792 at 651-663, 654 (2nd Ed. 2001).

[3] *Id.*; http://www.loc.gov/exhibits/madison/images/vc11.jpg.

[4] *Supra* at n. 2.

In accord with the natural rights theory, the Court in *Robertson v. Baldwin,* 165 U.S. 275, 281-82 (1897) stated that:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion. . . .

The Court pointed out that the Second Amendment is among those individual rights that Americans "inherited from our English ancestors" and that the

Bill of Rights is not a collection of "novel principles of government" but something personal and individual.

In *United States v. Verdugo-Urquidez,* 494 U.S. 259, 265 (1990) (considering the Fourth Amendment), the Court addressed the use of the term "people" in the Constitution and Bill of Rights:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. CONST., amdt. 1; Art. I, § 2, cl. 1. While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

"The people" has the same consistent meaning throughout the Constitution and the Bill of Rights and the Second Amendment is no exception. *Id.* A textual analysis of the Bill of Rights as a whole compels only one conclusion: "the people" in the

Second Amendment refers to individual Americans and not state governments or other collective bodies.

The Second Amendment does not lay down the right of the people to keep and bear arms as a matter of positive law but reflects that the right is more fundamental. The Second Amendment functions as a means to preserve the fundamental, individual right to keep and bear arms.

II. THE SECOND AMENDMENT MUST BE INTERPRETED IN CONJUNCTION WITH THE HISTORICAL USE OF ARMS BY INDIVIDUALS FOR SELF-DEFENSE, HUNTING, AND OTHER PRACTICAL PURPOSES.

In the time of the Founding Fathers, arms were used for self-defense and hunting. *United States v. Emerson*, 270 F.3d 203, 251-55 (5th Cir. 2001). As the court of appeals below pointed out, the right of self-defense and self-preservation includes "the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government." *Parker v. District of Columbia,* 478 F.3d 370, 383 (D.C. Cir. 2007). It would be incongruous for the Founding Fathers to have lived in a time when individuals regularly used arms for those purposes but not to have envisioned an individual, private right to keep and bear arms.

III. AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS IS GOOD PUBLIC POLICY.

Then as now, ranchers and rural landowners routinely use arms for lawful practical purposes. They use arms to protect their cattle and livestock from predators and provide fresh game for their tables. Ranchers and rural landowners use arms to provide for their self-defense in the vastness of the West where timely assistance from law enforcement is impossible.

In 1955, Louis L'Amour penned a Western classic, *Heller With a Gun* (Bantam Reissue, May 2005).[5] In the novel, set in the time of the Old West in Wyoming and Montana, Dodie Saxon, a youngster in her teens, comments that:

> Out here a gun is a tool. Men use them when they have to . . . Where there's no law, all the strength can't be left in the hands of the lawless, so good men use guns, too.

Id. at 100. Mr. L'Amour neatly sums up the public policy behind the Second Amendment. It is the individual right to keep and bear arms that allows individuals to use arms for lawful practical purposes and to protect themselves. That right, understood from the beginning of this Republic to be an individual right, must be respected and given the full protection it deserves.

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[5] Any similarity between the title of Mr. L'Amour's classic novel and Respondent's last name in this case is coincidental but nonetheless interesting if not prophetic.

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CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
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v.

DICK ANTHONY HELLER,

Respondent.

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**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

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BRIEF OF PINK PISTOLS AND GAYS AND LESBIANS FOR INDIVIDUAL LIBERTY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

◆

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INTEREST OF *AMICI CURIAE*

Pink Pistols is an unincorporated association established in 2000 to advocate on behalf of lesbian, gay, bisexual and transgendered (hereinafter LGBT) firearms owners, with specific emphasis on self-defense issues.[1] There are 51 chapters in 33 states and 3 countries. Membership is open to any person, regardless of sexual orientation, who supports the rights of LGBT firearm owners. Pink Pistols is aware of the long history of hate crimes and violence directed at the LGBT community. More anti-gay hate crimes occur in the home than in any other location, and there are significant practical limitations on the ability of the police to protect individuals against such violence. Thus, the right to keep and bear arms for self-defense in one's home is of paramount importance to Pink Pistols and members of the LGBT community.

Gays and Lesbians for Individual Liberty ("GLIL") is a non-partisan organization founded in 1991. GLIL is an international organization of persons committed to the political philosophy of individual liberty, both generally and as it affects lesbians, gay men and bisexual persons. GLIL seeks to advance the principles of the free market, individual responsibility and non-interference by government in the private lives of all citizens. GLIL seeks to educate members of the gay and lesbian community about these principles, while at the same time promoting tolerance and acceptance of gay men and lesbians among members of the wider society. GLIL is based in Washington, D.C., with members across the United States and in several foreign countries. To achieve its goals, GLIL sponsors lectures, debates, panel discussions, fundraisers for charitable organizations, and social events. In 1993 GLIL sponsored a Second Amendment event. The speaker's remarks, which have been posted on GLIL's website[2] ever since, explain why the right to possess firearms for self-protection is of critical importance to gay men and lesbians. Pink Pistols and GLIL urge this Court to confirm that LGBT individuals have a Second Amendment right to keep and bear firearms for their own protection within the confines of the home.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici curiae* states that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief.

◆

SUMMARY OF THE ARGUMENT

Laws that prevent the use of firearms for self-defense in one's own home disproportionately impact those individuals who are targets of hate violence due to their minority status, whether defined by race, religion, sexual orientation, or other characteristic. Even in their homes, LGBT individuals are at risk of murder, aggravated assault and other forms of hate violence because of their sexual orientation. In fact, the home is the most common site of anti-gay violence. Thus, for certain LGBT individuals, the possession of firearms in the home is essential for a sense of personal security – a fact generally lost in the majoritarian debate about restricting individual's access to, and use of, firearms. As shown below, not only do members of the LGBT community have a heightened need to possess firearms for self-protection in their homes, the Second Amendment clearly guarantees this most basic right. This Court should not permit the democratic majority to deprive LGBT individuals of their *essential* and constitutional right to keep and bear arms for self-defense in their own homes. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997) (recognizing "the countermajoritarian implications of judicial review").

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[2] Austin Fulk, *Gun Control vs. Our Freedom, available at* http://glil.org/archives/articles/1993_12-fulk-guns.html (last visited February 6, 2008).

Indeed, Petitioners' arguments seeking to limit the right to keep and bear arms to persons who are actively serving in militias would produce absurd results irreconcilable with the purpose of the Bill of Rights and the plain language of the Second Amendment. Interpreting the Second Amendment as recognizing a right conditioned upon military service, where eligibility for military service is defined by the Government, prevents the Amendment from acting as any constraint on Government action at all. Such a result is contrary not only to the literal text of the

Amendment, but to the intentions of the Framers. Further, in light of the current "Don't Ask, Don't Tell" policy, such an interpretation would completely eradicate any Second Amendment right for members of the LGBT community. Petitioners' strained construction should be rejected.

◆

ARGUMENT

I. THE SECOND AMENDMENT GUARANTEES LGBT INDIVIDUALS THE RIGHT TO KEEP AND BEAR ARMS TO PROTECT THEMSELVES IN THEIR HOMES.

Almost five years ago this Court held that the Due Process Clause protects the right of gay men and lesbians to engage in consensual sexual acts within the privacy of their own homes, "without intervention of the government." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The exercise of that right, or even the non-sexual act of having a certain "appearance," however, continues to put members of the LGBT community at risk of anti-gay hate violence and even death. Since *Lawrence* was decided, at least 58 members of the LGBT community have been murdered and thousands of others have been assaulted, many in their own homes (the most common site of anti-gay hate crimes), because of their sexual orientation.[3] The question now presented is whether LGBT individuals have a right to keep firearms in their homes to protect themselves from such violence. Because LGBT individuals cannot count on the police to protect them from such violence, their safety depends upon this Court's recognition of their right to possess firearms for self-protection in the home.

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[3] *See* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence (2003-2006).

A. Recognition Of An Individual Right To Keep And Bear Arms Is Literally A Matter Of Life Or Death For Members Of The LGBT Community.

The need for individual self-protection remains and is felt perhaps most pointedly by members of minority groups, such as the LGBT community. Minority and other marginalized groups are disproportionately targeted by violence, and have an enhanced need for personal protection. In 2005 alone, law enforcement agencies reported the occurrence of 7,163 hate crime incidents. Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006).[4] Members of the LGBT community are frequent targets of such violence. Indeed, for the years 1995-2005, law enforcement agencies reported more than 13,000 incidents of hate violence resulting from sexual-orientation bias. *See* Federal Bureau of Investigation, Uniform Crime

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[4] The FBI collects data for only 82.6% of the nation's population. Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006).

Report, Hate Crime Statistics (1995-2005). The individual stories of brutality underlying those statistics are horrific:

- On April 19, 2005, Adam Bishop was bludgeoned to death with a claw hammer in his home because he was gay. He was hit at least eighteen times in the head and then left facedown in a bathtub with the shower running.[5]
- On May 13, 1988, Claudia Brenner and Rebecca Wight were shot eight times – in the neck, the head and the back – and left for dead while hiking the Appalachian Trail, because they were lesbians. Rebecca died.[6]
- On December 31, 1993, Brandon Teena, Lisa Lambert and Philip De Vine were murdered in a farmhouse in rural Richardson County, Nebraska in an act of anti-LGBT violence. Brandon and Lisa were both shot execution style, and Brandon was cut open with a knife.[7]

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[5] Paul Peirce, *Witnesses Testified, Bishop Thought His Brother Was Gay*, Tribune-Review, June 5, 2002, *available at* http://www.tampabaycoalition.com/files/607brotherslayssiblingthoughthewasgay.html (last visited January 31, 2008).

[6] Gregory M. Herek & Kevin T. Berrill, Hate Crimes: Confronting Violence Against Lesbians and Gay Men 11-15 (Diane S. Foster ed., 1992).

[7] Katherine Ramsland, *A Grisley Find, available at* http://www.crimelibrary.com/notorious_murders/not_guilty/brandon/1.html

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- On the night of October 6-7, 1998, Matthew Shepard was pistol-whipped, tortured, tied to a fence in a remote area and left to die. He was discovered eighteen hours later, still tied to the fence and in a coma. Matthew suffered a fracture from the back of his head to the front of his right ear. He had severe brain stem damage and multiple lacerations on his head, face and neck. He died days later.[8]
- On February 19, 1999 Billy Jack Gaither was set on fire after having his throat slit and being brutally beaten to death with an ax handle. In his initial police confession, Gaither's murderer explained "I had to 'cause he was a faggot."[9]
- On November 19, 2006, Thalia Sandoval, a 27-year-old transgender Latina woman, was stabbed to death in her

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(last visited January 31, 2008). *See also* Gender Education and Advocacy, *Remembering Brandon, available at* http://www.gender.org/remember/people/brandon.html (last visited January 31, 2008).

[8] The Matthew Shepard Renga Project, *The Matthew Shepard Story, available at* http://www.public.asu.edu/~aarios/renga/page2.html (last visited January 31, 2008). *See also* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard 2 (Mary E. Swigonski, et al. eds. 2001).

[9] Assault on Gay America, *The Life and Death of Bill Jack Gaither, available at* http://www.pbs.org/wgbh/pages/frontline/shows/assault/billyjack/ (last visited February 5, 2008).

> home in Antioch, California. The death was reported as a hate crime.[10]

In fact, anti-gay violence is even more prevalent than the FBI statistics indicate. "Extensive empirical evidence shows that, for a number of reasons, anti-lesbian/gay violence is vastly under-reported and largely undocumented." LAMBDA Services Anti-Violence Project (March 7, 1995) at ii. The U.S. Department of Justice estimates that only 49% of violent crimes (rape, robbery, aggravated assault, and simple assault) are reported to the police.[11] Many incidents of anti-lesbian/gay violence are not reported to police because victims fear secondary victimization, hostile police response, public disclosure of their sexual orientation, or physical abuse by police.[12] Further, investigative bias and lack of police training also contribute to underreporting of anti-LGBT hate crimes.[13] For these reasons, incidents of anti-gay

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[10] National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2006.

[11] U.S. Department of Justice, Bureau of Justice Statistics Reporting Crimes to the Police, 1992-2000 (Ref. No. NCJ-195710).

[12] *See* LAMBDA Services Anti-Violence Project (March 7, 1995) at 15-16; National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998 (April 1999) at 22 (reasons given for not reporting anti-gay violence include "shame . . . fear of reprisal by the criminals, fear of being 'outed' (about their sexual orientations) and fear of the police itself"). *See also* From Hate Crimes to Human Rights: a Tribute to Matthew Shepard, *supra*, at 3.

[13] *See* LAMBDA Services Anti-Violence Project (March 7, 1995) at 16 ("[M]ost local police officers have never received

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violence reported by the FBI represent a small fraction of those reported to LGBT community anti-violence programs. During 1994, for example, "for every incident classified as anti-lesbian/gay by local law enforcement, community agencies classified 4.67 incidents as such."[14] Similarly, while the FBI reported only 26 anti-gay homicides in the ten-year period 1995-2005,[15] the National Coalition of Anti-Violence Programs reported three times that number in half that time (78 anti-gay homicides in the five year period 2002-2006). *See* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence (2003-2006). Studies have shown that approximately 25% of gay males have experienced an anti-gay physical assault. *See* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard, *supra*, at 157.

Hate crimes based on sexual orientation are the most violent bias crimes. *See* From Hate Crimes to Human Rights: A Tribute to Matthew Shepard, *supra*, at 2 ("Anti-LGBT crimes are characterized as the most violent bias crimes."). *See also* LAMBDA Services Anti-Violence Project (March 7, 1995) at 20 ("The reported [anti-gay] homicides were marked by

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specific training on identifying bias crimes, let alone the additional skills and knowledge required to respond appropriately to anti-lesbian/gay crime.").

[14] *See* LAMBDA Services Anti-Violence Project (March 7, 1995) at 15.

[15] *See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics (1995-2005).

an extraordinary and horrific level of violence with 49, or 70%, involving "overkill," including dismemberment, bodily and genital mutilation, multiple weapons, repeated blows from a blunt object, or numerous stab wounds."); Gregory M. Herek & Kevin T. Berrill, Hate Crimes: Confronting Violence Against Lesbians and Gay Men 25 (Diane S. Foster ed., 1992). ("A striking feature . . . is their gruesome, often vicious nature.").

Anti-gay hate crimes are also the most likely to involve multiple assailants. LAMBDA Services Anti-Violence Project (March 7, 1995) at 7 ("[A]nti-lesbian/gay offenses involve a higher number of offenders per incident than other forms of hate crime."). In 1994 "[n]ationally, 38% of the incidents involved two or more perpetrators." *Id.* "One-quarter involved between two and three offenders, and 12% involved four or more offenders. Nationally, there were at least 1.47 offenders for each victim." *Id.*

While the District of Columbia's gun laws preclude LGBT residents from possessing in their homes firearms that can be used for self-protection, *see* D.C. Code § 7-2507.02, the laws do not protect LGBT residents from gun violence. To the contrary, "when a weapon was involved [in an anti-gay attack] in the D.C. area, that weapon was three times more likely to be a gun" than elsewhere in the nation. Gay Men & Lesbians Opposing Violence, *Anti-Gay Violence Climbs 2% in 1997, available at* http://www.glaa.org (last visited January 31, 2008). "Firearms accounted for 33% of all D.C.-area [anti-gay] assaults involving weapons, compared to 9% nationally." *Id.*

Laws, such as D.C. Code § 7-2507.02, that prevent the use of firearms for self-protection in the home are of particular concern to members of the LGBT community, because historically hate crimes based on sexual-orientation bias have most commonly occurred in the home or residence. *See, e.g.*, Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2002 Edition (2003) at 7 ("Incidents associated with a sexual-orientation bias (1,244) most often took place at homes or residences – 30.8 percent. . . ."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2003 Edition (2004) at 8 ("Incidents involving bias against a sexual orientation also occurred most often in homes or residences – 30.3 percent of the 1,239 incidents reported in 2003."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2001 Edition (2002) at 7 ("The data indicated that of the 1,393 hate crime incidents motivated by sexual-orientation bias, 33.4 percent of the incidents occurred at residences or homes."); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2005 Edition (2006) at Table 10 (reporting more anti-gay incidents in a home or residence than in any other location). Thus, members of the LGBT community have an acute need for this Court to recognize their right to possess firearms to protect themselves from hate violence in their homes.

B. The Police Have No Duty To Protect And Do Not Adequately Protect LGBT Individuals From Hate Violence That Occurs In Their Homes.

Members of the LGBT community often must rely upon themselves for protection against hate violence in their homes. Police are seldom able to respond quickly enough to prevent in-home crimes. Worse, as this Court has held, the police have no mandatory legal duty to provide protection to individuals. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 760-61 (2005). To the contrary, police officers are granted discretion in determining when and where to exercise their authority:

> A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.
>
> "In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police . . . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally . . . [T]hey clearly do not mean that a police officer may not lawfully decline to . . . make an arrest. . . ."
>
> . . . . It is, the [*Chicago v. Morales*, 527 U.S. 41 (1999)] Court proclaimed, simply "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances."

Id. See also DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 191-93 (1989) (substantive component of the Due Process Clause does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors").

Moreover, police have historically exercised their discretion in a manner that disfavored the protection of members of the LGBT community. *See* Lillian Faderman, Odd Girls Out and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America 194-95 (Richard D. Mohr, et al., eds. 1991). In fact, in 1997 the National Coalition of Anti-Violence Programs reported that, in anti-gay violence "[t]he number of reported *offenders who were law enforcement officers* increased by 76% nationally, from 266 in 1996 to 468 in 1997." *See* Gay Men & Lesbians Opposing Violence, *Anti-Gay Violence Climbs 2% in 1997, available at* http://www.glaa.org (last visited January 31, 2008) (emphasis added). *See also* National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998 (April 6, 1999) at 24 ("[T]here were very dramatic increases in 1998 in reports of verbal and/or physical abuse by police in response to victim's attempts to report a bias crime. . . . [O]ne in five victims of an anti-gay bias incident in 1998 who attempted to report it to police were treated to more of the same. Almost one in 14 became victims of actual (and in some cases, further) physical abuse."). As a consequence, members of the LGBT community have a heightened need for this Court to recognize their individual right to possess firearms to protect themselves.

The triple-murder of Brandon Teena and two others in a rural farmhouse in 1993 starkly illustrates this need. Brandon, his girlfriend and a male friend were murdered in an anti-LGBT hate crime, after police failed to arrest the two men who had previously kidnapped, raped and assaulted Brandon:

> On December 31, 1993, John Lotter and Marvin Thomas Nissen murdered Brandon, Lisa Lambert and Philip De Vine in a farmhouse in rural Richardson County, Nebraska. These multiple murders occurred one week after Lotter and Nissen forcibly removed Brandon's pants and made Lana Tisdel, whom Brandon had been dating since moving to Falls City from Lincoln three weeks earlier, look to prove that her boyfriend was "really a woman." Later in the evening of this assault, Lotter and Nissen kidnapped, raped, and assaulted Brandon. Despite threats of reprisal should these crimes be reported, Brandon filed charges with the Falls City Police Department and the Richardson County Sheriff, however, Lotter and Nissen remained free. Lotter and Nissen have [since] both been convicted. . . . [16]

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[16] Gender Education and Advocacy, *Remembering Brandon, available at* http://www.gender.org/remember/people/brandon.html (last visited January 31, 2008)

Brandon, Lisa and Philip were home when their anti-gay attackers broke in and shot them execution-style. In D.C. they would have been prevented by law from possessing a firearm in the house that they could have used in self-defense to save their own lives. This Court should not adopt a reading of the Second Amendment that would leave LGBT individuals helpless targets for gay-bashers. *See United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) ("The right to defend oneself from a deadly attack is fundamental."); *United States v. Henry*, 865 F.2d 1260, 1988 WL 142975, at *5 (4th Cir., Dec. 27, 1988) (same).

II. LGBT INDIVIDUALS HAVE A SECOND AMENDMENT RIGHT TO POSSESS FIREARMS TO PROTECT THEMSELVES FROM HATE VIOLENCE IN THEIR HOMES.

Not only do LGBT individuals have a need to possess firearms for their own self-protection, the Second Amendment clearly guarantees that right. Petitioner and certain *amici* argue that the justification clause ("A well regulated Militia, being necessary to the security of a free State") that precedes the Second Amendment's operative clause ("the right of the people to keep and bear Arms, shall not be infringed") either vests the government with this right, or redefines "the people" as only those serving the government in a military capacity. Brief of Petitioners at 12, 14. Petitioner's argument has three critical flaws. First, so limiting the scope of those possessing the right requires turning the very structure and purpose of the Bill of Rights on its head. Second, the proposed construction is incompatible with the manifest intent of the Founders. Third, Petitioner's approach would permit excessive government intrusion into spheres of privacy this Court has long recognized are protected by the Bill of Rights.

A. The Bill Of Rights Protects The Rights Of Individuals From Governmental Encroachment.

A "growing body of scholarly commentary" which marshals "an impressive array of historical evidence," *see Printz v. United States*, 521 U.S. 898, 938-39 & n. 2 (1997) (Thomas, J. concurring)[17] has convincingly reinforced what is apparent from the Second Amendment's plain language. The Second Amendment acknowledges an individual right to keep and bear private arms, and restricts governmental infringement of that right, in order to help secure the liberty of individuals – "the people" – within a free society. And as is evident from the text of the Second

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[17] *See, e.g.*, references collected at Laurence Tribe, American Constitutional Law 897 & n. 211 (3d ed. 2000). Professor Tribe concludes that "perhaps the most accurate conclusion that one can reach with any confidence is that the core meaning of the Second Amendment is a populist/republican/federalism one [and] . . . the amendment achieves its central purpose . . . through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes." *Id.* at 902 & n. 221.

Amendment, the history of its adoption, and this Court's prior cases, Petitioner's argument is not only wrong, it turns the basic structure of the Bill of Rights on its head.

As the Court of Appeals correctly recognized, the basic structure of the Bill of Rights acknowledges individual rights in "the people," and concomitantly limits governmental infringement of those rights. *Parker v. Dist. of Columbia*, 478 F.3d 370, 383 (D.C. Cir. 2007). *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (discussing "rights guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution"); *United States v. Guest*, 383 U.S. 745, 771 (1966) ("the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority") (Harlan, J., concurring in part, dissenting in part); *Nelson v. County of Los Angeles*, 362 U.S. 1, 10 (1960) ("The basic purpose of the Bill of Rights was to protect individual liberty against governmental procedures. . . .") (Black, J. and Douglas, J., dissenting). This structure is a direct result of the events that led to the enactment of the Bill of Rights. The Constitution sent to the states for ratification in 1787 lacked a Bill of Rights, and its absence presented a major obstacle to ratification. The Documentary History of the First Federal Elections 1788-1790, Vol. 3:119-120 (Gordon DenBoer, et al. eds. 1986). Opposition by anti-Federalists to ratification without a Bill of Rights led several state ratifying conventions separately to endorse rights declarations.[18]

Although Federalists and Anti-Federalists debated whether an express articulation of rights would best serve to protect the liberties embraced in those rights, they were united in their view that the rights were both fundamental and individual, and operated as a limitation on governmental power. *See* Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra,* at 65-80. As Thomas Jefferson observed, "[A] bill of rights is what the people are entitled to *against* every government on earth, general or particular, and what no just government should refuse, or rest on inference." The Writings of Thomas Jefferson, Memorial Edition Vol. 6:388-389 (Albert Ellery Bergh, et al., eds. 1903-1904); The Papers of Thomas Jefferson 12:440 (Julian B. Boyd, et al., eds. 1955)) (emphasis added).

The Second Amendment fits this structure of "the entire Bill of Rights . . . [which] concerned restrictions upon federal power" counterpoised against "basic and fundamental rights which the

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[18] These declarations largely resembled the amendments that James Madison ultimately submitted to the first House of Representatives in 1789. Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra,* at 65-76; *The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the Framers, Report of the Subcommittee on the Constitution, Committee on the Judiciary, The Right to Keep and Bear Arms, U.S. Senate,* 97th Cong., 2d Sess. 68-82 (1982) (Statement of Stephen P. Halbrook).

Constitution guaranteed to the people." *Griswold v. Connecticut*, 381 U.S. 479, 490-93 (1965) (Goldberg, J., concurring). The Second Amendment right to keep and bear arms is not a Bill of Rights "outlier," rather it is one of the "specific guarantees . . . provided in the Constitution," *Casey*, 505 U.S. at 848 (*quoting Poe v. Ullman*, 367 U.S. 497, 543 (1961)), which this Court, rightly, has on numerous occasions placed in the same category of other individual rights in the Bill of Rights. *See, e.g.*, *Robertson v. Baldwin*, 165 U.S. 275, 280 (1897); *Casey*, 505 U.S. at 848.

The essential tension between individual rights and governmental restrictions that creates the equilibrium of the Bill of Rights itself makes clear why the justification clause cannot support the "collective right" theory.[19] Petitioner's argument that the right is

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[19] The "collective right" theory also requires adoption of the dubious position that the framers intended a drastically different definition of "the people" in the Second Amendment, one much different from how this Court interprets the phrase in other parts of the Bill of Rights. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("the people" are individuals who are part of the national community, or who have otherwise developed sufficient connection with this country to be considered part of that community). As Professor Tribe has noted, it would be "hard to sustain the position" that "the people" whose rights are protected in the Second Amendment are not the same individuals who, in the Preamble to the Constitution, are recognized to have "ordained and established" it, who are protected in the First Amendment from governmental infringement of their right to peaceably assemble, acknowledged in the Fourth Amendment to have the right to be free from unreasonable searches and seizures, and who retain non-enumerated

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vested in some governmental collective, whether a state or a state's militia, requires that the very government restricted from infringing the right become the right holder. It also supposes that a "right" can somehow exist in a whole, but not in any of its parts. This Orwellian juxtaposition is not only repugnant to the Amendment's text, it is directly contrary to the important commonalities in the political philosophy of the leaders of the emerging nation, as well as the history of events leading to the ratification of the Bill of Rights, which make clear that self-defense was the foundation of the right.

B. The Second Amendment Guarantees The Right To Possess Firearms For Self-Defense.

John Locke and Algernon Sidney unquestionably were important expositors of the 17th century English Republican natural rights theory expressed in the Declaration of Independence, the Bill of Rights, and in the founders' letters and debates leading to ratification. Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 1, 5-6, 59-60, 80-86 (University Press of Kansas 1985); Donald S. Lutz, The Origins of American Constitutionalism 112-119, 139-143 (Louisiana State University Press 1988).

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rights under the Ninth Amendment and certain non-delegated powers under the Tenth Amendment. Laurence H. Tribe, American Constitutional Law, *supra,* at 898-99 n. 213.

See also, 1 Laurence Tribe, American Constitutional Law, *supra* at 6-7. Jefferson made both Locke and Sidney required reading at the University of Virginia.

> [A]s to the general principles of liberty and the rights of man, in nature and in society, the doctrines of Locke, in his 'Essay Concerning the true original extent and end of civil government', and of Sidney in his 'Discourses on government', may be considered as those generally approved by your fellow citizens of this, and the United States . . .

Caroline Robbins, Algernon Sidney's Discourse Concerning Government, 4 Wm. & Mary Q. 267, 269 (3d Series 1947); Saul K. Padover, The Complete Jefferson 1112 (New York, 1943).

To Locke, the right to use arms to protect oneself was foundational. Private persons "have a right to defend themselves and recover by force what by unlawful force is taken from them . . . " John Locke, Second Treatise of Civil Government 1690, 14:174 (1955) (1764). That right presupposes the ability to preserve one's own life by using arms, because "the law could not restore life to my dead carcass." *Id.* at 173. Sidney's liberty calculus also hinged on the right of "every man [to be] armed" because "[s]words were given to men, that none might be Slaves, but such as know not how to use them." Algernon Sidney, Discourses Concerning Government 157 (1698). *See generally*, Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra,* at 28-35. The same fundamental, individual right was recognized by Blackstone and Montesquieu, who were favorites of early American political authors. *See, e.g.*, Donald S. Lutz, The Origins of the American Constitution, *supra*, at 142-43. In Book 1, entitled "Of the Rights of Persons," Chapter One, entitled "Of the Absolute Rights of Individuals," Blackstone said that the right of the people to be armed "protect[ed] and maintain[ed] inviolate the three great and primary rights, of personal security, personal liberty, and private property," and described the right to have weapons as "a natural right of resistance and self preservation." William Blackstone, Commentaries on the Laws of England, I:136-139 (1st ed. 1979) (1765-1769. Charles Montesquieu described self-defense as "a duty superior to every precept," and stated "[i]t is unreasonable . . . to oblige a man not to attempt the defense of his own life." Charles Montesquieu, The Spirit of the Laws 2:64, 60 (T. Nugent transl. 1899) (Hafner Publishing Co. 1949).

The view that the right of armed self defense was a first law of nature both preceded enactment of the Constitution, and continued to prevail in the decades following its enactment. Shortly before the Revolutionary war commenced, Blackstone confirmed that every Englishman had the right of "arms for their defence," which stemmed from "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." William Blackstone, Commentaries on the Laws of England 139 (Legal

Classics Library 1983) (1765).[20] William St. George Tucker, regarded as "America's Blackstone," was the first major legal commentator on the U.S. Constitution. His works have been cited at least forty times by this Court. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev., 1359, 1371, 1376 (1998). Tucker described the right of self defense as "the first law of nature," protected by the Second Amendment as "the true palladium of liberty." William Blackstone, 1 Commentaries *app. D 300.

Given the nature of the abuses that led to the American Revolution, it is not surprising that references to self-defense often appear in the context of the actions of oppressive governments and their standing militaries.[21] But by using the term militia in the justification clause, the framers were not making a qualitative distinction, conditioning the right depending on whether the loss of liberty might happen at the hands of one, or of many, from a single attacker or a tyrant with a powerful standing army. Rather, as Hamilton recognized in The Federalist, No. 28, the source of the right to keep and bear arms which protects against the loss of liberty, whether by the tyrant or ordinary criminal, is the "original right of self-defense which is paramount to all positive forms of government." The Federalist No. 28 (Alexander Hamilton). Similarly, in The Federalist, No. 46, Madison railed against any government "afraid to trust the people with arms," because the ability to "defend the rights of which they would be in actual possession" hinges on "the advantage of being armed, which the American People possess over the people of almost every other nation." The Federalist No. 46 (James Madison). Introducing the Bill of Rights in Congress, Madison acknowledged that "the rights of conscience, of bearing arms [etc.] . . . are declared to be inherent in the people." Works of Fisher Ames 54 (Seth Adams, ed., Boston, Little Brown & Co. 1854) (letter of Massachusetts Congressman Fisher Ames). John Adams' contemporaneous analysis of state constitutions similarly describes "self-defence" as "the primary canon of the law of nature," as he confirmed the right that "arms in the hands of citizens [may] be used at individual discretion . . . in private self defence . . . " John Adams, A Defence of the Constitutions of Government of the United States of America 3:475 (London 1787-1788) (1971). And far from envisioning that the use of the term "militia" in the justification clause as a means by which the government could disarm citizens, the founding fathers were adamant that the government lacked any such power. Thomas Jefferson proposed that the Virginia Constitution declare that "No free man shall ever be debarred the use of arms." Thomas Jefferson, *Draft Constitution for Virginia, available at* http://www.yale.edu/lawweb/avalon/jeffcons.htm (last visited February 5, 2008). Indeed, Jefferson quoted criminologist Cesare Beccaria's 1764 book "On Crimes and Punishment, in voicing opposition to "[l]aws that forbid the carrying of arms . . . [because they] disarm only those who are neither inclined nor determined to commit crimes . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man." The Commonplace Book of Thomas Jefferson 314 (Gilbert Chinard ed. 1926).[22]

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[20] England's Bill of Rights of 1689 had guaranteed for nearly a century "[t]hat the Subjects, which are Protestants, may have Arms for their Defence, suitable to their conditions, as allowed by law." http://www.yale/edu/lawweb/Avalon/England.htm (last visited February 5, 2008). The right reflected in that statute was indeed an ancient component of common law tradition. *See*, Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra,* at 54.

[21] That fact notwithstanding, the personal and foundational nature of the right of armed self-defense was repeatedly referenced in writings and speeches during the ratification process, and Madison's proposals were understood to concern individual rights. Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra,* at 76.

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[22] It is inconceivable that Jefferson and others would not have protested mightily at any suggestion that the Second Amendment's justification clause trumped the individual right or provided a means to disarm ordinary citizens. During the ratification process in Massachusetts, Samuel Adams expressly cautioned against any such construction. "The Constitution be never construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Samuel Adams, Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, 86-87 (Peirce & Hale, eds., Boston, 1850). So too did Tench Coxe in "Remarks on the First Part of the Amendments to the Federal Constitution." Writing under the pseudonym "A Pennsylvanian" in the Philadelphia Federal Gazette, June 18, 1789 at 2 col. 1 he stated: " . . . the people are confirmed by the article in their right to keep and bear their private arms." Notably, there is no

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C. The Second Amendment Guarantees The Right To Possess Firearms In One's Home.

The right to preserve one's life from the illegal acts of others is the foundation of liberty. The need to exercise that right will undeniably be influenced both by one's "victim potential," as well as the animus that one's station invokes among members of society who commit crimes. Thus petitioner's proposed interpretation, which would exclude those most in need of exercising the right, must be rejected. Moreover, the statutes at issue infringe the right in the most unreasonable way possible, by denying it even in the very inner sanctum of liberty, the home.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847. Nowhere is governmental infringement of any liberty right (much less the foundational liberty right of armed self defense) more suspect than the home. As this Court explained in *Lawrence*: "Liberty protects the person from unwarranted government intrusions into a

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indication that any participant urged that "the people" in the Second Amendment had a dramatically different meaning that in other provisions of the Bill of Rights, that the Second Amendment secured a right not on behalf of "the people" but of much feared select militias, that the individual right armed self-defense was not subsumed within the right acknowledged, or that the Amendment would somehow provide a means for governments to disarm law abiding citizens. Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right, *supra*, at 76-84.

dwelling or other private places. In our tradition the State is not omnipresent in the home." *Lawrence*, 539 U.S. at 562. Nowhere are vital liberty interests more protected from governmental infringement than the "unambiguous physical dimensions of an individual's home." *Payton v. New York,* 445 U.S. 573, 589, 597 & n.45 (1980). The home is a person's "castle and fortress" for the "defence against injury and violence." *Wilson v. Layne*, 526 U.S. 603, 609 (1999), (quoting *Semayne's Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.)). Thus, the government's power to regulate private conduct is more circumscribed there than its power to regulate public conduct. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 558 (1969) (while "the States retain broad power to regulate obscenity that power simply does not extend to mere possession by the individual in the privacy of his own home"). Given these two propositions, governmental prohibition of the right to possess firearms usable for self-defense within the sanctuary of the home must certainly be a "no entry zone."

Petitioner correctly observes that the right specifically guaranteed was not "created" by the Second Amendment, *United States v. Cruikshank*, 92 U.S. 542, 551 (1875) ("neither is it in any manner dependent upon that instrument for its existence"), but fails to appreciate the consequences. Because the right pre-existed the Bill of Rights and the Second Amendment (and, like other Bill of Rights Amendments, was enacted both to acknowledge the right and to protect "the people's" exercise of the right from governmental infringement) the common law principles at the time of ratification surely inform the nature of the right. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . .' *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Part of the ancient common law right that was acknowledged in the Second Amendment is necessarily contained in the maxim *et domus sua cuique est tutissimum refugium* ("and where shall a man be safe if it be not in his own house?"). Sir Edward Coke, The First Part of the Institutes of the Laws of England, or, A Commentary on Littleton 162 (F. Hargrave and C. Butler, ed. 1832). This doctrine has been repeatedly emphasized in this Court's decisions – the home is the sanctuary of personal liberty. *See, e.g., Lawrence*, 539 U.S. at 562; *Stanley v. Georgia*, 394 U.S. 557 (1969) (recognizing right to possess obscenity in one's own home); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (describing protected interest in right to privacy and emphasizing the protected space of the marital bedroom).

III. THE SECOND AMENDMENT MUST RECOGNIZE AN INDIVIDUAL RIGHT OF "THE PEOPLE" TO AVOID DISQUALIFYING LGBT INDIVIDUALS FROM ANY ENJOYMENT OF THAT RIGHT.

An interpretation of the Second Amendment as a guarantee of an individual, rather than collective right of the states, is required if the Second Amendment is to have any application to LGBT individuals. Because the law effectively prevents members of the LGBT community from offering military service, reading the Second Amendment as Petitioners urge – to confer a collective right to keep and bear arms, based upon the condition of membership in "state and congressionally regulated military forces" (*see* Brief of Petitioners at 8-9, 12-14) – renders that right meaningless to LGBT individuals. Moreover, interpreting the Second Amendment as recognizing a right conditioned upon military service, where eligibility for military service is defined by the Government, prevents the Amendment from acting as a constraint on Government action. Such a result is contrary not only to the literal text of the Amendment, but to the intentions of the framers, who would not have guaranteed the right to possess firearms solely to those eligible for military service, while denying the right to possess firearms, for self-defense, from those groups most in need.

A. If The Right Recognized In The Second Amendment Is Conditioned Upon Membership In State And Congressionally Regulated Military Forces, LGBT Individuals, And Others, Are Excluded From The Right To Bear Arms.

The definition of persons eligible for military service is far narrower than "the People." *See, e.g.*, 10 U.S.C. § 311 (1994) (The "Militia Act") (the militia consists of "all able-bodied males at least 17 years of age and . . . under 45 years of age [some National Guard re-enlistees to age 64] who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard"). *See also* 10 U.S.C. § 654 ("Policy Concerning Homosexuality in the Armed Forces") ("A member of the armed forces shall be separated from the armed forces if . . . the member has engaged in . . . a homosexual act or acts" or "the member has stated that he or she is a homosexual or bisexual, or words to that effect" or "the member has married or attempted to marry a person known to be of the same biological sex."). Even if the Court's decisions on sex equality, including *United States v. Virginia*, 518 U.S. 515 (1996) and *Craig v. Boren*, 429 U.S. 190 (1976), are applied to the Militia Act to include able-bodied women between the ages of seventeen and forty-four, individuals of any gender over forty-four years of age, those whose professions exempt them, or open members of the LGBT community remain excluded from eligibility for military service.

While such eligibility restrictions are discriminatory, this Court has made clear its deference to the judgment of Congress on issues of "national defense and military affairs" when applying an apparently relaxed form of rational basis review. *See Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Indeed, "perhaps in no other area has the Court afforded Congress greater deference." *Id.* at 64-65. The Court has described the "constitutional power of Congress" to "raise and support armies and to make all laws necessary and proper to that end" as "broad and sweeping," (*id.* at 65 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968))), while describing its own "lack of competence" on issues relating to the regulation of the armed forces as "marked." *Id.* at 65-66 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.")). *See also Parker v. Levy*, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.")

Relying on this Court's decisions and the extreme deference afforded to Congress in a rational basis review of issues related to military regulation, federal courts considering the constitutionality of 10 U.S.C. § 654 and its prohibitions on the service of open members of the LGBT community in the military have found those prohibitions constitutional. *See, e.g.*, *Thomasson v. Perry*, 80 F.3d 915, 927 (4th Cir. 1996) (upholding 10 U.S.C. § 654 and noting that "'[t]he special status of the military has required, the Constitution has contemplated, Congress has created, and [the Supreme] Court has long recognized' that constitutional challenges to military personnel policies and decisions face heavy burdens," and that "[i]t is with those burdens in mind that we address appellant's particular arguments"); *Able v. United States*, 155 F.3d 628, 632 (2nd Cir. 1998) (upholding 10 U.S.C. § 654, emphasizing the "narrow" rational basis review and "great deference" applied to "Congressional judgments affecting the military"); *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996) (upholding 10 U.S.C. § 654 and noting the "especially deferential" rational basis review applied to due process challenges of "military policy"); *Selland v. Perry*, 905 F.Supp. 260, 264 (D. Md. 1995) (upholding 10 U.S.C. § 654 and noting the "general principle of deference" and thus "relaxed restrictions" of the First Amendment in military settings); *Witt v. United States Dep't of Air Force*, 444 F.Supp.2d 1138, 1145 (W.D. Wash. 2006) (upholding 10 U.S.C. § 654, explaining that "review of Congressional enactments is especially deferential in the military context"); *Cook v. Rumsfeld*, 429 F.Supp.2d 385, 397-98 (D.Mass. 2006) (upholding 10 U.S.C. § 654 under a rational basis review, noting that "[d]eference to Congressional judgment is of even greater importance in a case such as this one where the legislation challenged was enacted pursuant to Congress' authority over the national military forces"). These cases effectively find, as Congress pronounced in its findings supporting the "Don't Ask, Don't Tell" policy, that "[t]here is no constitutional right to serve in the armed forces." 10 U.S.C. § 654(a)(2).

Consequently, under Petitioner's construction of the Second Amendment, which conditions the right to keep and bear arms upon membership in an organized military force, the exclusion of older individuals and openly LGBT individuals from military service would necessarily exclude them from the right to keep and bear arms in their own self-defense. Such an interpretation unacceptably robs from those groups most vulnerable, the means to protect themselves in their own homes.

B. Because The Government Defines Eligibility For Service In Regulated Military Forces, Interpreting The Second Amendment As A Right Conditioned Upon Membership In A Regulated Military Force, Prevents The Amendment From Constraining Government Action.

Interpreting the justification clause as a condition on the existence of the right would render the Second Amendment nugatory. The Amendment, specifically its operative clause, is useful only if it provides some meaningful constraint on government action. It fails to provide such constraint if it the right is conditioned on military service, since, as demonstrated above, the government is permitted to limit eligibility for military service as it sees fit. Indeed, if the scope of the right recognized in the operative clause is limited by the justification clause's reference to the militia, which the government can define, then the Second Amendment provides no meaningful check against government power. Such a reading cannot be squared with the purpose behind the Bill of Rights. While the justification clause may aid interpretation of the operative clause where there are ambiguities, it cannot take away what the operative clause clearly gives. Furthermore, a construction of the right recognized by the Second Amendment which ties that right to eligibility for military service renders the right and the Amendment devoid of any fixed meaning, as military eligibility requirements are ever-changing. Such a construction would also permit modification of the scope of a Constitutional right *via* statute – *e.g.*, 10 U.S.C. § 654 ("Policy Concerning Homosexuality in the Armed Forces").

C. Conditioning Second Amendment Rights Upon Membership In A Regulated Military Force, Which Excludes LGBT And Other Individuals From Enjoying The Right To Self-Defense, Is Contrary To The Intentions Of The Framers.

Construing the Second Amendment to recognize a right of "the People," rather than merely those recognized as eligible for formal military service is consistent with the intentions of the Constitution's framers. The text of the Amendment, itself, indicates that the framers acknowledged the right to inhere in "the People," not just those "militia eligible." Had the framers meant to limit the acknowledged right only to those militia-eligible, they could have easily done so. *See, e.g.*, Militia Act of May 8, 1792, ch. 33, § 1, a

Stat. 271 (repealed 1903) (limiting military service members to white, able-bodied male citizens between the ages of eighteen and forty-five). Rather, the choice not to limit the right to possess firearms, acknowledged in the Second Amendment, to only those "militia eligible" follows logically from the framers' belief that the right to self-preservation and self-defense, through the possession of arms, if necessary, was a right conferred upon each individual by natural, rather than positive, law. *See supra*, § II.B.

To read the Second Amendment as Petitioners insist, as a right which turns solely upon militia eligibility, would mean that the framers guaranteed the right to self-defense through the possession of arms to those who needed such defense the least, while leaving the groups most vulnerable to attack helpless to defend themselves even in their own homes. While Jefferson feared that laws preventing persons from bearing firearms would "serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man,"[23] reading the Second Amendment as acknowledging a collective right, and upholding the D.C. law at issue, here, accomplishes the same. By effectively preventing LGBT individuals from defending themselves through possession of firearms in their own homes, persons motivated to attack

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[23] The Commonplace Book of Thomas Jefferson 314 (Gilbert Chinard ed. 1926).

LGBT individuals may do so with the confidence that their intended victims will be unarmed. Such a result not only conflicts with the natural law right of man to act in his own self-defense, as recognized by the framers, but jeopardizes the privacy rights of LGBT individuals recognized by this Court in *Lawrence*, when the exercise of such rights makes one an unarmed target.

◆

CONCLUSION

For the foregoing reasons, *amicus* respectfully request that this Court affirm the decision of the Court of Appeals and confirm that LGBT individuals have a Second Amendment right to keep firearms in their homes for their own self-protection.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF OF PROFESSORS OF CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF PROFESSORS OF CRIMINOLOGY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

I. INTEREST OF AMICI CURIAE

Amici curiae, professors of criminology, submit this brief in support of the Petitioners and assert that the empirical evidence, documented in numerous well designed and peer reviewed studies, highlights the importance of Washington, D.C.'s gun law in diminishing handgun violence. Amici are scholars who teach, write and speak about criminal justice.[1] James Alan Fox is the Lipman Family Professor of Criminal Justice and Professor of Law, Policy and Society at Northeastern University.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

David McDowall is a Professor in the School of Criminal Justice at the State University of New York at Albany.

II. SUMMARY OF ARGUMENT

The gun control legislation enacted in the District of Columbia in 1976 that banned handguns in the city ("D.C. Gun Control Law") is an effective law enforcement tool that has promoted the public health and safety by reducing the level of handgun violence in the District of Columbia ("District"). Criminological studies evaluating the effects of the D.C. Gun Control Law have proven that it has reduced the rate of firearm homicides and suicides committed in the District. The evidence illustrates that by reducing the number of handguns available in the District, the D.C. Gun Control Law restrains violent intent from elevating into actual gun violence. Studies also show that unrestrained access to handguns can result in accidental or impulsive homicides, suicides, and unintentional injuries among people with no prior criminal propensities. Thus, curbing access to handguns lessens the risk of these most serious outcomes. Empirical analysis of the D.C. Gun Control Law shows that it has had just such an effect in the District. Moreover, the effectiveness of the D.C. Gun Control Law would only increase if the surrounding jurisdictions followed its example and implemented stricter gun control measures as well.

III. ARGUMENT

1. The D.C. Gun Law Is an Effective Mechanism for Reducing Handgun Violence.

Amici agree with, and hereby incorporate, Petitioners' position that "where a legislature has articulated proper reasons for enacting a gun-control law, with meaningful supporting evidence, and that law does not deprive the people of a reasonable means to defend themselves, it should be upheld." Brief for Petitioners 44, *citing* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 716-19 (2007). Amici review here the salient criminological research that, by itself, provides the District with more than enough "meaningful supporting evidence" to require the reversal of the U.S. Court of Appeals for the District of Columbia Circuit ("Court of Appeals").

A. There Is A Proven Correlation between the Availability of Handguns and Incidents of Violence.

Handguns are unquestionably the weapon of choice for those involved in gun-related crimes. In 2006, for example, the Federal Bureau of Investigation ("FBI") reports that handguns were used in 7,795 homicides, or 76.6 percent of murders involving firearms and 52 percent of all reported murders in the United States. *See* FBI Uniform Crime Reports 2006, Expanded Homicide Data Table 7, *available at* http://www.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_07.html (last visited January 10, 2008). Researchers have found that "increases in gun ownership lead to increases in the number of homicides." *See* Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1100-01, 1104 (2001). It has been estimated that a ten percent increase in handgun ownership increases the homicide rate by two percent. *Id.* at 1095-98. These findings support other studies showing that because handguns are so readily available and so obviously lethal, they contribute to escalating violent crime to a deadly level. *See* Philip J. Cook, *The Technology of Personal Violence*, 14 Crime & Just. 1, 47 (1991). A study by noted criminologists Frank Zimring and Gordon Hawkins found that eighty percent of handgun murders result from altercations that escalate to a deadly level. *See* F.E. Zimring & G. Hawkins, *The Citizen's Guide to Gun Control* 16 (1987). Zimring and Hawkins concluded that "the circumstances in which most homicides were committed suggested that they occurred in a moment of rage and were not the result of a single-minded intent to kill." *Id.* Thus, it is "a combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict [that] is the most important single contribution to the high U.S. death rate from violence." F. E. Zimring and G. Hawkins, *Crime is Not the Problem: Lethal Violence in America* 122-23 (1997).

Criminological research has established that the high rate of handgun homicides in the United

States is due, at least in part, to the high rate of handgun ownership in the United States. Matthew Miller, MD, *et al.*, *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988-1997*, 92 Am. J. of Pub. Health 1988 (2002) (surveying studies establishing the correlation between firearm availability and homicide). The rate of handgun ownership and the rate of handgun homicides in the United States, when compared to the same data from other countries, illustrate the strong correlation between the availability of handguns and the incidence of handgun homicides.

	Handguns	Handguns per 100,000	Handgun Homicides per 100,000
United States	56,833,000	22,696	3.56
Israel	171,448	3,716	0.542
Sweden	308,261	3,700	0.228
Canada	595,000	2,301	0.031
Australia	263,900	1,596	0.07
Great Britain	480,000	837	0.012

Nicholas Dixon, *Why We Should Ban Handguns in the United States*, 12 St. Louis U. Pub. L. Rev. 243, 249 (1993). According to the findings in the chart above, the United States experiences about four times the level of handgun homicides per 100,000 people than Israel, Sweden, Canada, Australia, and Great Britain combined.

Despite this well-established correlation between gun availability and gun violence, some researchers maintain that liberalizing gun control laws, such as allowing nearly anyone who applies to obtain a concealed weapons permit, actually reduces gun violence. *See, e.g.*, John R. Lott *et al.*, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. Legal Stud. 1 (1997) ("Lott Study"). The Lott Study concluded that "[a]llowing citizens without criminal records or histories of significant mental illness to carry concealed handguns deters violent crimes...If the rest of the country had adopted right-to-carry concealed handgun provisions in 1992, at least 1,414 murders and over 4,177 rapes would have been avoided." *Id.* at 64.

However, subsequent analysis of the Lott Study points out several flaws in its methodology and results. The Lott Study compared changes in crime in ten states that passed "shall-issue" laws (i.e. laws allowing concealed weapons permits to almost anyone who applies) to states that did not have shall-issue laws. *See id.* at 12. The comparison, however, did not consider how the crack cocaine market influenced crime in the shall-issue states, which were mostly less populated states with limited urban areas, as compared to the states without shall-issue laws, which were mostly heavily populated states with large urban areas. *See* Jens Ludwig and Philip J. Cook, *Evaluating Gun Policy: Effects on Crime and Violence* (2003), Chapter 8, *The Impact of Concealed-Carry Laws* 289. The crack cocaine market had a greater impact in poor, urban areas, which are primarily located in states that do not have shall-issue laws. *Id.* Thus, the Lott Study attributed smaller crime increases in states with shall-issue laws to the enactment of those laws "when wholly separate forces were really the explanation." *Id.* Moreover, because spikes in crime rates encourage the adoption of shall-issue laws, subsequent returns to normal crime rates "will be inaccurately attributed to the passage of the law[s]." *Id.* If one extends

Lott's statistical model by five years, for example, and applies it to the period in the mid-1990s when high crime rates reversed, "suddenly shall-issue laws are associated with uniform *increases* in crime." *Id.* at 289-90 (emphasis in original). Broad national crime swings occurring in the late 1980s and 1990s and the inability to account for the criminogenic influence of crack render "strong claims about the likely impact of passing a shall-issue law" difficult to make. *Id.* at 325. The Lott Study therefore does little to undermine the widely-accepted conclusion that the availability of guns has a strong correlation to the level of gun-related crimes.

B. The Effectiveness of the D.C. Gun Control Law Demonstrates Its Reasonableness.

The D.C. Gun Control Law was designed to reduce the level of handgun violence in the District, and over the last 30 years, it has proven its effectiveness. A comprehensive study of the District's D.C. Gun Control Law charted its effects over a period of twenty years, beginning in January 1968, eight years prior to the law's enactment, and extending to December 1987, eleven years subsequent to its enactment. The study concluded that an abrupt decline in gun-caused homicides in the District immediately followed the enactment of the ban, but that there was no comparable decline elsewhere in the region. Colin Loftin *et al.*, *Effects of Restrictive Licensing in Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 1615 (1991) ("Loftin Study").

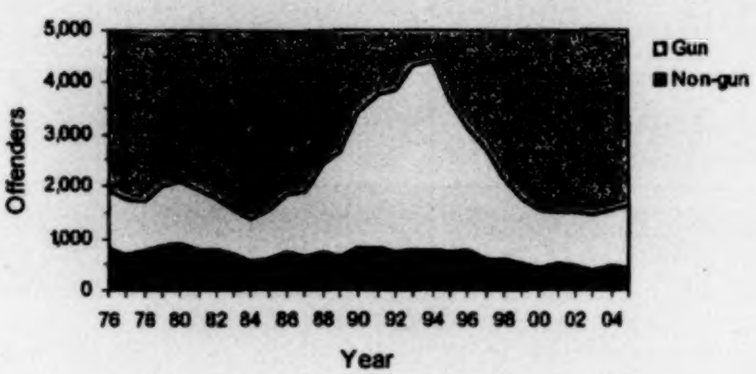
The Loftin Study, which was published in the New England Journal of Medicine, analyzed gun-related homicides and suicides in the District and non-gun-related homicides and suicides in the District, and compared them to the same categories in the District's Maryland and Virginia suburbs. *Id.* at 1615. The results showed rather dramatic benefits from the law. In the approximately eleven years after the law took effect, gun-related homicides decreased by twenty-five percent, and gun-related suicides decreased by twenty-three percent in the District. *Id.* at 1617. At the same time, non-gun-related homicides and suicides in the District did not change by a statistically significant amount, and the statistics for both gun-related and non-gun-related homicides and suicides remained largely the same in both the Maryland and Virginia suburbs included in the Loftin Study. *Id.* These results strongly indicate that the D.C. Gun Control Law, rather than a general reduction in the crime rate, "reduced gun-related suicides and homicides substantially and abruptly." *Id.* at 1620. The Loftin Study concluded:

> In light of our study, alternative explanations

> appear implausible. The pattern of change in mortality rates that would be predicted from the effects of the gun law is specific and is unlikely to be simulated by coincidental changes in demographic, economic, cultural, or social factors.

Id. at 1618.

The Respondent has argued that the rise in violent crimes in the District from 1980 to 1997 establishes that the D.C. Gun Control Law was ineffective. Brief in Response to Petition for Certiorari 27-28. However, the entire nation experienced an increase in violent crimes during this period because of the emergence of the crack cocaine market and related gang activity. *See* James A. Fox & Marianne W. Zawitz, U.S. Dept. of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States*, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf (last accessed January 10, 2008). In the mid-1980s, as crack cocaine became the drug of choice in urban areas, drug dealers widely distributed crack in small single-hit quantities by recruiting large numbers of teenaged distributors. Alfred Blumstein, *Youth Violence, Guns, and the Illicit Drug Industry*, 86 J. of Crim. L. and Criminology 10–36 (1995). Because dealing drugs was a potentially violent undertaking, the teenagers peddling crack cocaine armed themselves with guns. *See* Joseph F. Sheley and James D. Wright, *In the Line of Fire: Youth, Guns and Violence in Urban America* (1995). Once some youngsters acquired guns, their peers did as well. David Hemenway *et al.*, *Gun Carrying Among Adolescents*, 59 L. and Contemp. Problems 39–53 (1996). A dramatic increase in gun-related violence among the nation's youth resulted.



As shown in the figure above, from 1985 to 1993, the number of teenagers who killed with a gun quadrupled. There was no concomitant increase in non-gun-related juvenile homicides. James Alan Fox *et al.*, *The Will to Kill: Making Sense of Senseless Murder* 88 (3d ed. 2008). Respondent's statistics therefore neither undermine the findings of the Loftin Study nor undermine the effectiveness of the D.C. Gun Control Law, but merely shed light on what was a national trend of gun-related violence among the nation's youth. *See* Loftin Study, *supra*, at 1620 ("It is reasonable to assume that the restrictions on access to guns in the [D]istrict continued to exert a preventative effect even as homicide rates were driven up by conflict over drugs and other factors.").

The American Civil Rights Union ("ACRU"), in its brief, challenges the Loftin Study by claiming that it did not undergo peer review. *See* Brief *Amicus Curiae* of the American Civil Rights Union in Support of the Respondents to Petition for a Writ of Certiorari 17. However, the Loftin Study was published in the New England Journal of Medicine ("NEJM"), which "employs a highly rigorous peer-review and editing process to evaluate manuscripts for scientific accuracy, novelty, and importance." *See* NEJM Publication Process, *available at* http://media.nejm.org/persistentpdfs/Press%20Kit%20Publication%20Process.pdf (last accessed January 10, 2008).

The ACRU also contends that the Loftin Study used an incorrect date for determining when the D.C. Gun Control Law could influence handgun violence in the District ("intervention date"), and that another researcher, Gary Kleck, found that the law had no effect when using the purportedly correct intervention date. *Id.*; *see also* Chester L. Britt, Gary Kleck, and David Bordua, *A Reassessment of the DC Gun Law: Some Cautionary Notes On the Use of Interrupted Time Series Designs For Policy Impact Assessment*, 30 Law and Society Review, 361 (1996) ("Kleck Study"). However, a subsequent review of the Kleck Study found that even if one accepts (which one should not) the intervention date suggested in the Kleck Study, it only affects the data on homicides (not suicides), and the Kleck Study did not find that the effect of the D.C. Gun Control Law disappeared even with a different intervention date.

See David McDowall *et al.*, *Using Quasi-Experiments to Evaluate Firearm Laws: Comment on Britt et al.'s Reassessment of the DC Gun Law*, 30 Law and Society Review, 381, 386 (1996) ("McDowall Study").

The Kleck Study also suggested that Baltimore was a better comparison for the District than were the suburban counties that the Loftin Study considered. *See* Kleck Study, *supra*, at 365-66. While the Kleck Study stated that gun-related homicides fell in Baltimore after the District enacted the D.C. Gun Control Law, indicating that the law could not account for the decrease in gun violence in the District, the McDowall Study established that the data underlying the Kleck Study failed to account for significant information obtained in the Loftin Study, particularly the reduction in gun-related suicides in the District after the effective date of the D.C. Gun Control Law. McDowall Study, *supra*, at 382-83. According to the McDowall Study, while the Kleck Study correctly found that the rate of firearm homicides fell in Baltimore from 1968 to 1987, the non-gun-related homicides and suicides also fell in Baltimore during the same period. *Id.* at 383. In the District, by contrast, the non-gun-related homicides and suicides remained largely the same after the effective date of the D.C. Gun Control Law, suggesting that Kleck's data from Baltimore does not show "a pattern of decrease that is specific to gun-related deaths," *id.*, while the data from the District does. The McDowall Study also analyzed gun-related and non-gun-related homicides and suicides from Memphis and Boston, the United States cities then closest in population to the District. *Id.* at 385-86. In neither of these cities did gun-related homicides and suicides change by a statistically significant amount in the period after the effective date of the D.C. Gun Control Law. *Id.* at 385. This conclusion bolsters the findings of the Loftin Study that the D.C. Gun Control Law was effective in reducing the levels of gun-related homicides and suicides in the District.

C. The D.C. Gun Control Law Effectively Reduces the Supply of Handguns in the District.

The D.C. Gun Control Law inhibits the supply of handguns in the District, and therefore helps to reduce the level of handgun homicides and suicides in the District. Criminologists have established that commerce in handguns flows from two sources: primary and secondary market suppliers. Philip J. Cook *et al.*, *Underground Gun Markets*, 117 Economic Journal F588, F591 (2007) ("Cook Study"). The primary market consists of sales of new or used firearms by licensed gun dealers, such as retail firearm store owners or private individuals holding the requisite federal firearms license. Glenn L. Pierce *et al.*, *Characteristics and Dynamics of Illegal Firearms Markets: Implications for a Supply-Side Enforcement Strategy*, 21 Justice Q. 391, 393 (2004). These suppliers, by virtue of their federal license, are required to maintain appropriate records of transactions and conduct background checks of potential purchasers. *Id.* The secondary market consists of all private sales from individual to individual that transpire through private sales or gun shows. *Id.*; *see also* Philip J. Cook *et al.*, *Regulating Gun Markets*, 86 J. Crim. L. & Criminology 59, 68-69 (1995).

Efforts to control these markets, and thus to reduce the prevalence of gun crime, follow two basic strategies: supply-reduction and demand-reduction. The supply-side initiatives, such as the D.C. Gun

Control Law and the Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 921-22, attempt to limit the availability of guns either across-the-board or to certain specified groups. *See* Anthony A. Braga *et al.*, *The Illegal Supply of Firearms*, 29 Crime & Just. 319, 341 (2002). Demand-side approaches, such as gang intervention programs and special prosecution of gun offenders, strive to lessen the need or desire within offender populations to carry and use guns for illegitimate purposes. *See*, *e.g.*, Cook, *Underground Gun Markets*, *supra*, at F600-01 (describing police intervention to deal with possession of guns by gang members).

Current research suggests that both supply-side and demand-side approaches to gun regulation are promising. *See* Pierce, *supra*, at 420 (recommending that jurisdictions interested in reducing the availability of guns "develop a portfolio of interventions."). While substitute guns from jurisdictions with more permissive gun control laws can influence the effectiveness of attempts to regulate the supply of guns, research shows that even when substitute guns from out-of-state enter a jurisdiction with supply-side regulations, such as the District, the price of such out-of-state, illegally imported guns is higher, thereby inhibiting demand.

> In cities such as New York and Boston, where the prevalence of gun ownership is low because legal transactions are subject to onerous regulations or are banned, prices in the secondary market are higher than in other east coast locales. The street prices of guns are actually higher than the prices of guns in gun stores. As a result, dealers have long been able to make a profit by buying guns in Virginia or points south and running them northward to the street markets of northeastern cities. The high price of guns in the secondary market in New York and Boston is the direct result of the regulation of the primary market.

Cook, *Regulating Gun Markets*, *supra*, at 72. The increased retail price of out-of-state guns purchased in jurisdictions with strict gun control measures suggests that even supply-side regulations can decrease the demand for guns by effectively increasing the price for substitute guns. *Id.* at 79.

In Chicago, for example, researchers found that "Chicago's handgun ban may…have helped to reduce criminal access to guns by preventing the location of licensed gun dealers in high-crime neighbourhoods." Cook, *Underground Gun Markets*, *supra*, at F606. Thus, supply-side gun control laws, such as the D.C. Gun Control Law, while unable to completely foreclose the illegal gun market, are nonetheless effective in reducing gun crime. *Cf.* Philip J. Cook *et al.*, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277, 300 (2001) ("A successful supply-side strategy for reducing gun crime does not require that today's street criminals have guns taken away from them. It is sufficient to block the transactions that supply guns for criminal use.").

2. Stricter Gun Control Laws in Adjacent Jurisdictions Would Make Individual Gun Control Laws More Effective.

Supply-side gun control regulations are valuable tools for tightening the illegal gun market. However, as alluded to *supra*, permissive gun control regulations existing in other, particularly adjacent jurisdictions, can limit the reach of such regulations. These permissive regulations explain, together with other factors such as the crack cocaine market and gang activity, the increase in gun homicides in the District in the late 1980's.

A recent study of 25 cities across the entire continental United States bears this point out. In cities located in states with strict gun control laws, including permit-to-purchase licensing, mandatory registration of handguns, and waiting periods, the number of handguns purchased that originated in those states was significantly less than in cities located in states with more permissive gun control laws. *See* D.W. Webster, J.S. Vernick, L.M. Hepburn, *Relationship Between Licensing, Registration, and Other Gun Sales Laws to the Source of State Crime Guns*, 7 Injury Prevention, 184, 189 (2001) ("Webster Study"). For example, the cities of Boston, Jersey City, and New York, are all located in states with permit-to-purchase requirements, registration requirements, and waiting periods greater than seven days. *Id.* at 186. The percentages of crime guns in those cities first purchased *within* the state were 31.4 percent, 13 percent, and 14 percent, respectively. *Id.* By contrast, in Atlanta, Houston, and Miami, where there are no permit-to-purchase requirements, registration requirements, or wait periods longer than seven days, the percentages of crime guns first purchased within the state were 86 percent, 88.3 percent, and 90.1 percent, respectively. *Id.* The Webster Study concluded that "comprehensive gun sales regulations...can affect the availability of guns to criminals." *Id.* at 189. However, the "potential benefits from comprehensive state gun control measures appear to be diminished by the lack of such controls in other states...[because] proximity to people living in states with weak gun laws increased the proportion of a city's crime guns originating from out-of-state gun dealers." *Id.* at 188. In the District, for example, of the 991 successfully traced firearms that police recovered in 2006, "more than half originated in Maryland or Virginia and illegally made their way into the District." Annual Report on

Guns in the District of Columbia 5 (2006), *available at* http://mpdc.dc.gov/mpdc/lib/mpdc/publications/2006_AR_Guns_in_DC.pdf (last accessed January 10, 2008). Thus, where certain governments have more permissive gun control regulations, adjacent governments with stricter gun control measures suffer the consequences when guns obtained in the more permissive jurisdictions are imported. Regulations such as the D.C. Gun Control Law represent an appropriate and important part of reducing gun-related violence and would only prove more effective if the surrounding jurisdictions also adopted stricter gun control measures.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

January 11, 2008

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, *et al.*,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE JACK N. RAKOVE, SAUL CORNELL, DAVID T. KONIG, WILLIAM J. NOVAK, LOIS G. SCHWOERER ET AL. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amici Curiae, listed in the Appendix, are professional historians. They have all earned Ph.D. degrees in history, hold academic appointments in university departments of history, and specialize in the American Revolution, the Early Republic, American Legal History, American Constitutional History, Anglo-American Legal History, or related areas. Amici curiae have an interest in the Court having an informed understanding of the history that led to the adoption of the Second Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The central question is whether the Second Amendment protects a private right to keep handguns and other firearms, independent of an individual's membership in a state-regulated militia. As a problem for constitutional historians, the question can be elaborated and restated in this way: Did the framers and ratifiers of the Amendment believe they were constitutionally entrenching an individual right to keep arms for personal protection? Or did they conceive the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, other than the Roger Williams University School of Law, which paid for the printing of this brief through Professor Bogus' research account. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk, Amici complied with the conditions of those consents by providing seven days advance notice of their intention to file this brief.

Amendment to achieve a different end, by affirming that a "well-regulated militia" of citizen-soldiers would preserve "the security of a free state," principally by lessening the need for a republican government to depend on a standing army?

Historians can best assess these claims by reconstructing the context within which the adopters of the Amendment acted. Recovering that context involves more than snatching a line from Blackstone's *Commentaries* or Madison's 46th *Federalist*, or ringing endless changes on the references to hunting and fowling in the *Dissent* of the Anti-Federalist minority in the Pennsylvania ratification convention. It instead involves explaining how a popular right to keep and bear arms figured in the ratification debates of 1787-1788; how that debate was in turn shaped by the Militia Clause of Art. I, § 8; and why that clause appeared to threaten key Anglo-American political ideas dating to the Glorious Revolution of 1688-1689. Setting the context for the Second Amendment also requires exploring analogous provisions in the parliamentary Bill of Rights of 1689 and the declarations of rights that accompanied the first state constitutions.

Once explored, this context establishes that the private keeping of firearms was manifestly not the right that the framers of the Bill of Rights guaranteed in 1789. Though Anglo-American political tradition did indeed value the idea of an armed populace, it never treated private ownership of firearms as an individual right. The right stated in the seminal English Bill of Rights of 1689 was vested not in individuals but in Parliament, which remained free to determine "by law" which Protestant subjects could own which weapons and how they could be used. Nor did the first American constitutions and declarations of rights include clauses protecting private use of firearms.

The right to keep and bear arms became an issue in 1787-1788 only because the Constitution proposed significant changes in the governance of the militia, an institution previously regulated solely by state law. Anti-Federalists argued that Congress would abuse its proposed authority to organize, arm, and discipline the militia by allowing that venerated institution to atrophy from neglect and lack of funding. A national government that could command permanent armed forces with its own resources would gain an engine for tyranny. Republican political thinking had long regarded standing armies as a danger to liberty, and a militia of citizen soldiers as one of its greatest bulwarks. Anti-Federalists rehearsed these arguments, and several ratification conventions—notably Virginia and New York—adopted resolutions affirming that a right to keep and bear arms, when tied to service in the militia, merited constitutional protection. Nothing in the ratification debates of 1787-1788, however, indicated that the exercise of this right required limiting the customary police powers of state and local government.

Federalist supporters of the Constitution dominated the First Congress that met in the spring of 1789. In framing the Second Amendment, they simultaneously sought to assuage the expressed Anti-Federalist concern about the maintenance of the militia while preserving congressional authority over its organization, arming, and discipline. They rejected language that would have modified that authority, including a qualifying provision, proposed by the House of Representatives, defining the militia as "composed of the body of the people." Acceptance of that definition would impair congressional authority to determine how extensive membership in the militia should be.

Nothing in this argument challenges the idea that eighteenth-century Americans had ready access to firearms, or that they valued the concept of a well-armed citizenry. Individuals were legally free to purchase and keep weapons as they could other property; but like other forms of property, the keeping of firearms was subject to extensive legal regulation. What is at dispute is whether legal rights of private ownership were what the Second Amendment constitutionally entrenched. During this period, Americans were hardly shy about identifying and discussing such fundamental rights as representation, trial by jury, or freedom of conscience, or the natural rights to life, liberty, and property. The fact that references to the keeping of firearms are so few and terse, or that the modern academic controversy over the Second Amendment has been forced to squeeze so much modern interpretive blood from so few evidentiary turnips, is itself an indicator of how minor a question this was at the time. The same cannot be said about the role of the militia in the constitutional order. That was the subject that was patently in dispute in 1787-1789, and that is why the exceptional preamble to the Second Amendment is a true guide to its original meaning.

ARGUMENT

EVEN AFTER THE PARLIAMENTARY BILL OF RIGHTS OF 1689 ALLOWED CERTAIN CLASSES OF PROTESTANT SUBJECTS TO KEEP ARMS, BRITISH CONSTITUTIONAL DOCTRINE AND PRACTICE SUBJECTED THE LIMITED RIGHT THEREIN RECOGNIZED TO EXTENSIVE LEGAL REGULATION AND LIMITATION.

The closest English antecedent to the American notion of a right to bear arms appears in the Bill of Rights, the parliamentary reenactment in December 1689 of the Declaration of Rights that the new monarchs, William and Mary, accepted seven months earlier after the Glorious Revolution forced James II to vacate his throne. Knowledgeable Americans were familiar with the Bill of Rights and the circumstances of its creation. Americans saw the English document as part of a common constitutional tradition, a binding pledge by the Crown to acknowledge the legal supremacy of Parliament and thereby respect the rights of the people.

That link between parliamentary supremacy and popular rights is critical to understanding the import of Article VII of the Bill of Rights, which provided "That the Subjects which are Protestants may have Armes for their defence Suitable to their Condition and as allowed by Law." The formal grievance that Article VII answered was that James II had violated settled law "By causing several good Subjects being Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law." Bill of Rights (1689) *reprinted* in 5 The Founders' Constitution 1-2 (Philip Kurland and Ralph Lerner, eds. 1987). The authors of the Bill of Rights were reacting to the efforts of Charles II and James II to maintain Stuart rule through a standing army increasingly officered and manned by Irish Catholics. Commissioning Catholics as military officers did indeed violate the Test Act, which required officeholders to swear an oath denying Catholic doctrine on transubstantiation. In the paranoiac atmosphere of the 1680s, James's open practice of Catholicism and the birth of his male heir made the fear of a Catholic restoration all the more ominous.

The arms-bearing right that the Bill of 1689 affirmed, then, was a response to this specific situation, tied to the belief that an armed Protestant population would safeguard the realm against a Catholic restoration. It did not establish a general right of all persons to keep weapons, and especially firearms, for purposes of individual defense. An earlier version of Article VII could be read to grant the right to all Protestants. But that expansive possibility was checked when the House of Lords added the crucial qualifying language, "Suitable to their Condition and as allowed by Law." Lois Schwoerer, *To Hold and Bear Arms: The English Perspective,* 76 Chi.-Kent L. Rev. 30-48 (2000). The first qualification tracked a long history of legislation making the possession of weapons, and again especially firearms, dependent on the holders' social and economic status. The second qualification was a reference to the Game Law of 1671, which allowed lords of manors to appoint gamekeepers to "take and seize all such guns" used by "divers disorderly persons" to hunt and trap "game intended to be preserved" for the higher classes of English society. 6 English Historical Documents 466-467 (Andrew Browning, ed., 1988). Adoption of the Bill of Rights did not affect Parliament's capacity to regulate who could or could not possess firearms. In fact, when a new Game Act was adopted in 1693, the House of Commons rejected (169-65) a proposal allowing "every Protestant to keep a musket in his House for his defence not withstanding this or any other Act." Many members voting had sat in Parliament in 1689; they evidently did not read Article VII as establishing a broad-gauged right all Protestants could claim. Schwoerer, *Hold and Bear Arms*, *supra* at 50-51.

The notion that Article VII made ownership of firearms a fundamental right immune to substantive regulation fails for a broader reason. The lasting constitutional significance of the Bill of Rights was not only to identify certain rights of the subject that merited protection, but also to lay down the basic premises that shaped British constitutionalism thereafter: that the monarch could not make law simply by royal edict, but that he must rule *lawfully*, with the consent of Parliaments freely elected and frequently assembled. The concept of parliamentary supremacy, as exercised through the king-in-Parliament, was the great principle the Bill of Rights vindicated. The liberty Englishmen cherished would be secured by confirming that a Parliament respectful of their rights and representative of society would have sovereign authority to make law. Article VII endorsed the idea that well-to-do Protestants might keep arms against the threat of a Catholic restoration, but as the formula "according to law" made clear, this imposed no limit on the reach of parliamentary power.

That understanding also informed a much-cited passage from Sir William Blackstone's *Commentaries* (1765).

> "The fifth and last auxiliary right of the subject ... is that of having arms for their defence, suitable to their condition, and such as are allowed by law," Blackstone wrote, citing the Bill of Rights. This was "indeed, a publick allowance under due restraints, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."

1 William Blackstone, Commentaries *139. Notwithstanding the reference to "self-preservation," this passage cannot be construed to assert an unregulated private right of self-defense, for two reasons. First, Blackstone's corpus of five "subordinate" or "auxiliary" rights involve the subject's relation to public authority, respectively through the constitution of Parliament; the limitation on royal prerogative; access to courts of justice; the right to petition; and finally, the right to arms as a security against oppression. *Id.* at *136-139. Second, the phrases "suitable to their condition, and such as are allowed by law," and "under due restraints" denote the regime of parliamentary regulation that the Bill of Rights made the fundamental principle of British constitutionalism. Blackstone was an unequivocal defender of that regime. "So long therefore as the English constitution lasts," Blackstone wrote in the very next chapter, "we may venture to affirm, that the power of parliament is absolute and without control."

Id. at 157. Whatever principle the Bill of Rights stated always lay within the power of Parliament to apply and regulate, and thus to modify or limit. In this sense, the Bill of Rights did not establish a catalogue of rights in the modern, positivist, constitutionally-entrenched sense of the term. Like the clauses of Magna Carta, all of its provisions were subject to modification, control, and repeal by subsequent Parliaments. So long as Parliament sat, Blackstone envisioned no situation under which the auxiliary right of resistance could be invoked. *Id.*

THE FIRST AMERICAN BILLS OF RIGHTS MADE NO MENTION OF A PRIVATE RIGHT TO KEEP ARMS

One application of parliamentary sovereignty was the program of colonial legislation adopted after 1765. As the Declaratory Act of 1766 stated, the colonists were subject to parliamentary jurisdiction "in all cases whatsoever." 27 Danby Pickering, The Statutes at Large From Magna Carta to the End of the Parliament of Great Britain 19-20 (London, John Archdeacon, 1767). Americans rejected that claim by declaring independence. But in doing so they did not repudiate the general conception of legislative supremacy, which remained the leading principle of the new state constitutions adopted with independence, and that principle embraced a robust conception of the reach of legislative authority. *See generally*, Gordon S. Wood, Creation of the American Republic, 1776-1787 at 162-163 (1969).

Nor did the declarations of rights that eight states concurrently adopted effectively limit legislative power. In only two states (Pennsylvania in 1776, Massachusetts in 1780) were they made part of the actual constitutions. These declarations operated not as legally binding commands but rather as statements of republican principles or common law protections. They have also been faulted for being less comprehensive than modern readers might expect them to have been.[2]

Even so, these early declarations indicate which rights the first state constitutions deemed fundamental. It is noteworthy that none made any reference to the private ownership and personal use of firearms. There is no direct equivalent in the American declarations to the selective Protestant "subjects" invoked in the Bill of Rights of 1689.[3] What appear instead are statements, either bundled together in one article or linked in successive articles, affirming the virtue of a well-regulated militia, the danger of standing armies, and the importance of maintaining civilian control over the military.

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[2] In January 1787, to compensate for the omission of such a declaration from its 1777 constitution, the New York legislature approved An Act Concerning the Rights of Citizens of this State. None of its thirteen articles mentioned a right to keep and bear arms. 19 Documentary History of the Ratification of the Constitution 504-06 (John Kaminski and Gaspare Saladino, eds., 1976-) (hereafter DHRC). Six months later, the Continental Congress adopted the Northwest Ordinance. Its supplemental six articles constituted a bill of rights but made no mention of a right to arms. 1 Founders' Constitution *supra* at 28-29.

[3] Section 43 of the Pennsylvania constitution does grant "inhabitants ... liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property."

None of the modest variations among the formulae used by different states suggest that the right to bear arms vested in individual citizens for private purposes. Virginia refers to "a well-regulated Militia, composed of the body of the people, trained to arms." Delaware and Maryland simply refer to "a well regulated militia." More intriguing are the clauses stating the purposes for which arms may be borne: "for the defence of the State" (North Carolina, Art. XVII); "for the common defence" (Massachusetts, Art. XVII); and most striking, "for the defence of themselves and the state" (Pennsylvania, Art. XIII). 7 Sources and Documents of United States Constitutions 403 (William F.Swindler ed., 1978) (N.C.) (Mass. vol. 5 at 95; Pa. vol. 8 at 279). The first two clearly have no bearing on a private right, free of legal regulation. Although the Pennsylvania clause appears open to a broader interpretation, two considerations render this reading improbable. First, the opening clause of Article XIII immediately preceded two other clauses reiterating the usual condemnation of standing armies and endorsement of civilian supremacy. The Article as a whole is thus concerned with military matters. Second, and contextually more important, the Pennsylvania variant needs to be read against the colony's unique history. Since the mid-1750s, a political impasse between the proprietary governor and the assembly, and the influence of Quaker pacifism on provincial governance, effectively prevented the colonial government from maintaining a militia. Residents of frontier counties exposed to Indian attack during the Seven Years War and Pontiac's rising of 1763 petitioned the provincial government to organize militia and provide the resources necessary to sustain it. These efforts failed, and Pennsylvania had no militia at all during the two decades preceding independence. Unlike most colonies, its legal assembly continued to meet into the spring of 1776, but without mobilizing a provincial militia against the British threat. As a result, extra-legal committees arose in Philadelphia that were strongly supported by the province's voluntary militia units. These committees demanded the drafting of a new state constitution that would coerce military service from every citizen. When the constitution writers of 1776 used the phrase "for the defence of themselves," they accordingly were referring not a personal right of self-defense but to the community's capacity to protect itself against the threats raised either by Native Americans or the British army. Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, Rutgers L.J. (forthcoming 2008).

The sole noteworthy reference to a private right to arms in 1776 appears in the draft Virginia constitution that Thomas Jefferson prepared while marooned in Philadelphia writing the Declaration of Independence. His list of Rights Private and Public included: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]." The bracketed phrase did not appear in the first draft of this document, and may indicate Jefferson's uncertainty about the extent of the right. 1 Papers of Jefferson 344, 353, 363 (Julian Boyd ed. 1950).

The lack of discussion of an individual right to firearms is unsurprising. Their ownership and use were not major issues in eighteenth-century America, as they arguably remained in contemporary Britain. There debate still raged over the revision and enforcement of game laws, with a landed aristocracy trying to protect its traditional privileges, against poachers and others who could use the protein illegal hunting provided. *See* E. P. Thompson, Whigs and Hunters: The Origin of the Black Act (1975). No such aristocratic order or tradition existed in America, which was probably the most protein-rich society in the world. Americans could legally obtain and use firearms as they could other property, subject to the regulation to which all property was liable.

It is equally unsurprising that the militia remained an object of constitutional concern in 1776. The American revolutionaries were conscious heirs of a radical Whig tradition that regarded standing armies as a bane to liberty, and which celebrated the idea of a citizens militia as the optimal form of military organization for a republic. *See* generally "No Standing Armies!" The Antiarmy Ideology in Seventeenth-century England (1974). This was a staple theme of eighteenth-century political writing, and its lessons were reinforced when Britain sent its standing army to Boston, first to enforce the Townshend duties (1768-1770) and then to compel obedience to the Coercive Acts of 1774. The latter led to the outbreak of civil war in April 1775, when the militia organized by the Massachusetts Provincial Congress resisted the British march on Concord.

BY PROPOSING TO TRANSFER AUTHORITY OVER THE MILITIA FROM THE STATES TO CONGRESS, THE CONSTITUTION RADICALLY CHALLENGED CONVENTIONAL REPUBLICAN THINKING ABOUT THE NATURE OF THE MILITIA.

Individual ownership of firearms was not an issue at the Federal Convention of 1787. The records of its deliberations contain no reference to whether the government—national, state, or local—could regulate possession of firearms. The Framers adhered to the general concept of "internal police" that had shaped American thinking about federalism since 1776, if not earlier. Under this understanding, the states retained broad and exclusive legislative authority to regulate most facets of daily life—ownership and use of property, rules of inheritance, criminal law, and all the aspects of communal health, welfare, and safety. Pennsylvania's Declaration of Rights of 1776 expressed this value by affirming that "the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same." 5 Founders' Constitution *supra* at 6.The Framers no more imagined that the Constitution would abridge the states' power to regulate firearms than they thought it would impinge their authority to control noxious substances.

The one issue addressed at the 1787 Convention that could affect citizens' access to firearms concerned the militia. Under the Articles of Confederation, its regulation remained solely under state control. But complaints about its training, discipline, and performance persisted throughout the war for independence. In a "Sketch for a Peacetime Establishment" (May 1783), Washington proposed uniform standards of training for the militia in every state, and further argued that an effective militia could only be formed from a select body of young men, as opposed to the larger mass of adult males legally eligible for service. 26 Writings of George Washington 389-390 (John Fitzpatrick, ed., 1931-1944). Similar proposals were made in the Report on a Military Peace Establishment drafted by a congressional committee chaired by Alexander Hamilton. 3 Papers of Alexander Hamilton 393-396 (Harold Syrett, ed., 1962). *See* Don R. Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship,* 55 Wm. & Mary Q. 40-44 (1998).

Militia reform, though not the most pressing issue facing the Federal Convention of 1787, was part of the Federalist agenda for strengthening the national security powers of the Union. *Id.* at 43-44. Unlike many of the legislative powers enumerated in Article I, Section 8, congressional governance of the militia sparked significant discussion at Philadelphia. An extended debate on August 18 found the Framers divided over the practicability of dividing power over the militia between national and state governments. Several delegates insisted that that the states would never cede their traditional authority over training and disciplining the militia. But others, including General Charles Pinckney and James Madison, argued for the importance of "uniformity . . . in the regulation of the Militia throughout the Union." 2 Records of the Federal Convention of 1787 at 330-333 (Max Farrand, ed., 1966).

The militia question was then referred to a grand committee of one member from each state. Its report of

August 21 presented the clause that would finally be adopted, which empowered Congress "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.* at 352.

When this clause was debated on August 23, several delegates again criticized the proposed scope of congressional jurisdiction over the militia. But their reservations were rebutted by other delegates, led by Rufus King, speaking for the committee, and Madison, who insisted that the only effective militia would be one ultimately controlled by Congress. This discussion included important comments on how the militia would be armed. Madison wondered whether King's initial definition of "*arming,* [as] specifying the kind size and caliber of arms" would exclude Congress "furnishing arms" to the states. King replied that "*arming* meant not only to provide for the uniformity of arms, but included authority to regulate the modes of furnishing, either by the militia themselves, the State Governments, or the National Treasury." Several efforts to weaken the proposed clause in the interest of preserving greater state control over the militia proved futile. Madison and others argued that "The states neglect their militia now," and would do no better after the Constitution gave the national government greater resources for national defense. Nine states approved the proposed change; only Connecticut and Maryland dissented. *Id.* at 384-388.

The Constitution authorized Congress "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Though this clause was uncontroversial and occasioned no debate, *id.* at 390, it, too, demonstrates that the Framers contemplated converting the militia into a national institution. That commitment in turn explains why the militia question became a significant element in the public debate over ratification of the Constitution.

ANTI-FEDERALIST OBJECTIONS TO THE MILITIA CLAUSE PREPONDERANTLY EVOKED THE TRADITIONAL FEAR OF STANDING ARMIES AND ITS COROLLARY ENDORSEMENT OF THE VALUE OF THE MILITIA

This radical shift in jurisdiction over the militia would have been controversial by itself, but it became even more so when coupled with giving Congress independent authority to maintain an army and navy. Anti-Federalists steeped in the literature of the age knew that this amounted to the creation of a standing army, that dreaded enemy to the liberty of the people. From the start of the ratification debates, they sought to modify those clauses. Within a fortnight of the adjournment of the Federal Convention, the Virginia Anti-Federalist Richard Henry Lee urged the Continental Congress to endorse a "Bill of Rights" that would declare, *inter alia*, "That standing Armies in times of peace are dangerous to liberty," and should only be raised with a two-thirds vote in both houses of Congress. 13 DHRC at 239. Lee identified a number of fundamental rights deserving recognition, but said nothing about firearms.

The best antidote to standing armies, Anti-Federalists argued, was a militia drawn from the body of the citizenry. The survival of that venerated institution was exactly what the Constitution would threaten if Congress abused its power by failing to keep the militia well-armed, by making service onerous, or by recruiting a "select militia" not drawn from the body of the people. On the other side, leading Federalists held to the Framers' view that a state-governed, mass militia would lack the training and discipline needed to turn citizens into battle-ready soldiers. In *Federalist* 29, Hamilton forthrightly argued that a "well-regulated" militia must be a select one, because it would be impossibly expensive and burdensome to subject the whole body of the male citizenry to the training required.

Discussion of citizens' access to firearms during the ratification debates of 1787-1788 focused nearly exclusively on the comparative merits and risks of a standing army or the militia. The hackneyed idea that standing armies were inimical to liberty was reinforced by the charge that a distant national government could rule as extensive a country as the United States only through armed force. Militia service was also treated as a matter of civic duty, for a key element in republican thinking reaching as far back as Machiavelli treated the *obligation* to bear arms in defense of one's country as one of the rights and privileges that distinguished republican *citizens* from the *subjects* of other polities that slavishly relied on hireling soldiers lacking intrinsic loyalty to the regime.[4]

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[4] This point merits far more development than it can receive here, for it illustrates how republican thinking conceived of rights

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As at the Federal Convention, these exchanges treated the militia not as the disembodied mass of the people, but as a legal institution subject to concurrent national and state administration. That was the meaning of James Madison's oft-quoted remark in *Federalist* 46, noting that half a million armed Americans would overmatch any force a national government bent on tyranny could field. Those armed citizens would act not as a spontaneous, self-deputized force, but as members of an institutional militia "united and conducted by governments possessing their affections and confidence." *Id.* at 334-335. Here, as on other issues, the dominant way in which the ratifiers constructed the danger of tyranny lurking in the Constitution was to imagine a struggle between national and state governments, and manifestly not a conflict between the people, on the one hand, and the combined power of the two levels of the federal system on the other. The preeminent Anti-Federalist charge against the Constitution was that it would bring about a "consolidation" of all effective power in the national government, leaving the states as hollow jurisdictions. Jack Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution, 148, 181-184 (1996). Federalists replied, as Madison's 45th and 46th Federalists

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not solely as something to be protected against abuse by the state, but in the very different language of the civic duties of citizens. The right to serve on a jury was thus regarded as being at least as important, and arguably more so, than the right to be tried by one. The relation between this civic conception of rights and the right to keep and bear arms is developed in Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America (2006).

essays particularly argue, by identifying all the political and structural advantages that would favor the state governments.

The central question was thus whether Congress would make the militia completely its creature, depriving the states of any residual authority over its use or even existence, and leaving it dependent on federal largesse for its arms. The fullest discussion of these concerns took place at the Virginia convention in Richmond in June 1788. Anti-Federalist Patrick Henry insisted that congressional power over the militia was plenary and exclusive. 10 DHRC 1276. George Mason similarly imagined how the militia might be disarmed: not by the federal government confiscating weapons, but rather, "Under various pretences, Congress may neglect to provide for arming and disciplining the militia, and the State Governments cannot do it, for Congress has an exclusive right to arm them." *Id.* at 1270. Federalist leaders Madison, George Nicholas, and John Marshall replied strenuously that power over the militia was indeed concurrent, and that the states remained free to arm their own militia and use them for internal security. *Id.* at 1273, 1280, 1306-1308. "If Congress neglect our militia," the future Chief Justice observed, "we can arm them ourselves." *Id.* at 1308. This was a critical point in a state where the militia was the first line of defense against the ever-present danger of slave rebellion. *See* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998).

Because the Virginia convention was so evenly divided, Federalists accepted a proposal to recommend constitutional amendments to the first Congress.

This was where the antecedent wording of the Second Amendment can be found, closely followed by the similar language adopted by New York two weeks later.[5] Both begin by declaring "That the people have a right to keep and bear arms;" both then declare "that a well regulated Militia [Virginia: composed of the body of the people trained to arms; New York: including the body of the People *capable of bearing arms*] is the proper, natural and safe defence of a state." The Virginia article adds further statements condemning standing armies and upholding civilian supremacy over the military. The New York declaration tracks these two provisions closely in a following article, but after first inserting an additional article declaring "That the militia should not be subject to Martial Law, except in time of War, Rebellion or Insurrection." *Id.* at 1553; Linda Grant DePauw, The Eleventh Pillar: New York State and the Federal Constitution 294 (1966).

Text and context both establish that the dominant issue throughout the period of ratification was the future status and condition of the militia, not the private rights of individuals. Even when Anti-Federalists spoke of the militia being disarmed, their expressed concern was not the specter of federal confiscation or prohibition of private weapons, but rather that the national government might neglect to provide arms. They worried that militiamen might be subject to military justice, or marched to faraway locations, to their personal inconvenience and the insecurity of their own communities. Above all, Anti-Federalists worried that by allowing the traditional militia to atrophy, Congress would rely increasingly on its own permanent army, to the overall detriment of the public liberty the Revolution had been fought to establish.

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[5] In New York, it is not part of the amendments proposed in the second part of the instrument of ratification but rather appears in the first part, which stated the delegates' understanding of the Constitution they were accepting.

EXPLICIT ANTI-FEDERALIST REFERENCES TO A PRIVATE RIGHT TO ARMS WERE CONSPICUOUSLY FEW IN NUMBER AND FAILED TO GENERATE POLITICAL SUPPORT.

In contrast to the numerous discussions of the militia during the ratification debates, explicit references to the private ownership of firearms were few and scattered. The three noteworthy statements come from the Pennsylvania, Massachusetts, and New Hampshire conventions. Only the last commanded the support of a majority of delegates, and presents a formula unique to the discussions of 1787-1788. The twelfth constitutional amendment that New Hampshire recommended for future consideration read: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." Neil H. Cogan, Complete Bill of Rights 181 (1997). In Massachusetts, an omnibus rights-protecting amendment that the convention *rejected* stated "that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." 6 DHRC 1453, 1469-1471.

Finally, the minority Anti-Federalist delegates to the Pennsylvania ratifying convention included in their published *Dissent* this proposed amendment:

> "7. That the people have a right to bear arms for the defense of themselves and their own state, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals."

The next proposed amendment followed section 43 of the state constitution in stating that the people "shall have liberty to fowl and hunt in seasonable times, on the lands they hold" as well as navigable waters and other unenclosed lands. 2 DHRC 597-598. *See also* Cornell, A Well-Regulated Militia, *supra*, at 50-52, 55-58.

These two articles are often offered as evidence that the Founders thought of the right to bear arms as ensuring a private right to possess weapons, as did the court below. Pet. App. 27. But that reading is incorrect. First, the dissenters who endorsed this proposal comprised only a third of the Pennsylvania convention. Second, as previously noted, the reference to "the defense of themselves and their own state" had particular connotations in Pennsylvania, tied not to an individual's right to defend his home, but to the colonial government's failure to organize effective militia units prior to independence. Third, the proposed formula against "disarming" leaves ample room for police-power regulation by recognizing "real danger of public injury from individuals" as a legitimate basis for public action.

What constitutes a "real danger" time and circumstance must determine, but even the dissenters conceded that whatever right individuals retain must be judged against the danger of "public injury." Fourth, the dissenters appeared disinclined to push this right too far. There is no further discussion of the private use of firearms in the explanatory passages of the *Dissent.*

Fifth, and most important, these two clauses fell stillborn on the larger debate that continued to rage for months. One early response was witheringly sarcastic. Why not add this further clause, Noah Webster asked: "That Congress shall never restrain any inhabitant of America from eating and drinking, *at seasonable times*, or prevent his lying on his *left side*, in a long winter's night, or even on his back, when he is fatigued by lying on his *right.*" 15 DHRC at 199. Had Anti-Federalists continued to want to push for the constitutional protection of firearms, ample time remained to muster support in the nine states yet to act on the Constitution. Once published, however, these clauses of the *Dissent* were politically inert. If the Pennsylvania dissenters tried to place the question of a private right to arms before the body politic, their fellow Americans declined their summons. Far from being the key to a constitutional puzzle, the *Dissent* was an exception to the true rule: that such debate as occurred over a right to keep and bear arms always took place within the context of the future status of the militia.

JAMES MADISON'S ORIGINAL DRAFT OF THE SECOND AMENDMENT DOES NOT SUPPORT AN INDIVIDUAL RIGHTS INTERPRETATION

In drafting the amendments that evolved into the Bill of Rights, James Madison had no reason to place a private right to firearms on his agenda. Madison worked from a pamphlet compiling all the amendments proposed by the states, and only New Hampshire had spoken explicitly of individuals being disarmed. Taking the Virginia and New York recommendations as his model, Madison again made the militia the urgent question to confront. In culling the amendments, Madison rejected anything that implied a structural change in the Constitution, limiting the proposals he introduced in the House of Representatives on June 8 largely to matters of rights.

Madison was primarily but not exclusively concerned with protecting individual rights, and this placed him at the leading edge of American thinking during this period. He was arguably the first major thinker to recognize how the protection of rights in a republic differed from a monarchy. There, the problem was to protect the people as a whole against the concentrated power of the state. In a republic, by contrast, the chief problem was to protect individuals and minorities against popular majorities wielding power through the legislature. Rakove, Original Meanings, 310-318, 330-336. But as the eventual Tenth Amendment demonstrates, Madison also intended to rebut Anti-Federalist charges of "consolidation" by affirming the reserved powers of the states and people, in a manner akin to the Second Amendment. Because he understood that the states would retain their traditional police powers, Madison would naturally have included the power to regulate firearms among those still belonging to the states.[6]

Advocates for an individual rights view of the Amendment often make much of a single line in an outline of Madison's June 8 speech, to wit: "They relate 1st to private rights." Some lines later, after the fresh heading "Bill of Rights—useful not essential" and the immediately subsequent comment "fallacy on both sides—espec[iall]y as to English Decl[aratio]n of Rights," Madison made a passing reference to "arms to Protestts." 12 Papers of James Madison 193-194 (Robert Rutland ed., 1962-1991). This elliptical material is cited as proof that Madison conceived the right "to keep and bear arms" primarily in private, individual terms. There are several difficulties with this view. One is that "1st" need not mean *exclusively* or *solely*; it may simply be a general statement identifying the first of many aspects of his amendments. Moreover, this line appears to refer to the amendments generally; it is not specifically related to the right to bear arms provision. The subsequent reference to "arms to Protestants" clearly refers to the English Bill of Rights of 1689. The passage in Madison's June 8 speech that corresponds to this portion of the outline indicates that Madison was reiterating his long-standing misgivings about the value of bills of rights as "paper" or "parchment barriers." *Compare* Speech of

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[6] Only four years earlier, he had introduced a bill, originally drafted by Jefferson as part of the comprehensive revision of Virginia laws, to prohibit hunters who had violated the ban on deer hunting from the "bearing of a gun [not arms]" beyond their own lands. 2 Papers of Jefferson *supra* at 443-444

June 8, 1789, *id*. at 203, with Letter to Jefferson of Oct. 17, 1788,11 Papers of Madison 297.

In his speech, Madison did not discuss the right to bear arms. Nor was it part of the proposal he later described "as the most valuable on the whole list": to insert in article I, section 10 a clause forbidding the states to violate "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." (12 Papers of Madison, 208, 344)

Madison's original version of the Second Amendment tracked the wording of the Virginia convention, but with some changes.

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person. Complete Bill of Rights, *supra* at 169.

Adding the phrase "well armed" responded to the concern that the militia might atrophy from joint neglect by Congress and the states. Madison omitted the references to standing armies and civilian supremacy in the Virginia and New York recommendations. The Constitution fully covered both principles with its provisions for biennial military appropriations, delegation of enumerated powers over national security to Congress, and the designation of the president as commander-in-chief. The final clause was derived from a similar provision recommended by the Maryland convention. *Id.* at 181. Its presence confirms that the principal subject was the militia. That clause was also the sole subject of the recorded House debate on the entire article.

THE FINAL REVISIONS OF THE SECOND AMENDMENT REFLECTED THE FEDERALISTS' DETERMINATION TO PRESERVE CONGRESSIONAL AUTHORITY OVER THE ORGANIZATION OF THE MILITIA.

The House select committee reviewing Madison's proposals revised this language in three noteworthy ways. First, it improved his syntax by turning the reference to the militia into a strong preamble, rather than leaving it dangling between the "keep and bear arms" and "religiously scrupulous" sections. Second, the committee dropped the phrase "well armed." Most important, it inserted the phrase "composed of the body of the people" after "militia," thereby moving "the people" vested with the right closer to the republican ideal of the adult male citizenry. *Id.* at 169-170.

In this form, the amendment went to the Senate as Article 5 in the House resolutions of August 24. There three changes took place. One was minor: "best security of a free State" was altered to "being necessary to the security of a free State." *Id.* at 175-176. Two were substantive. The Senate eliminated the clause exempting religious dissenters, in effect preserving a discretionary congressional authority over the composition of the militia. More important, and to similar effect, it deleted the House-added modifier "composed of the body of the people." *Id.* at 174, 176.

Proponents of the individual right interpretation see this last alteration as sloppy editing not meant to alter the amendment's intended meaning. *E.g.*, Malcolm, To Keep and Bear Arms, *supra* at 161. That view wholly ignores the character of the Senate that did the editing. Only two Anti-Federalists sat in the inaugural Senate session, and their twenty Federalist colleagues included men like Rufus King, a shaper of the original militia clause of the Constitution, and Hamilton's father-in-law, General Philip Schuyler. These Federalists shared Washington's and Hamilton's view that the defense needs of the nation required a militia system not constitutionally yoked to the impracticable idea of keeping "the body of the people" trained to arms. The amendment, as revised, would still assuage Anti-Federalist concerns by stating a principled commitment to the value of a militia. But it would not hinder Congress in using its best judgment to determine how to organize, arm, and discipline an effective militia. The Senate had no credible motive to weaken the substantive delegation of power in Article I, Section 8, which acceptance of the House language arguably might do.

On September 9 the Senate considered and rejected another substantive alteration of the article, most likely proposed by the two Anti-Federalists, William Grayson and R. H. Lee. This one would have revived the anti-standing army and civilian supremacy clauses, while requiring two-thirds votes in Congress to maintain a "standing army or regular troops" in peacetime. Complete Bill of Rights, *supra* at 173-174. The House had previously rejected a similar amendment offered by the South Carolina Anti-Federalist, Aedanus Burke. *Id.* at 172. These rejected proposals again confirm that the context within which Congress considered the eventual Second Amendment was solely a military one.

On September 9 the Senate considered and rejected one other amendment: to insert "for the common defense" immediately after "keep and bear arms." *Id.* at 174-175. This action has sometimes been explained as assuring that the amendment would protect an individual right by eliminating a qualification. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 35 (1996). In the absence of recorded debate, or even knowledge of who moved the amendment, two other explanations are more compelling. One is that the phrase was superfluous, redundant of the militia's manifest purpose. Second, and more important, the adoption of such a qualification could conflict with the Militia Clauses of Article I, implying that other authorized uses of the militia, such as the suppression of insurrections, had become constitutionally suspect. Federalists intent on preserving the authority of Congress over the use of the militia would have seen this amendment as a problematic limiting qualification.

THE SECOND AMENDMENT IS BEST UNDERSTOOD AS AN AFFIRMATION OF FEDERALISM VALUES, WHICH HELPS TO EXPLAIN WHY THE "INSURRECTIONIST" THEORY OF ITS ORIGINS IS FALLACIOUS.

In endorsing the value of a well-regulated militia, led by officers appointed by the state governments, the framers of the Second Amendment affirmed that the militia would be a "partly federal, partly national" institution in the sense in which James Madison used that phrase in *Federalist* 39. The Militia Clause vividly illustrates the "compound" nature of the American constitutional republic. Both levels of government would have a share in controlling the militia; both would act directly on the citizens who formed it; and the line between national and state authority would be a matter for political determination. For their part, citizens had a civic duty to participate in the militia, if national and state law required them to do so. But both levels of government would have to reckon with the preferences of citizens in deciding what those duties would be. The actual history of the militia soon demonstrated that the people's aversion to serving in a well-regulated militia outweighed the Federalists' desire to turn it into a more effective, combat-ready outfit. In practice Congress regularly thwarted efforts by both Federalist and Republican administrations to fulfill the nationalizing promise of the Militia Clause.

There is a second federal dimension to the origins of the Second Amendment. Outside the question of whether militia members would be armed at national, state, or personal expense, there was no credible basis upon which the national government could regulate possession of firearms. Insofar as these were subject to regulation, state and local governments would be the necessary agents as they regulated all other forms of property. The existing regime of police power regulation was tolerant of private ownership of weapons, but not so lax as to prohibit states or localities from determining, for example, when the private keeping of gunpowder or the public carrying of firearms threatened public safety. Not even the most paranoid Anti-Federalist imagined that the national government would have the incentive or means to interfere with this traditional form of regulation.

Federalism also identifies a critical weakness in current academic notions of the "insurrectionist" origins of the Amendment, which hold that it was conceived to preserve a right of popular resistance to tyrannical government. Here again, Madison's comparison of the authority and political resources of national and state governments in *Federalist* 45 and 46 captures an eighteenth-century reality that modern readers can easily overlook. If the national government were to act despotically, it would have to encroach upon or commandeer the residual, constitutionally recognized authority of the states. If, for example, it sought to confiscate privately owned firearms for purposes other than those associated with the militia, the states could be expected to challenge that usurpation, and a militia composed of the community and directed by the state governments would come to their support, rather than be supinely dragooned into national service. The insurrectionist theory presumes what those at the time could not have fathomed: that national and state governments, both elected by the people, would collude to deny the people their fundamental rights.

An "insurrectionist" Second Amendment fails a second test of historical plausibility. As noted, the Constitution authorized Congress to mobilize the militia to "suppress Insurrections." The Republican Guarantee Clause of Article IV further empowered the national government, "on Application" by a state, to intervene within it "against domestic Violence." The clear inspiration for this provision was Shays's Rebellion in

Massachusetts, which occurred only months before the Federal Convention met, an upheaval that profoundly influenced the Federalist movement. Under the Articles of Confederation, Congress lacked authority to lend military assistance to the Massachusetts government as it sought to suppress that uprising. These two clauses were the Framers' direct answer to the deficit of authority that the Massachusetts rebellion exposed. It beggars the historical imagination to think that the same Federalist congressmen who wrote the Second Amendment were intent on protecting a popular right to insurrection.

A HISTORICALLY-GROUNDED ANALYSIS OF WHAT WAS ACTUALLY DEBATED IN 1787-1789 CAN ONLY CONCLUDE THAT THE STATUS OF THE MILITIA WAS ALWAYS WHAT WAS IN DISPUTE, AND NOT THE PRIVATE RIGHTS OF INDIVIDUALS.

Historians can best contribute to the resolution of contemporary constitutional disputes by recovering and reconstructing the context within which the adopters of particular clauses thought and acted. The process of recovering and reconstructing what the past was like must pay close attention to the value of particular *texts*, the statements that bear most directly on the matter in dispute. But equally important, it must also convey a sense of *context*, which requires locating particular pieces of historical evidence within a framework that best allows us to evaluate their probative value. The historian's recurring complaint about "law office history," as it is colloquially disparaged, is that it routinely indulges in the selective and uncritical use of quotations, stripped from the context in which they were uttered, and given meanings that contemporaries would have been astounded to learn they carried. *See, e.g.*, Don Higginbotham, *The Second Amendment in Historical Context,* 16 Const. Comment. 221 (1999). Because of the exceptional passions surrounding the Second Amendment, this one realm of constitutional controversy appears more susceptible to this kind of misuse than any other. A vast and sometimes vituperative literature has grown up around this subject, and sorting out claims and counterclaims can require heroic efforts.

The central argument of this brief is that throughout the period when the Second Amendment took shape, the status of the militia under the new Constitution indeed defined the controlling framework for discussing the people's right to keep and bear arms. The evidence sustaining this claim is easy to find in the voluminous records of the ratification debates, and the explanation for its salience is equally easy to provide. The benefits of a citizens' militia and the corresponding dangers of a hireling army were stock themes of the political literature Americans imbibed during the eighteenth century. When the Framers applied lessons drawn from the Revolutionary War to the national defense related clauses of Article I, they provoked predictably critical reactions from their Anti-Federalist opponents. The idealized image of a militia of citizen soldiers had deep roots in Anglo-American political culture, and as the distinguished historian Bernard Bailyn has observed, on this point as on others, the Anti-Federalists faithfully followed the radical Whig legacy that led the colonists to revolt a decade earlier. Bernard Bailyn, Ideological Origins of the American Revolution 331-351 (enlarged ed., 1992).

By contrast, explicit references in the same voluminous records to the ownership of firearms for private purposes are conspicuously few. That is one reason why a handful of quotations figure so prominently in the modern controversy, often cited to support points at odds with their intended meaning. More important, when Pennsylvania Anti-Federalists sought to elevate the use of firearms for private purposes into a right deserving constitutional recognition, their proposal fell on deaf ears. Had Americans felt that the Constitution threatened private access to firearms, nothing prevented this claim from becoming another of the many persistently sustained charges that Anti-Federalists leveled against the Constitution. But that is exactly what did not happen. Instead, it was the militia question that the Virginia and New York conventions debated seven months later, endorsing the recommendations that Madison and his colleagues carefully pared. The debate, in short, was always about the militia and its public purposes, never about a private right. That is why the unique justificatory preamble to the Second Amendment is a true guide to its meaning, and not rhetorical persiflage.

This brief takes no position on how well armed Americans were, something historians are still trying to gauge. It assumes that many Americans owned firearms and expected them to remain relatively easy to obtain. What this brief does argue, however, is that these private aspects of the ownership of firearms never crossed the threshold of constitutional significance in 1787-1789.

Historians are often asked what the Founders would think about various aspects of contemporary life. Such questions can be tricky to answer. But as historians of the Revolutionary era we are confident at least of this: that the authors of the Second Amendment would be flabbergasted to learn that in endorsing the republican principle of a well-regulated militia, they were also precluding restrictions on such potentially dangerous property as firearms, which governments had always regulated when there was "real danger of public injury from individuals." 2 DHRC at 624.

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia should be reversed.

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APPENDIX

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IN THE

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DISTRICT OF COLUMBIA, et. al.,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICI[1]

This brief is respectfully jointly submitted by Jeanette Moll on behalf of similarly situated Ohio Concealed Carry Permitholders and the U.S. Bill of

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[1] Party attorneys were duly notified of the filing in writing seven days in advance pursuant to the requirement. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission.

Rights Foundation. Amicus curiae U. S. Bill of Rights Foundation is a non-partisan public interest law policy development organization seeking remedies at law on targeted legal issues that contravene the Bill of Rights and related constitutional law.

SUMMARY OF ARGUMENT

In the law, it is the slippery slope that we must be careful not to start down without an understanding of where that slope will lead. The founders of our nation crafted the Bill of Rights and Constitution with an eye to the tyranny they had experienced in their native England. The rights they sought to ensure had been trampled in their homeland. These rights included privacy rights, freedom of speech and the freedom of religion. Natives of a land with a government sponsored church, they were well aware of the need to keep government out of church so that they could freely worship. It was this overreaching governmental intrusion that formed the basis of the laws that formed our nation.

The right to keep and bear arms was fundamental among these. Our founders deemed it so important that this right was placed at number two in the Bill of Rights. How can an individual be free if he is unable to secure his own home? Never did the founding fathers intend our citizenry to be reliant on an overreaching, all inclusive government to protect our individual rights. Rather, the powers of the government were to be limited so that the government served the people, not that the people served the government.

Should we choose to undercut any of these rights which were reserved to the people, we start down a path that will lead to the tyranny of colonial England where our rights and freedoms are infringed upon.

The well reasoned Court of Appeals decision in *Parker v. District of Columbia*, 478 F.3d 370, 381-382 (D.C. Cir. 2007) focuses on the meaning of "the people" but an equally relevant point to be considered in the instant case is the intent of our founders to ensure that we, the people, are secure in our own homes. The right to keep and bear arms is but one example of this. The Third Amendment states that "[n]o soldier shall, in the time of peace be quartered in any house, without the consent of the owner." U.S. Const. amend. III. Moreover, the Fourth Amendment provides for "[t]he right of the people to be secure in their persons, [and] houses...against unreasonable searches and seizures." U.S. Const. amend IV.

The Bill of Rights as contained within the United States Constitution laid out individual rights. These rights recognize our right to control our homes and the governmental activity that occurs there in. The law at issue in this case is an egregious infringement upon those rights. Law abiding citizens are restricted from moving their own belongings within their own homes and are controlled in the manner in which they keep their personal belongings in their homes. The District of Columbia has clearly overstepped its authority by trampling on the rights that we have held inviolate since our nation's inception.

ARGUMENT

I. THE SECOND AMENDMENT IS AN INDIVIDUAL RIGHT

A. Only "People" Have Rights, Government Has Authority

The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Court held that the "Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons..." *Id.* at 264. The analysis was thorough and steeped in the historical logic and tradition that makes this country great.

The Court outlines the three most popular interpretive models of the Second Amendment: collective right, a hybrid of individual and collective rights and an individual right. *Id.* 218-220. Admittedly, the Court states that none of their "sister circuits" adhere to the individual right model as they do. The individual right model recognizes that the Second Amendment directs the right to keep and bear arms to the individual.

There is no special meaning attached to the word "people" according to the individual right model. *Emerson* at 227. The Court determines that there is no evidence to support that this word in the Second Amendment has a different connotation than it does elsewhere in the Constitution. When taken as a whole, the text of the Constitution highly proposes that "the people" has the exact same meaning in the Second Amendment as the other places in the Constitution. All through the Constitution in fact, "people" have "rights" and also "powers" while state and federal governments have "authority" or "powers" but never "rights." *Id.* at 228. Therefore, rights are reserved for individuals.

The phrase "bear arms" has been used in conjunction with civilians on numerous occasions, which include the declarations of rights and initial constitutional provisions of a minimum of ten states. This illustrates that the common usage of these words were not exclusive to bearing arms during military service; they could refer either to civilian or military situations. *Id*. at 229-231.

To "keep...arms" continues the Court, is an individual right reflecting the plain meaning of those words. *Id*. at 232.

The Court deems that the Second Amendment's preamble: "A well regulated Militia, being necessary to the security of a free State..." is clearly an individual right since it would be inconsistent with the "substantive guarantee's text, its placement within the Bill of Rights and the wording of the other articles thereof and of the original Constitution as a whole" to consider this phrase under any other model. *Id*. at 233.

From the unambiguous logic and analysis of the Court, there can be no uncertainty that the right conveyed by the Second Amendment is an individual one.

B. The Second Amendment as a Collective Right Results in the Loss of an Amendment in the Bill of Rights

Justice Kleinfeld's analysis of the Second Amendment as an individual right in *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) (dissenting from denial of rehearing en banc) is unequivocal and influential. He states that the panel's collective right interpretation is "an odd deviation from the individualist philosophy of our Founders." *Id.* at 571. The opinion of the panel does not address whom the states would sue or even what a claim could be should they try to enforce their collective right. *Id.* He stresses that the 9th Circuit has in effect, repealed the Second Amendment "without the democratic protection of the amendment process, which Article V requires." *Id.* at 571. This results in the loss of one of the amendments in the Bill of Rights and threatens the remainder of the Constitution for all those who live within the Circuit's jurisdiction. *Id.* at 571, 572.

The panel's collective interpretation of "the people" in the Second Amendment has no "logical boundary" and thus threatens all rights guaranteed to "the people" in the Constitution. *Id.* at 572. The collective right applied to "the people" by the panel is inconsistent with the Supreme Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). There, the Court stated that "the people" was a term of art that is used in the Constitution's Preamble, Article I § 2, the First, Second, Fourth, Ninth, and Tenth Amendments and had the same meaning every place it is used. *Silveira* at 576. It is unimaginable that the panel would similarly repeal the First Amendment's right of "the people" to the freedom of assembly, or the Fourth Amendment's protection of "the people's" right to be secure against an unreasonable search and seizure. *Id.* Accordingly, if logic dictates, there can be no other conclusion than to read the phrase "the people" consistently throughout *all* of the amendments in which it appears with the full understanding that these rights are possessed by the individual.

II. A MAN'S HOME IS HIS CASTLE

This notion transcends the actual physical invasion into one's private home by the government. The District of Columbia's gun control laws infringe on the liberties of law abiding citizens only, those who desire to be safe in their home and be able to defend themselves and their family against an intruder. These citizens are not criminals attempting to conceal contraband. The Fourth Amendment sets forth the boundaries of the government while allowing law enforcement to conduct their business of properly apprehending criminals and their contraband from a private home. It states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. amendment IV. The Founders were all too aware that government will invade into all areas of the individual's life unless it is given firm, unyielding limitations. We, as citizens of the United States, must at some point stop the slow and ultimately painful loss of our freedoms. There is a long history of landmark Fourth Amendment cases decided on by this Court. Government needs to be kept in check constantly because of its propensity to ooze into our private lives.

In more recent history, the Court settled the issue that a Fourth Amendment search actually occurs when the government violates society's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 361 (1967). The importance of the home, the sanctity of a residence, whether one owns the property, rents or is a mere overnight guest is illustrated repeatedly in the Fourth Amendment cases the Supreme Court hears.

A. Governmental Presence, Whether Tangible or Intangible, Has No Place In Our Homes

In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court stated at the crux of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.* (quoting

Silverman v. United States, 365 U. S. 505, 511 (1961)). Fourth Amendment protections come into play when the government violates a person's expectation of privacy that society deems reasonable *Id.* at 33. When we return to our home, we shelter ourselves from the outside world and expect to be safe, to know our government must respect our privacy there and that we will be free from governmental infringement.

Illustrating again the inviolability of one's home, the Court states that governmental intrusion into the interior of a home is the "most commonly litigated area of protected privacy" and the measure of the minimal expectation of privacy that is acknowledged to be reasonable has deep roots from the common law. *Id.* at 34. If that minimal protection is extracted from our expectation, then our protected privacy the Fourth Amendment assures would be eroded. The interior of a home is a constitutionally protected area. *Id.*

The government claimed the thermal scan of the home in *Kyllo* did not detect any private actions happening in private places. The Court stated, "In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." *Id.* at 37. This should hold true for an intangible government presence in our homes as well, such as the government dictating to us, as law abiding citizens, what we can keep in our homes. The Fourth Amendment delineates “a firm line at the entrance to the house.” *Id.* at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

Understandably, there is a balance that needs to be struck between an individual’s rights and privacy with protecting public concerns. The Court writes, “”The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”” *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

B. English Origins of the Fourth Amendment and the Sanctity of One’s Home

In the Fourth Amendment case of *Wilson v. Layne,* 526 U.S. 603 (1999), the Court discusses the often quoted origins of our Fourth Amendment by noting that an English court in 1604 observed that “the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.” *Id.* at 609-610 (quoting Semayne’s Case, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.)). This illustrates that for centuries, the home has been revered, deemed exceptional and needing protection against government infringement. Additionally, William Blackstone stated in his Commentaries on the Laws of England, that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome." *Id.* at 610 (quoting William Blackstone, 4 Commentaries on the Laws of England 223 (1765-1769)). He also wrote that he thought it was the right of every Englishman to have "arms for their defence" and that right stemmed from one's "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Silveira v.Lockyer,* 328 F.3d 567, 576 (quoting 1 William Blackstone, Commentaries on the Laws of England 139 (Legal Classics Library 1983) (1765)). The arms were not only for self defense but for the resistance to tyranny as well. *Id.* at 576. Accordingly, respondent Heller desires to avail himself of the right to defend himself in his home. The Founders exemplified this "centuries-old principle of respect for the privacy of the home" when penning the Fourth Amendment. *Wilson* at 610. Additionally, the *Wilson* Court reminds us that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). Continuing on, the Court points out the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic..." *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 602 (1980)). The government's claims of the *Wilson* case ignore the importance of the "right of residential privacy at the core of the Fourth Amendment." *Wilson* at 612.

We must be cognizant of the fact that the government can invade a home in other ways rather than physical entry. Step by step they erode the sanctity. We as a country must operate in concert to be ever vigilant in protecting our homes from government encroachment whether as individuals, community or through the judiciary. We must also remember our roots, the origins of our protections we possess as documented in our Constitution.

CONCLUSION

For the reasons set forth above, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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CURIAE
BRIEF

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IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA and ADRIAN M. FENTY,
Mayor of the District of Columbia,
Petitioners,
v.
DICK ANTHONY HELLER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF RETIRED MILITARY OFFICERS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE [1]

Amici are retired military officers of the Army, Navy, Air Force, Marine Corps, and National Guard that have served at the highest levels of military command.[2] Based on these experiences, *Amici* are uniquely able to address the direct impact this case will have on our military. Indeed, this Court has in the past recognized the value of the military's perspective in constitutional cases. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003). Given that Petitioners' collectivist view of the Second Amendment would undermine both military preparedness and national defense, *Amici* have a strong interest in this case.

In particular, banning personal firearm possession eliminates an important deterrent to those who might attack the homeland. This country profits from our enemies' recognition that an attack on the United States would be met with force by not only our armed forces, but also by a body politic fully capable of defending itself from foreign aggression. Moreover, private ownership of firearms makes for a more effective fighting force. Military recruits with previous firearms experience and training are generally better marksmen, and accordingly, better soldiers. In short, experience has taught that individual ownership of firearms is an indispensable element of national security. *Amici* therefore submit this brief in support of Respondent and urge affirmance of the decision below.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The amicus has given the parties at least seven days notice of its intention to file this brief.

[2] A complete list of the *amici* retired military officers is provided as an appendix to this brief. *Amici* include 19 retired officers ranked Brigadier General/Rear Admiral (lower half) or higher, one retired Sergeant Major of the Army (the senior enlisted member of the United States Army and senior enlisted advisor to the Chief of Staff of the Army) and one former member of Congress.

INTRODUCTION

Text, structure, and history lead to the inexorable conclusion that the Second Amendment guarantees to "the People" an individual right to own and possess firearms. The Second Amendment would be irreconcilable with the remainder of the Bill of Rights if it, as Petitioners starkly assert, merely delegated to the several States an unfettered right to regulate the right "to keep and bear Arms." Indeed, under the "states' rights" interpretation offered by the District of Columbia ("the District"), labeling the Second Amendment a "right" would be quite misleading. Governments have powers; the People have rights. Moreover, classifying the Second Amendment as a state power, and thereby vesting supreme authority over gun ownership in government, is incompatible with the history surrounding its enactment.

The Second Amendment, like many other provisions of the Constitution, was born of compromise and necessity. The founding generation had become acutely aware of the shortcomings of the Articles of Confederation. In particular, the Articles established a woefully deficient system of national defense under which the States had a primary role. The Constitutional

Convention, perhaps above any other single reason, was convened to redress this problem. At the same time, however, the Framers' experience with the British made them all too familiar with the dangers that large standing armies posed to individual liberty. Thus, while there was broad agreement that a stronger federal military was needed, any call for a large and permanent national armed force would be met with resistance.

The Second Amendment, which enshrined the preexisting right to personal firearm ownership in the Constitution, offered a solution agreeable to all concerned. For those (primarily Anti-Federalists) concerned with the threat posed by a large national army to domestic tranquility, guaranteeing the right to "keep and bear arms" in the Constitution ensured that the People could act as a direct check against any tyrannical impulses this national army might harbor. As both James Madison and Alexander Hamilton explained in the Federalist Papers, the national army, no matter how fierce, could never overtake a body politic armed and trained to defend its liberty. Through the Second Amendment, and contrary to the path chosen by almost every other nation throughout history, the Framers made clear that the ultimate responsibility to defend the nation from internal assault rested with each American citizen.

For those concerned that a smaller national army would be insufficient to meet the growing security needs of the country, the Second Amendment ensured a reservoir of trained marksmen capable of contributing to the national defense if circumstances required. Whether organized formally or informally, the militia depended on a citizenry in possession of, and familiar with, firearms. The Federal government's authority to call the "militia" to national service would be meaningless if those answering the call were of limited or no use on the battlefield. That is, a national defense apparatus that depends on the grace of the several States resembles the ineffective system employed under the Articles of Confederation and intentionally abandoned in the Constitution. Accordingly, Petitioners' conception of the Second Amendment simply cannot be squared with its evident purpose.

Moreover, the purpose underlying the enactment of the Second Amendment has been realized. As time and experience has proven, a citizenry with access to—and experience with—firearms is an invaluable aspect of national security. Foremost, individual firearm ownership creates a pool of talented recruits. Our nation's military leaders have consistently noted that recruits entering the military with firearms experience in civilian life generally become better marksmen, and thus better soldiers. Empirical analysis has confirmed these insights. A study conducted by Arthur D. Little, Inc. reached the same conclusion: the military achieves significant benefits from its ability to recruit from a pool of citizens experienced with firearms. Outright bans on gun ownership, such as the law under review here, are thus detrimental to national security.

The obvious benefits of a citizenry trained in the use of firearms has not been lost on Congress. Indeed, Congress has consistently promoted individual firearms expertise through its Civilian Marksmanship Program. Through this program, which dates back to 1903, Congress has funded firearms training, sponsored national marksmanship competitions, and authorized the distribution and sale of surplus military weapons to these programs. The Civilian Marksmanship Program necessarily assumes the existence of an individual right to keep firearms. Were gun possession subject to unchecked State control, Congress surely would have allocated the funds to the States instead of providing direct funding. Congress' longstanding support for individual firearms training confirms its rejection of the "states' rights" view of the Second Amendment advocated by the District.

That this case involves a ban on handguns, and not military rifles, is not meaningful. The military regularly issues handguns to service members. Indeed, roughly three million service pistols were produced for the U.S. military over the last century. The wide distribution of handguns in the military makes sense; pistols are routinely carried and used in military operations. In any event, many skills involved in shooting, safely handling, and cleaning firearms are fairly universal and thus may be applied to other firearms beyond handguns. Moreover, in urban areas such as the District, smaller shooting ranges and storage areas make the handgun a far more suitable weapon for training purposes. In a case such as this, banning handguns is tantamount to banning any meaningful gun possession and ownership whatsoever.

Finally, individual gun ownership has a direct national security benefit: it deters foreign aggressors from attacking the United States. Those otherwise disposed to attack this country realize that for such an invasion to succeed, they must not only defeat our first-rate military, but they must also defeat a people armed, trained, and prepared to defend its sovereignty. From the American Revolution, to the War of 1812, to the Hawaiian Islands on December 7, 1941, Americans have proven quite capable of contributing to the armed defense of this Nation without the command or blessing of the several States. In addition, Switzerland, perhaps the least bellicose Western nation, has earned its reputation through a national commitment to individual firearm ownership and marksmanship. Swiss citizens are almost universally armed and are expected to defend the country should it be attacked. The commitment of the Swiss to individual firearm ownership exemplifies the idea of peace through strength.

In the end, both the purpose and effect of the Second Amendment intersect with basic principles of national defense. The Framers understood that individual gun ownership provided a final line of defense against attacks on liberty—whether the threat is internal or foreign. Our national experience with gun ownership has validated this belief. Individual gun ownership provides a pool of talented military recruits and thus produces a more skilled fighting force. Moreover, those skilled in the use of firearms, but not serving in the military, deter attacks from abroad. There simply can be no question that the Second Amendment is an indispensable aspect of national defense, and in turn, individual liberty. For these reasons, *Amici* support Respondent and urge affirmance of the decision below.

ARGUMENT

I. The District's "States' Rights" View Of The Second Amendment Is Inconsistent With Its Place In The Constitutional Plan.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. The District argues that the "text and history of the Second Amendment" prove that it "protects the possession and use of guns only in the service of an organized militia." Brief for Petitioners at 8, District of Columbia v. Heller, No. 07-290 (Jan. 4, 2008) ("Pet. Br."). In their view, the Second Amendment "was enacted to *protect* states' prerogatives; not constrain them." *Id.* at 36. Petitioner's "states' rights" conception of the Second Amendment is flatly incompatible with the text and structure of the Constitution. *See* Brief for Respondent at 5-10, District of Columbia v. Heller, No. 07-290 (Feb. 4, 2008) ("Resp. Br."). Even if the Second Amendment has an entirely military focus, however, Petitioners' argument that the individual right to "keep and bear Arms" extends only to service in a state-run militia is untrue to history and unfaithful to the Second Amendment's place in our constitutional order. *See id.* at 19-40.

"The primary shortcoming of the Articles of Confederation was that the central government it provided for was too weak." *United States v. Emerson*, 270 F.3d 203, 236 (5th Cir. 2001). The establishment of a cohesive national military, therefore, was a central objective of the constitutional convention. *See* Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 961, 980-82 (1975) (noting that Shays' Rebellion in 1786 awakened many to the need for a stronger central military and that Madison pointed to it as one of the "ripening incidents" that led to the constitutional convention) (citation omitted); Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 Miss. L.J. 135, 154 (2006) ("[T]he Articles of Confederation was too weak to enable the country to overcome security threats posed by both internal and external forces. . . . When the Federal Constitutional Convention opened in the late spring of 1787, the ability of the nation to defend itself had the full attention of the convention delegates.")

At the same time, "although a stronger central government was needed, the central government was to remain one of limited and enumerated powers only, lest the cure be worse than the disease." *Emerson*, 270 F.3d at 236. There was genuine concern that a standing federal army represented a threat to individual liberty. *See, e.g.*, *United States v. Miller*, 307 U.S. 174, 178-79 (1939) ("The sentiment of the time strongly disfavored standing armies."). As a contemporary publication rhetorically asked: "What then will there be to oppose to their encroachments? Should they ever pretend to tyrannize over the people, their *standing army* will silence every popular effort. . . .” *A Democratic Federalist*, Pennsylvania Herald, Oct. 17, 1787, *reprinted in* David E. Young, *The Origin of the Second Amendment* 46 (2d ed. 1995)). The prospect of a standing federal army, therefore, presented a difficult problem. Imposing too many institutional constraints on its formation and structure would mean the continuation of the failed national defense plan associated with the Articles of Confederation; however, there was no assurance that a standing army, once formed, would remain immune from tyrannical impulses. The problem was resolved in large measure by securing the pre-existing individual right “to keep and bear Arms” in the new Constitution.

First, through the Second Amendment, the Framers ensured that the People could act as a direct check on any threat to domestic tranquility that a standing national army might represent; a federal army would be powerless against the People trained to arms. The size of such an army would not “exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms,” or approximately “twenty-five or thirty thousand men.” The Federalist No. 46 (James Madison). By comparison, Madison wrote, rising in opposition to a national army turned against the People “would be . . . a militia amounting to near half a million of citizens with arms in their hands.”[3] *Id.*

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[3] At the time of the framing, it was universally understood that the “militia” encompassed all males physically capable of bearing arms. *See Miller*, 307 U.S. at 179 (“[T]he Militia comprised all males physically capable of acting in concert for the common defense.”); The Federalist No. 29 (Alexander Hamilton) (explaining that the militia are “men who are daily

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This check on the potential abuse of power associated with large standing armies thus assuaged much of the concern expressed by Anti-Federalists. *See* Resp. Br. at 15, 36-37. As James Madison explained, "[i]t may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops." The Federalist No. 46 (James Madison). Americans were less susceptible to tyranny by a strong central government because, unlike "the people of almost every other nation," they have "the advantage of being armed." *Id.* A national army could "never be formidable to the liberties of the people while there is a large body of citizens . . . who stand ready to defend their own rights and those of their fellow-citizens." The Federalist No. 29 (Alexander Hamilton). This is only true, however, if the "right" belongs to the individual; vesting the right to "keep and bear Arms" in the several States would allow the states to disarm the people completely, should they so choose, and would thereby render the check on tyranny illusory.

Second, an armed body politic could provide a reservoir of troops capable of defending the Nation in times of emergency, limiting the need for a large standing army. *See* George Mason, Remarks at the Virginia Convention Debates (June 14, 1788), *reprinted in* 3 *Elliot's Debates* 378 (1836) ("If insurrections should

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mingling with the rest of their countrymen"). Thus, in contrast to Petitioners' contention that the militia was seen as a kind of specialized fighting force, the militia was in fact the way that the people organized themselves into a more organized and effective fighting force. *See* Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 23 (1996).

arise, or invasions should take place, the people ought unquestionably to be employed."); *Miller*, 307 U.S. at 179 ("[T]he common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion."). As Professor Laurence Tribe has explained, "the core meaning of the Second Amendment is a populist/republican/federalism one: Its central object is to arm 'We the People' so that ordinary citizens can participate in the collective defense of their community and their state." 1 Laurence Tribe, *American Constitutional Law* 902 n.221 (3d ed. 2000); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 Mich. L. Rev. 1333, 1355 (1995) ("[O]ne of the reasons Congress guaranteed the right of the people to keep and bear arms was so that a popular militia could be drawn from the body of the people.").

The Militia Clause, U.S. Const. art. I, § 8 cl. 15, which allowed the federal government to call on the People to defend the nation in times of need, thus reduced the demand for a massive federal army:

> If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary, will be a more certain method of preventing its existence than a thousand prohibitions upon paper.

The Federalist 29 (Alexander Hamilton); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context:*

The Case of the Vanishing Predicate, 76 Chi.-Kent L. Rev. 403, 512 (2000) ("In the years 1789-91, the operational role of the militia reflected the military dualism of the founders, who envisioned both a smallish standing army and a serviceably effective militia, each held in check by the federal structure."); *Emerson*, 270 F.3d at 240 ("[F]ederal militia powers obviated the need for, or [at least] minimized the likelihood of, a large standing army being kept in existence.").

The role of the People in defense of liberty, whether threatened domestically or from abroad, thus necessarily depended on citizens having ready access to arms. *See* The Federalist No. 29 (Alexander Hamilton) ("Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped. . . ."). Indeed, an individual right to keep arms "assure[s] the continuation and render[s] possible the effectiveness of the militia." *Miller*, 370 U.S. at 178. And, by guaranteeing this right, citizens would have the skill needed to usefully bear them in defense of the Nation should the need arise. *See, e.g., Emerson*, 270 F.3d at 235 ("The militia consisted of the people bearing their own arms when called to active service, arms which they kept and hence knew how to use."); *Silveira v. Lockyer*, 328 F.3d 567, 587 (9th Cir. 2003) ("An effective militia requires not only that people have guns, but that they be able to shoot them with more danger to their adversaries than themselves.").

Thus, as the court below explained, "[a] ban on the use and ownership of weapons for private purposes, if allowed, would undoubtedly have had a deleterious, if not catastrophic, effect on the readiness of the militia for action." *Parker v. District of Columbia*, 478 F.3d 370, 394 (D.C. Cir. 2007). Petitioners' conception of the Second Amendment, however, places the existence of the militia within the unfettered discretion of the States. It is inconceivable that the Framers enacted an amendment to the Constitution that once again gave the States a dominant role in national defense. As Alexander Hamilton wrote, the States cannot have the ultimate say in how the federal government utilizes the militia as part of its national security responsibilities: "If a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security." The Federalist No. 29 (Alexander Hamilton).

In sum, Petitioners' contention that the Second Amendment is a grant of unconditional authority to the States to disarm the People is inconsistent with the bargain struck in the Constitution. By guaranteeing the right "to keep and bear Arms" in the Constitution, the Framers provided a check against the potential abuses a standing army might otherwise commit. Moreover, individual firearm ownership provided a second line of defense against foreign attack, thus allowing the formation of a smaller national army. A view of the Second Amendment that renders these important purposes subject to a State veto is not only historically inaccurate, but as Respondent has explained, irreconcilable with the text and structure of the Constitution. The court below correctly ruled that "the Second Amendment protects an individual right to keep and bear arms." *Parker*, 478 F.3d at 395.

II. The Right To Individual Ownership Of Firearms Protected By The Second Amendment Is Essential To National Defense.

The United States military benefits substantially from the ability to recruit from a pool of civilians that are already experienced in the use of firearms. In addition, having a ready force of armed civilians able to defend the nation from foreign invasion is a key component of national security. As such, failure to preserve the individual right to bear arms protected by the Second Amendment will undermine the national security of the United States.

A. The United States Military Benefits From the Ability to Recruit From a Pool of Civilians Experienced in the Use of Firearms.

1. *Military Recruits With Firearms Training and Experience Make Better Soldiers.*

Military recruits with training and experience with firearms in civilian life generally make better marksmen—and therefore better service members—than those who have not had such experience. As Secretary of War Elihu Root once explained:

> 'I know of nothing more important in the way of preparation for war than teaching the young men of the country to shoot straight. . . . It is of no use to pay, equip, subsist, and transport a soldier to the battlefield unless he can hit an enemy when he shoots at him.'

Secretary Root's Farewell Report, N.Y. Times, Dec. 7, 1903, at 5. "As a nation we must depend upon our volunteer soldiers in time of trial. . . . Of course, a soldier who cannot shoot is a soldier who counts for very little in battle, and all credit is due to those who keep up the standard of marksmanship." Letter from Theodore Roosevelt, President of the United States, to Priv. Howard Gensch, New Jersey Nat'l Guard (Sept. 25, 1904), *excerpted in* Jeffrey L. Rodengen, *NRA: An American Legend* 43 (2002).

The Nation's political and military leaders thus placed a heavy emphasis on civilian marksmanship during World War II. President Franklin D. Roosevelt called "promotion, among the citizens of this Nation, of rifle marksmanship . . . an essential contribution to the national defense." Letter from Franklin D. Roosevelt, President of the United States, to Major General M. A. Reckord, Executive Vice President, Nat'l Rifle Ass'n (Feb. 1, 1938) (reprinted in Appendix at 3a). Then-General Dwight D. Eisenhower similarly observed that "[a]ny young man that has ahead of him prospective service in the armed forces will do well to learn all he can about the American military rifle. . . . Expertness in its use cannot be over emphasized." Letter from Gen. Dwight D. Eisenhower, Commander-in-Chief, Allied Force Headquarters, to Dr. M. J. Damlos, Cleveland Civilian Marksman's Ass'n (Aug. 16, 1943) (5a).

During World War II, the National Rifle Association, in conjunction with the Army's National Board for the Promotion of Rifle Practice ("NBPRP"), organized civilian shooting clubs and civilian instructors in a nationwide pre-induction rifle training program. The Director of the Selective Service System praised this program for "giv[ing] an opportunity to thousands of

American men to learn the basic principles of straight shooting prior to entering military service. . . . The place of marksmanship in the training of any solder of the fight for victory cannot be underestimated." Letter from Lewis G. Hershey, Dir., Selective Serv. Sys., to the Nat'l Rifle Ass'n (Feb. 1, 1943) (7a). Similarly, the Chairman of the War Manpower Commission noted that "our men must be trained to make the best use of the superior weapons with which they are armed," and said that the National Rifle Association's program "means more straight shooting and makes for victory." Letter from Paul V. McNutt, Chairman, War Manpower Comm'n, to the Nat'l Rifle Ass'n (Feb. 3, 1943) (8a).[4]

Empirical data confirms these insights. The Department of the Army commissioned the consulting firm of Arthur D. Little, Inc. to evaluate the effectiveness of its civilian marksmanship program, the NBPRP, administered by the Director of Civilian Marksmanship ("DCM"). *See* Arthur D. Little, Inc., *A Study of the Activities and Missions of the National Board for the Promotion of Rifle Practice* (1966), *reprinted in* James

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[4] President Harry S. Truman later added that "[t]he tradition of a citizen soldiery is firmly, and properly, imbedded in our national ideals." Letter from Harry S. Truman, President of the United States, to C. B. Lister, Sec'y-Treasurer, Nat'l Rifle Ass'n (Nov. 14, 1945) (9a). President John F. Kennedy, himself a World War II veteran, likewise attested to the importance of civilian marksmanship: "Through competitive matches and sports in coordination with the [NBPRP], the [National Rifle] Association fills an important role in our national defense effort, and fosters in an active and meaningful fashion the spirit of the Minutemen." Letter from John F. Kennedy, President of the United States, to Franklin L. Orth, Executive Vice President, Nat'l Rifle Ass'n (Mar. 20, 1961) (11a).

B. Whisker, *The Citizen Soldier and United States Military Policy* (1979) ("Arthur D. Little Report"). The Arthur D. Little Report analyzed data from over 12,880 Army trainees at four Army Training Centers, and found that trainees who had previous experience with firearms in civilian life are generally better marksmen, are more likely to use their weapon effectively in combat, and are less likely to be wounded or killed in combat. *See id.* at 47, 58, 64.

The report also found that trainees with previous firearms experience were more likely to enlist in the armed forces, more likely to prefer a combat unit, more likely to choose units where they were likely to use a rifle (such as infantry and airborne units), more likely to seek to become marksmanship instructors, and more confident of their ability to use their rifle effectively in combat. *Id.* at 58. While only 15.4% of trainees overall achieved "Expert" marksmanship scores (the highest possible category), 68.6% of trainees who were members of a DCM-affiliated civilian shooting club achieved an "Expert" score. *Id.* The report therefore concluded that, "[t]he marksmanship instruction, supervised practice, safety training, and competitions . . . sponsored and supported by clubs, the NRA, and the DCM are of *particular value to the military.*" *Id.* at 82 (emphasis added).

More recently, a RAND Corporation report found that service members with previous experience or training in a variety of military-oriented tasks generally perform better than novices. Jennifer Kavanagh, RAND National Defense Research Institute, *Determinants of Productivity for Military Personnel: A Review of Findings on the Contribution of Experience, Training,* *and Aptitude to Military Performance* (2005). Regarding the importance of experience in performing tasks, the report found that "there are relatively substantial returns to experience in the form of more effective performance on a wide range of tasks, heightened accuracy, and increased productivity." *Id.* at 4. The report found similar benefits from training: "additional training can improve proficiency, reduce performance error, and lead to a higher technical skill level among personnel." *Id.* at x.

Importantly, the report found that brief training periods—such as basic training—are not as effective at boosting performance as lifelong training: "Many studies suggest that it is the accumulation of training over a lifetime that has the largest effect on individual performance, rather than simply training in the previous six months." *Id.* The implication for marksmanship training is clear: service members who have lifelong experience and training in handling firearms are likely to perform better in marksmanship and other firearms skills than those who only receive firearms instruction upon entering military service.

In sum, because of the distinct advantages of recruiting from a pool of civilians with firearms experience, the United States military can field a more potent and effective fighting force to defend our Nation. The Arthur D. Little Report found that "the more marksmanship instruction trainees received prior to service, the higher their record scores," and concluded that "[s]hooting experience, and particularly marksmanship instruction, with military-type small arms prior to entry into military service contributes significantly to the training of the individual soldier." Arthur D. Little Report, *supra*, at 59, 82. Moreover, "the more marksmanship instruction, practice, competition and shooting experience individuals get before entering service, and the greater the density of such prior experience in the population of young men entering service, the more effective rifle units will be in combat and the fewer casualties they will suffer." *Id.* at 64.[5] Put simply, the individual right to keep arms increases our military's chances for battlefield success and, accordingly, its ability to protect the nation.

2. *The United States Government Has a Long History of Promoting Civilian Firearms Ownership and Training.*

Training military personnel to use firearms "is an extensive, resource-intensive activity, using considerable manpower, equipment, consumables, facilities and installations." John D. Winkler & Paul S. Steinberg, RAND Corp., *Restructuring Military Education and Training: Lessons from RAND Research* 1 (1997). Moreover, in a crisis situation, the military may need to rapidly muster a large force with little time for formal training:

> The problem is that the Army can by no means guarantee that sufficient in-service training

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[5] The report also noted that even trainees with no previous firearms experience assigned to units with a high number of experienced shooters tended to have higher marksmanship qualification scores. *Id.* at 63. The report explained that this was likely either because marksmanship instructors did not need to spend as much time with experienced shooters, or that the experienced shooters shared their knowledge and provided additional coaching to inexperienced shooters. *Id.*

> time will be available in a future contingency. There could easily be a time when trained men might be required almost immediately. A future world war could not be expected to allow the luxury of time granted in the two previous world wars. A future police action might require troops immediately as well. It is against such possibilities that a trained reservoir of manpower is maintained.

James B. Whisker, *The Citizen Soldier and United States Military Policy* 39-40 (1979) (citations omitted).

To address these concerns, the United States government has had a long-standing national policy of promoting civilian marksmanship and civilian firearms ownership. The Civilian Marksmanship Program dates to 1903, when the War Department Appropriations Act created the National Board for the Promotion of Rifle Practice (NBPRP) and the National Matches, an annual shooting competition. *See* Civilian Marksmanship Program, *2007 Annual Report* 2 (2007), *available at* http://www.odcmp.com/annual_report.pdf (last visited Feb. 9, 2008) ("2007 Annual Report"). Its purpose was "to provide civilians an opportunity to learn and practice marksmanship skills so they would be skilled marksmen if later called on to serve the U.S. military." About the CMP, Civilian Marksmanship Program, http://www.odcmp.com/about_us.htm (last visited Feb. 9, 2008) ("About the CMP").

At its first meeting on April 21, 1903, the NBPRP recommended:

> that every facility should be offered citizens outside of the Army, Navy, Marine Corps, and organized militia to become proficient in rifle shooting, and that this purpose can best be accomplished by means of rifle clubs. The board therefore respectfully recommends the encouragement by the War Department of the organization of rifle clubs composed of those who would be eligible for service in time of war, but without special obligation for war service on account of membership. . . .

Rodengen, *supra*, at 41. The NBPRP also adopted a resolution in 1904 that created a National Marksmen's Reserve competition for members of civilian shooting clubs. High scoring shooters in the competition were recorded as members of the nation's "second line of defense" by the War Department. *Id.* at 43. "In the event of a national emergency, members of the Marksmen's Reserve were promised 'first consideration' after volunteering for active duty." *Id.* Commenting on the NBPRP's purpose and early activities, Acting Secretary of War General Robert Shaw Oliver said:

> Our permanent military establishment or regular army must be small, . . . and in the event of a war with one or more of the first-class powers of the world we must depend largely upon the militia and the volunteers for our fighting force. With the modern long-range small arm it is all-important that the

> soldier should know how to shoot, and to hit what he shoots at.

Plans a Great Army of Expert Marksmen, N.Y. Times, Oct. 17, 1904, at 9.

The NBPRP also promoted civilian ownership of military firearms. In 1905, at the request of the NBPRP, Congress passed Public Law 149, which authorized the sale, at cost, of surplus military rifles and ammunition to civilian shooting clubs approved by the NBPRP. *See* Rodengen, *supra*, at 43. In 1910, Congress authorized the War Department to issue free surplus rifles and ammunition to shooting clubs, under the direction of the NBPRP. *See id.* at 53-54; *see also infra* note 6 and accompanying text.

The national commitment to civilian marksmanship was to some, however, still insufficient. As World War I raged in Europe, and U.S. entry seemed imminent, American Civil War veteran General George W. Wingate penned an editorial in the *New York Times* entitled "Teach Our Boys How to Shoot," which pointed to "the utter failure of the hastily collected and untrained 'emergency men' of Pennsylvania to offer any resistance worthy of the name to the invasion of that State by Lee's Veterans in 1863" as well as "the lamentable lack of skill in the use of the rifle shown by the British volunteers, and the great superiority of the Boers in battle resulting from their splendid marksmanship." Gen. George W. Wingate, *Teach Our Boys How to Shoot*, N.Y. Times, Jan. 31, 1915, at SM21. General Wingate proclaimed the necessity of civilian marksmanship to a useful military reserve for the U.S. military and called for a national rifle club movement: "It is a sport practiced as a sport, but it has a national value that other sports do not have, in that it will fit those who practice it to be efficient soldiers if their country needs them to be soldiers." *Id.* He also noted that the New York City Public Schools Athletic League trained 5,000 boys a year with .22 caliber rifles, and produced 400 boy sharpshooters whose shooting with a service rifle was equal or superior to National Guardsmen despite never having used a service rifle before competition. *Id.*

The National Defense Act of 1916 solidified the national policy of promoting civilian marksmanship and gun ownership. *See* Rodengen, *supra*, at 64-65. The Act dedicated $300,000 to promoting civilian marksmanship training. *Id.* It also directed that all military rifle ranges "shall be open for use by . . . all able-bodied males capable of bearing arms," and authorized the President to detail military firearms instructors to shooting ranges "for the purpose of training the citizenry in the use of the military arm." National Defense Act of 1916 § 113, 39 Stat. 166, 211 (1917). The Act continued the distribution of surplus military rifles to civilians, authorizing the Secretary of War "to provide for the issue of a reasonable number of standard military rifles and such quantities of ammunition as may be available for use in conducting such rifle practice."[6] *Id.*

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[6] The distribution of surplus firearms and ammunition to civilians and civilian shooting clubs for free, on loan, or at substantial discounts continued for over fifty years. *See* Jack Raymond, *Closer Check is Planned on Members of Rifle Clubs Obtaining U.S. Arms*, N.Y. Times, June 7, 1964, at 41. From 1960 to 1964, the Army sold 539,267 rifles and other firearms to civilians at discount, and spent another $12 million distributing free weapons and ammunition,

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Finally, the Act created the office of the Director of Civilian Marksmanship ("DCM") as the implementing agency for the NBPRP, and part of the U.S. Army. Rodengen, *supra*, at 64-65. The Civilian Marksmanship Program, as it later became known, was run under the U.S. Army's DCM supervision from 1916 to 1996. About the CMP, *supra*. The Civilian Marksmanship Program continues to the present day, having been privatized in 1996 and entrusted to the congressionally created Corporation for the Promotion of Rifle Practice and Firearm Safety, which is directed "to instruct citizens of the United States in marksmanship . . . to promote practice and safety in the use of firearms . . . to conduct competitions in the use of firearms . . . to issue, loan, or sell firearms, ammunition, repair parts, and other supplies." 36 U.S.C. § 40722. The Civilian Marksmanship Program operates with the cooperation and support of the U.S. Army, which supplies surplus .22 and .30 caliber rifles. 2007 Annual Report at 1-2.

Congress' commitment to civilian marksmanship training further undermines the District's "states' rights" conception of the Second Amendment.[7] Indeed,

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including 246.9 million rounds of free ammunition. *See Army Gives Figures on Civilian Weapons*, N.Y. Times, Aug. 16, 1964, at 46. In the late 1960s, the program was scaled back "to those clubs most of whose members still have their service obligation ahead of them and whose marksmanship training would be of greatest value to the military services." *Army Cuts Help to Gun Programs of Civilian Clubs*, N.Y. Times, June 22, 1968, at 1.

[7] *Amici* recognize that a separate group of retired military officers has offered its views to the Court regarding the value of

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the entire program is premised on the assumption that fostering private ownership and experience with firearms contributes to national defense. Had Congress agreed with the position taken here by the District, promotion and direct financing of individual firearms training would make little sense. Congress simply could have allocated funds to the States—as it does in a myriad of other areas, such as education, where the state and local government have primary authority. The Civilian Marksmanship Program is powerful evidence of Congress' longstanding commitment to an individual-rights view of the Second Amendment.

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an individual right to keep and bear arms to military service, as well as other issues. *See* Brief of Maj. Gen. John D. Altenburg, Jr., et al., District of Columbia v. Heller, No. 07-290 (Feb. 7, 2008). While *Amici* agree with that portion of the brief explaining why such access is vital to the national defense, *Amici* do not share their view that this case can be resolved under the Home Act Rule or an implied preemption analysis. *See, e.g, McIntosh v. Washington*, 395 A.2d 744, 751 (D.C. 1978) (firearms legislation permitted under Home Rule Act); *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415, 1426-27 (E.D. Cal. 1990), *aff'd*, 965 F.2d 723, 725-27 (9th Cir. 1992) (state firearms statute not preempted by Civilian Marksmanship Program); *Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276, 288-89 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681, 688 (2d Cir. 1996) (same); *Arnold v. Cleveland*, 616 N.E.2d 163, 175 (Ohio 1993) (same). In any event, these issues were not litigated below and are not part of the questions presented as formulated by this Court.

3. *Handgun Training is Beneficial to Military Effectiveness and National Defense.*

As Respondent explains, there is no serious argument that handguns fall beyond the protection of the Second Amendment. *See* Resp. Br. at 46-50. Indeed, although rifles are the primary combat weapon issued to infantry units, handguns are issued to many service members and are frequently used by the military. The armed services "issue pistols for personal protection to officers, senior non-commissioned officers, military police personnel, pilots, and crews of aircraft, combat vehicles and automatic weapons systems." Harold Kennedy, *Beretta 9mm Finds Niche in 'Low Intensity' Missions*, National Defense, Oct. 2000. More than 2.5 million .45 caliber Colt M1911 and M1911A1 service pistols were produced for the U.S. military over three quarters of a century. *Id.* The 9mm Beretta M9 service pistol was adopted as the official military service pistol in 1985, and over 316,000 pistols were delivered to the U.S. military in its first fifteen years of service. *Id.*

This wide distribution of handguns is not without reason; handguns see frequent use in the military. In the fifteen year period of 1985-2000, U.S. service members carried the M9 on more than 70 operations. *Id.* Furthermore, the U.S. military has long encouraged handgun training and marksmanship. The Department of the Army produces a 100-page U.S. Army Combat Pistol Training manual, which includes instruction on operating the M9, the M1911A1, and the .38 caliber revolver. Department of the Army, *U.S. Army Combat Pistol Training Manual* (2003). And, for at least a century, the various branches of the military have sponsored and competed in a variety of pistol matches, including the prestigious National Pistol Match. *See USAMU Hosts Small Arms Championships*, Infantry Magazine, Mar. 1, 2005 (mentioning service member winners of the "Secretary of the Army Pistol Match"); *Marines Triumph in Pistol Shoot*, N.Y. Times, Sept. 5, 1939, at 34; *Christofferson is Pistol Champion*, N.Y. Times, Aug. 28, 1919, at 13.

Moreover, many skills involved in shooting, safely handling, and cleaning firearms are fairly universal and thus may be applied to other firearms beyond handguns. Director of Civilian Marksmanship Colonel F.C. Endicott noted that "the basic marksmanship fundamentals which apply to the rifle apply as well to any other gun, large or small."[8] Letter from Colonel F.C. Endicott, Dir. of Civilian Marksmanship, A.G.F., to the Nat'l Rifle Ass'n (Feb. 27, 1943) (13a). Firearms experts therefore have developed universal gun safety rules. *See, e.g.*, Gregory B. Morrison & Jeff Cooper, *The Modern Technique of the Pistol* (1991); *Universal Gun Safety Rules*, Americans for Gun Safety Foundation, *available at* http://www.campaignadvantage.com/services/websites/archive/agsfoundation/safety/r_universal.html (last visited Feb. 9, 2008) (stating that their Universal Gun

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[8] The six basic marksmanship fundamentals discussed in the *U.S. Army Combat Pistol Training Manual* are very similar to the Fundamentals of Marksmanship discussed in Marine Corps Reference Publication (MCRP) 3-01A, *Rifle Marksmanship*, with both manuals explaining sight alignment, sight placement/sight picture, breath control, grip, and trigger control/trigger squeeze. *Cf.* Department of the Army, *U.S. Army Combat Pistol Training Manual* (2003); Department of the Navy, Marine Corps Reference Publication (MCRP) 3-01A, *Rifle Marksmanship* (2001).

Safety Rules "apply to virtually any situation involving firearms."). Thus, civilians who are familiar with handgun marksmanship and safety are much more likely to be able to safely and accurately fire a rifle or other firearm with minimal training upon entering military service.[9]

B. Armed Civilians Are an Effective Deterrent To and Defense Against Foreign Invasion.

In addition to the benefits that the military derives from being able to recruit from a pool of civilians experienced in the use of firearms, the existence of a large number of armed civilians poses a strong deterrent to any potential foreign invasion. Potential foreign aggressors know that to successfully invade the United States, they must not only defeat our military forces on the field of battle, but they must also attempt to suppress a well-armed population experienced in the use of firearms.

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[9] Moreover, in many urban areas, such as the District, handguns are a much more practical firearm for most residents to own because they are both easier to store in smaller urban dwellings and because local range facilities are more likely to accommodate handguns than rifles. Because of the more powerful ammunition used in rifles, it is often difficult to find rifle ranges in urban areas. *See* Sheppard Kelly, *Short Range Training Ammo, American Handgunner Tactical: 2008 Special Edition Annual* 84 (2007). In order for urban residents, such as the citizens of the District, to become proficient in the use of a firearm and thereby contribute to the national defense, it must be legal for them to own a handgun that they can store and transport both within their homes and to shooting ranges and repair facilities.

1. *The American Experience*

Armed civilians have defended America since even before its formal existence, as colonists took up arms against the tyranny of British rule. *See* David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J.L. & Pub. Pol'y 559, 593 (1986) ("The widespread American ownership of arms did not go unnoticed in the mother country, where it was often cited by English Whigs as a reason to negotiate rather than use force."). The colonial militia played a key role in the American Revolution:

> [F]rom the British viewpoint, rebel militia was one of the most troublesome and [un]predictable elements in a confusing war. The militia nullified every British attempt to impose royal authority short of using massive armed force. The militia regularly made British light infantry, German Jäger, and Tory Raiders pay a price, whatever the cost to the militia itself. . . . The militia never failed in any real emergency to provide reinforcements and even reluctant draftees for the State and Continental regular forces. From the British viewpoint, the militia was the virtually inexhaustible reservoir of rebel military manpower, and it was also the sand in the gears of the pacification machine.

John W. Shy, The Military Conflict Considered as a Revolutionary War, *Essays on the American Revolution* (Stephen Kurtz & James Hutson eds., 1973) *reprinted in* John W. Shy, *A People Numerous and Armed* 213, 237 (rev. ed. 1989).

Beleaguered by the continued harassment from frequent guerilla attacks by both regular and irregular militia, British morale plummeted as troops found themselves isolated in an unfriendly land. "Restricted to little more than the ground they stood on, the British increasingly found subsistence a matter of considerable difficulty." Eric Robson, *The American Revolution: In Its Political and Military Aspects, 1763-1783* at 162 (1965). This success of the colonial militia in hounding the redcoats across the countryside—and perhaps the success of the American Revolution itself—would not have been possible had colonial citizens not been widely armed. *See* William Marina, *Militia, Standing Armies, and the Second Amendment*, The Law & Liberty (Summer 1975) (explaining that the "most important single fact about the Revolution, and which alone made a protest and a fight to defend their liberties possible" was "the almost universal ownership of firearms, expertise in their usage, and membership in a citizen's militia, which characterized the American scene").

Having helped to win the nation's independence, American civilians were again called upon to defend their country as the militia in the War of 1812, most notably in the Siege and Battle of New Orleans, which culminated on January 8, 1815. In the battle, General Andrew Jackson commanded not only regular military units, but also an irregular force composed of state militia from several southern states, New Orleans uniformed and irregular city militia mustered en masse from the city residents, a battalion of free men of color, frontiersmen volunteers, Choctaw Indians, and a group of Baratarian pirates (or "privateers") fighting under Jean Lafitte. *See* Robert V. Remini, *The Battle of New Orleans:*

Andrew Jackson and America's First Military Victory 2, 59, 133 (2001). Although the performance of some untested irregular units was not flawless, the irregulars' marksmanship, local knowledge, and other skills nonetheless proved invaluable as Jackson handily defeated a much larger force of British regulars. *See id.* at 116, 146, 153-54, 162.

Moreover, even after the militia in America had largely been formalized as the National Guard, armed civilians have been called upon to defend the nation. On December 7, 1941, Hawaii activated the Hawaiian Territorial Guard, a group made up largely of ROTC cadets from the University of Hawaii and local high schools that was assigned to guard important public buildings and other installations. *See* Michael Slackman, *Target: Pearl Harbor* 254 (1991). Similarly, after the Alaska National Guard had been called up for federal service, the Alaskan territory was defended by the civilian Alaskan Territorial Guard, a largely Native militia of 6,600 "old men," "boys," and "sharpshooting women." *Remembering WWII Militia That Guarded Alaska After Japanese Attack*, Associated Press, Oct. 15, 2007, *available at* http://www.ktuu.com/global/story.asp?s=7217004 (last visited Feb. 9, 2008).

2. *The Swiss Example*

Switzerland is often recognized for its successful reliance on a well-armed citizen militia to deter invasion and defend the nation. *See* Lawrence Patton McDonald, Gen. George S. Patton & Gen. Lewis W. Walt, *The Swiss Report* (1983), *available at* http://www.constitution.org/mil/swiss_report.htm ("The Swiss Report") (last visited Feb. 9, 2008). This is generally attributed to the fact that the Swiss militia encompasses every able-bodied male between the ages of 20-50, who must keep a rifle and militia equipment in their homes, coupled with the strong Swiss tradition of competitive marksmanship: "Since 1815 the Swiss have not fought in a foreign war, yet they have maintained the tradition of a citizen army and rifle and pistol shooting are among the nation's most popular sports with almost every village having a shooting range." *Id.*

Despite sitting at the crossroads of Europe, neutral Switzerland was left alone by Nazi Germany during World War II—not because the German military was unable to invade—but because it was unwilling; German military officers determined that the resistance of the heavily armed Swiss citizens would make the cost too great. *See id.*; *see also* Stephen P. Halbrook, *Target Switzerland: Swiss Armed Neutrality in World War II* 65-66 (2003). Their decision was likely influenced by descriptions of the Swiss militia at the time as "the best defensive force in Europe . . . an army of sharpshooters who have competed for marksmen's prizes from boyhood." *Id.* at 71 (quotation and citation omitted).

Anticipating potential Nazi aggression in early 1939, the Swiss government announced an ordinance giving it authority to mobilize their militia without further notice; the announcement was designed as a deterrent measure, made just hours before Adolf Hitler was to give his annual Reichstag speech, which the Swiss feared might declare their nation a target. *See id.* at 65. In further preparation, the Swiss shooting associations urged the citizenry to take "the strongest measures of preparedness." *Id.* at 66. On September 1, 1939, the morning that Germany invaded Poland, the Swiss militia was ordered to mobilize; two days later, the Swiss militia had mobilized a fighting force of 435,000 from a population of just 4.2 million. *See id.* at 78. In contrast to the French, who took weeks to mobilize, "[t]he Swiss could mobilize quickly because *every man had his arms and equipment at home.*" *Id.* (emphasis added). Using this threat of a ready and highly capable citizen militia, Switzerland successfully defended its borders during the second world war.

The Swiss employed a similar defensive doctrine during the Cold War. The Swiss militia continues to have two primary goals: "(1) to deter war by the principle of dissuasion; and (2) if deterrence fails, to defend the territory and the population." The Swiss Report, *supra.* The Swiss doctrine emphasizes making any potential invasion as costly as possible to the aggressor:

> Dissuasion is a strategic posture which should persuade a potential aggressor to avoid armed conflict, by convincing him of the disproportion existing between the advantages gained from an attack on the country and the risks entailed. The risks which a potential aggressor must be made to perceive consists in the loss of prestige, military forces, war-potential and time, as well as in running counter to his ideological, political and economic interests.

Id. (quotation marks omitted). The Swiss will initially engage an enemy at the borders in conventional warfare, and then battle unconventionally if necessary: "The Swiss plan is to make every inch gained by the enemy a bloody and costly gain. In the event main units of the Army are destroyed, Swiss doctrine calls for continued passive and active resistance by means of guerrilla warfare." *Id.*

The key to the Swiss defensive doctrine of dissuasion is a nation full of armed citizens:

> The armed population is no bluff. Swiss militiamen are not required to turn in their weapons upon completion of their obligation. It is said that every Swiss home contains at least three weapons, for not only is there the militia system, but there is a long tradition of civilian ownership of firearms and, as pointed out before, rifle and pistol shooting are virtually the national sports of Switzerland.

Id. Without armed civilians in every home, the Swiss defensive doctrine would be rendered toothless and ineffective.

* * *

In sum, besides representing the proper construction of this constitutional provision, interpreting the Second Amendment to guarantee individuals the right to keep arms is in the national interest. Individual ownership and possession of firearms clearly leads to a citizenry skilled in their use. Widespread familiarity with, and access to, firearms thus contributes to national defense in two important ways: it produces better soldiers and provides a second line of defense against foreign aggressors. As experience has taught, these are not remote concerns; the People have consistently been called on to defend the Nation. By affirming the decision below, this Court can ensure that national defense and military preparedness is no longer undermined by jurisdictions, such as the District, that have thoughtlessly decided to disarm their citizens.

CONCLUSION

For all of these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — RETIRED MILITARY OFFICERS

Rear Admiral John C. Albright, National Oceanic and Atmospheric Administration

Brigadier General Sidney Baumgarten, New York National Guard

Major General John E. Bianchi, California National Guard

Brigadier General Vincente T. Blaz, United States Marine Corps, former member of United States Congress

Major General Miles Durfey, United States Air Force

Sergeant Major Julius W. Gates, United States Army

Rear Admiral Jan C. Gaudio, United States Navy

Rear Admiral Harry E. Gerhard, Jr., United States Navy

Brigadier General Arthur Gerwin, United States Air Force

Major General Timothy M. Haake, United States Army Reserve

Lieutenant Colonel Steven M. Harness, United States Army

Lieutenant General William M. Keys United States Marine Corps

Brigadier General Stephen D. Korenek, Alaska National Guard

Major Edward James Land, Jr., United States Marine Corps

Appendix A

Major General Douglas S. Metcalf, United States Air Force

Rear Admiral Jack Monger, United States Navy

Major General Jerald C. Newman, New York National Guard

Brigadier General William A. Newton, Jr., United States Army

Captain Daniel I. Nylen, United States Navy

Rear Admiral Robert S. Owens, United States Navy

Rear Admiral Robert O. Passmore, United States Navy

Rear Admiral Frank E. Raab, United States Navy Reserve

Brigadier General Lewis Spencer Roach, United States Army Reserve

Colonel Frederick Wintrich, United States Army

APPENDIX B — LETTERS CITED

THE WHITE HOUSE

Washington

February 1, 1938

My dear General Reckord:

On the occasion of the Annual Dinner of the National Rifle Association on February fourth, I will be very happy if you will convey my greetings and best wishes for a long life of service for your successful organization.

From a small beginning your Association has grown to large proportions. You are doing what I believe to be a meritorious work, contributing your efforts to carrying on the successful promotion, among the citizens of this Nation, of rifle marksmanship — an accomplishment in which our forefathers so effectively excelled. The growth of your Association is thoroughly consistent with the fundamental soundness of the purpose for which it was organized.

Both national and international rifle competitions, which you encourage, have served to inject the idea of sport into rifle shooting. I sincerely hope that it may always be kept on this basis which, while encouraging a free spirit of rivalry also makes an essential contribution to the national defense.

Very sincerely yours

s/ Franklin D. Roosevelt

Appendix B

Major General M.A. Reckord,
Executive Vice President,
National Rifle Association
Washington, D.C.

Appendix B

ALLIED FORCE HEADQUARTERS
Office of the Commander-in-Chief

16 August, 1943.

Dear Dr. Damlos:

It was nice to hear from you after all these years. I knew you'd be doing something useful in this war.

Any young man that has ahead of him prospective service in the armed forces will do well to learn all he can about the American military rifle. If he can become a really capable rifleman, so much the better. Once he has donned the uniform he will find his hours and days so packed with intensive training that he will find the time all too short to learn the many things he should know, for his own self-preservation, before he is called upon to meet the enemy. The one weapon that every man – soldier, sailor and airman – should be able to use effectively is the rifle. It is always his weapon of personal safety in an emergency, and for many it is the primary weapon of offense and defense. Expertness in its use cannot be over emphasized.

If the Cleveland Civilian Marksman's Association is bringing this kind of training and knowledge to the men who will one day become either officers or enlisted men in any of the armed forces, it is doing them, and the country, a service of incalculable value. I wish you luck.

Cordially,
s/ Dwight D. Eisenhower

Appendix B

Dr. M.J. Damlos,
Mentor Ave. and Southwood Road,
Mentor, Ohio.

Appendix B

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N.W.
WASHINGTON, D.C.

February 1, 1943

National Rifle Association
1600 Rhode Island Avenue, N.W.
Washington, D.C.

Gentlemen:

The National Rifle Association Nation Wide Pre-Induction Rifle Training Program will give an opportunity to thousands of American men to learn the basic principles of straight shooting prior to entering military service. I am sure that all prospective selectees will take advantage of these benefits wherever it is possible for them to do so.

The place of marksmanship in the training of any soldier of the fight for victory cannot be underestimated. It is reassuring to know that prospective soldiers have an opportunity to learn to use the finest small arms weapons in the world.

Sincerely yours,

s/ Lewis G. Hershey
DIRECTOR.

Appendix B

Office for Emergency Management

WAR MANPOWER COMMISSION

Washington, D.C.

February 3, 1943

National Rifle Association
1600 Rhode Island Avenue, N.W.
Washington, D.C.

Gentlemen:

Americans in war have always been deadly against enemies of their country because of superb leadership backed up by high courage and great skill in the use of weapons.

To defeat the bandit nations which have wantonly attacked us, our men must be trained to make the best use of the superior weapons with which they are armed.

The patriotic program of the National Rifle Association to organize the volunteer effort of its more than 3,000 rifle clubs and hundreds of capable instructors to provide pre-induction rifle training to our men who are soon to be called to the colors means more straight shooting and makes for victory.

Sincerely yours,

Paul V. McNutt
Chairman

Appendix B

THE WHITE HOUSE

Washington

November 14, 1945

Dear Mr. Lister:

The tradition of a citizen soldiery is firmly, and properly, imbedded in our national ideals. Initiative, discipline, and skill in the use of small arms are essentials for the development of the finished citizen soldier.

The National Rifle Association, in the periods between our last four wars, has done much to encourage the improvement of small arms and of small-arms marksmanship in the regular services, as well as in the National Guard, reserve units, and the civilian population.

During the war just ended, the contributions of the Association in the matter of small-arms training aids, the nation-wide pre-induction training program, the recruiting of experienced small-arms instructors for all branches of the armed services, and technical advice and assistance to Government civilian agencies aiding in the prosecution of the war – all contributed freely and without expense to the Government – have materially aided our war effort.

I hope that the splendid program which the National Rifle Association has followed during the past three-quarters of a century will be continued. It is a program which is good for a free America.

Sincerely,

s/ Harry Truman

Mr. C.B. Lister, Secretary-Treasurer
National Rifle Association of America
1600 Rhode Island Avenue, N.W.
Washington, D.C.

Appendix B

THE WHITE HOUSE

WASHINGTON

March 20, 1961

Dear Mr. Orth:

On the occasion of Patriots Day, I wish to offer my congratulations and best wishes to the National Rifle Association of America which over the past years has done credit to our country by the outstanding achievements of its members in the art of shooting.

Through competitive matches and sports in coordination with the National Board for the Promotion of Rifle Practice, the Association fills an important role in our national defense effort, and fosters in an active and meaningful fashion the spirit of the Minutemen.

I am pleased to accept Life Membership in the National Rifle Association and extend to your organization every good wish for continued success.

Sincerely,

s/ John F. Kennedy

Mr. Franklin L. Orth
Executive Vice President
National Rifle Association of America
1600 Rhode Island Avenue
Washington, D.C.

Appendix B

WAR DEPARTMENT
OFFICE OF
DIRECTOR OF CIVILIAN MARKSMANSHIP
WASHINGTON, D.C.

February 27, 1943

National Rifle Association of America,
1600 Rhode Island Avenue, N.W.
Washington, D.C.

Gentlemen:

I heartily indorse the program of the National Rifle Association and The Evening Star offering pre-induction marksmanship instruction to the men of Washington. This training course, and the national program of which it is a part, will be of inestimable value to the student and to the Army as well, and will go a long way toward making America's fighting forces the finest marksmen in the world.

Training in rifle marksmanship is of more importance in this war than ever. First, because every unit in the field is a combat unit, whether it be infantry, artillery, quartermaster or motor maintenance. It is subject to sudden and unexpected attack by parachute troops or roving mechanized forces. Thus, to be prepared for such eventuality, each man must be trained in the use of his individual weapon – rifle, carbine or submachine gun.

Appendix B

Second, because the basic marksmanship fundamentals which apply to the rifle apply as well to any other gun, large or small. Men who are properly grounded in this use of the rifle adapt themselves more quickly when in the service to any gun assigned them.

The instruction methods to be followed in this course are based on sound principles and doctrine, are identical to those followed at the Small Arms Firing School held in conjunction with the National Matches at Camp Perry, and closely parallel marksmanship instruction courses in all branches of service. All men anticipating military service should regard it an obligation to take advantage of this school.

Yours truly,

s/ F.C. Endicott
Colonel, GSC,
Director of Civilian
Marksmanship, A.G.F.

AMICUS
CURIAE
BRIEF

54175-1

29pp

No. 07-290

In The Supreme Court of the United States

DISTRICT OF COLUMBIA
AND MAYOR ADRIAN M. FENTY,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia but who wish to keep handguns and other firearms for private use in their homes.

INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over its 25 year history. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

One of the purposes of The Rutherford Institute is to preserve the most basic freedoms our nation affords its citizens—in this case, the constitutional right to bear arms.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of the brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

STATEMENT OF FACTS

Amicus incorporates by reference the statement of facts set forth in the brief of Respondent Dick Anthony Heller.

SUMMARY OF ARGUMENT

The Framers of the Constitution enacted the Bill of Rights in the aftermath of the War of Independence, fought as a consequence of the tyranny of the British Empire. The American colonists understood very well what it meant to live under an oppressive governmental regime. To them, tyranny was more than a word. It was a condition of life in a state of martial law. While the threat of tyranny that led to the inclusion of the Second Amendment in the Bill of Rights may not yet be of the magnitude it was in 1776, as Judge Kozinski of the Ninth Circuit reminds us, "However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once." *Silveira v. Lockyer*, 328 F. 3d 567, 570 (9th Cir. 2003).

To those brave Americans who framed the founding documents, the right to own a weapon was an essential ingredient to remaining free. In fact, to them, their rifles were a fundamental symbol of freedom. More than merely symbolic, however, was the fact that their guns remained the guarantor of the liberty they had fought so hard to achieve. To the Founders, therefore, their rifles were the means by which liberty was born, and the Second Amendment represented the medium through which it would be forever protected.

Since then, firearms have remained illustrative of the freedom of the United States, both literally and symbolically. As David B. Kopel, one the leading authorities on the Second Amendment, points out, "guns effectuate and symbolize individualism and self-reliance—two traits in which Americans outpace the rest of the industrial world."[2] Thus, it is not surprising that firearms have become both an enabler and a symbol of these inherently American values. Kopel further points out that the symbol of American heroism is the cowboy, whose contrast with his Canadian, British and Japanese equivalents shows the significance of the "common" gun. The classic cowboy carries a mass-produced handgun, such as a Colt .45, while the Canadian mounted policeman carries a special government-issued gun; the Japanese samurai carries a hand-crafted, exquisite sword; and the British knight wears expensive armor.[3] Such an example is illustrative of the values from which the United States was born, and which have been indelibly imparted into the American psyche.

Far from being solely romantic symbolism, the necessity of the right to bear arms has been exposed on numerous occasions. The history of the United States has shown multiple examples of attempts to repress the rights of others subsequent to 1776 and in contemporary times. "Tyranny" has been, and continues to be, practiced against certain groups in American society—in particular, African-

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[2] David B. Kopel, *The Ideology of Gun Ownership and Gun Control in the United States*, 18 Q. J of Ideology 3, 5 (1995).

[3] *Id.*

Americans—albeit in different forms. Therefore, individuals—American citizens—still necessarily need the right to guard against tyranny, whatever form it might take. By removing the basic protection that the Second Amendment affords individuals, both in theory and practice, an essential barrier against a potentially oppressive government would be eviscerated.

ARGUMENT

I. The Framers Of The Constitution Intended The Second Amendment To Apply To Individuals, To Serve As A Guarantor Against Tyrannical Government

The great legal and historical scholars across the political spectrum generally conclude that the Framers of the Constitution intended the Second Amendment to create an individual right.[4] There have been recent attempts, however, to subvert this fundamental right and make it more palatable with "modern" cultural values. But constitutional rights are not to be dictated by opinion polls or political correctness. Instead, the Second Amendment should remain applicable in an individual context, as it was intended to be, acting as the guarantor of all other rights and as the enduring symbol of freedom and liberty. As this Court has held:

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[4] *See* Randy E. Barnett and Don B. Kates, *Under Fire: the New Consensus on the Second Amendment*, 45 Emory L.J. 1139 (1996). *See also* GEORGE P. FLETCHER, A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 156 (Free Press 1988).

> The values of the Framers of the Constitution must be applied in any case construing the Constitution. Inferences from the text and history of the Constitution should be given great weight in discerning the original understanding and in determining the intentions of those who ratified the Constitution. The precedential value of cases and commentators tends to increase, therefore, in proportion to their proximity to the adoption of the Constitution, the Bill of Rights or any other amendments.

Powell v. McCormack, 395 U.S. 486, 547 (1969).

The Framers of the Constitution viewed the individual ownership of firearms as the ultimate check on the power of the government because an armed citizenry is in a better position to resist tyrannical behavior. In drafting the founding documents of the new republic, the Framers were heavily influenced by their English common law heritage. As this Court has held, "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte Grossman*, 267 U.S. 87, 108-109 (1925).

In particular, the writings of William Blackstone on the imperative need for an armed citizenry were extremely influential.[5] According to Blackstone, only with the weight of privately-held arms could the people vindicate their other rights if they were suppressed.[6] Such was the importance of an armed citizenry in free society that Blackstone stated: (a) the cardinal and inalienable natural right is the right to self-defense; (b) the right of each person to have arms for personal defense is an indispensable, inalienable ingredient in the right to self-defense; and (c) the three cornerstones of constitutional liberty are the right to petition for redress of grievance, the right to arms, and due process.[7]

Blackstone recognized that without the right to bear arms, the people would be unable to fully exercise their other rights. He explained, "[i]n vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the [English] Constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property."[8]

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[5] Blackstone was the most cited English writer by major American political writers between 1760 and 1805, second only to Baron de Montesquieu overall. *See* Donald Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, The American Political Science Review 78, March 1984, at 194.

[6] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *139-40 (1st ed. Oxford 1765).

[7] *Id.* at 143-44.

[8] *Id.* at 140-41.

Blackstone further argued that the right to bear arms was necessary to prevent tyranny, noting, "[t]he fifth and last auxiliary right of the subject... is that of having arms for defence... [for] the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[9] These principles found their way into the U.S. Constitution and Bill of Rights, codifying inviolate the rights of the new republic's citizens.

The recognition that individuals had the right to bear firearms furthered the concept that the government was subservient to the people and that it was the duty of the government to serve the people, rather than vice versa. Symbolically and practically, therefore, firearms represented the relationship between the government and the people, and the subordination of the former to the latter. As historian Joyce Lee Malcolm notes, "[t]he Second Amendment amplified the tradition of the English Bill of Rights for the purpose of preserving and protecting government by and for the people."[10]

James Madison explained this concept in *The Federalist No. 46*: "Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition..."[11]

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[9] *Supra* note 7.

[10] Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q., 285, 314 (1983).

Madison further contrasted the free experience of Americans with their European counterparts: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this alone they would not be able to shake off their yokes."[12]

Even during the debate between the Federalists and Anti-Federalists over ratification of the Constitution, there was little argument over the right to bear arms and the nature and necessity of it. The prominent Anti-Federalist Richard Henry Lee, for example, believed: "[t]o preserve liberty, it is essential that the whole body of the people always possess arms..."[13] This Court has also held that, "the remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists... The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights... The fears of the Antifederalists were well founded." *Minneapolis Star v. Minnesota Comm. Of Rev.*, 460 U.S. 575, 584-85 (1983).

Early American legal scholarship, written with the benefit of contemporaneous thought and knowledge, supported such an interpretation of the Second Amendment. St. George Tucker, who edited the works of Blackstone to make them relevant to the United States, interpreted the Second Amendment as an individual right. He indicated that when the right to keep and bear arms is prohibited, liberty stands "on the brink of destruction."[14] Tucker argued that the right to bear arms was among the individual's "most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation..."[15]

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[11] THE FEDERALIST NO. 46, at 242 (James Madison) (Bantam Classic ed. 1982).

[12] *Id.*

[13] RICHARD HENRY LEE, ADDITIONAL LETTERS FROM THE FEDERAL FARMER, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 341-42 (Herbert J. Storing ed. 1981).

This philosophy was incorporated into the highly influential commentaries of Justice Joseph Story and Judge Thomas M. Cooley, both of whom were cited approvingly by this Court in *United States v. Miller*, 307 U.S. 174 (1939). For example, Justice Story stated, "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[16]

Judge Cooley supplemented this argument, by stating, "The right declared [the right to keep and bear arms] was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation."[17]

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[14] 1 WILLIAM BLACKSTONE, COMMENTARIES app. at 300 (St. George Tucker ed. 1803, Lawbook Exchange, Ltd. 1996), quoted at David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1377-78 (1998).

[15] 1 ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 43 (1831).

[16] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891).

The Second Amendment stands today, as it has throughout the history of the United States, as the guarantor of all other rights, and of the Constitution itself. As important as the Second Amendment's practical implications are its symbolic implications. The firearm in the hands of the citizen symbolizes that we, the people, are our own masters, and we do not exist at the whim of the government.

History has shown on numerous occasions that a disarmed society almost always becomes an obedient and complacent society when faced with a tyrannical government. Such fears were paramount in the minds of the Framers of the Constitution, who had experienced, first-hand, the tyranny of King George III and his attempts to disarm them. Indeed, such fears of government tyranny have been present since time immemorial. Moreover, these fears were by no means unique to the eighteenth century; nor have they been reduced with the passage of time. Even as late as the twentieth century, more people were killed at the hands of government than in all of the centuries that preceded it combined.[18]

The right of individuals to bear arms still represents the ultimate insurance policy against tyranny and gives meaning, rather than just rhetoric, to the intentions of the Framers. Firearms in the hands of private individuals affords Americans the confidence and security to enjoy their other rights, safe in the knowledge that they are free from the risk of government oppression. American citizens are better able to defend themselves, their families, and their possessions with firearms than without. This is entirely within keeping with the great American traditions and values of individualism and self-reliance.

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[17] THOMAS COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 281 (2d ed. 1891).

[18] *See generally* RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT (Transaction Publishers 1994).

It must be remembered that the Second Amendment is, as Judge Kozinski put it, "a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed." *Silveira*, 328 F. 3d at 570. Just because that day has not come, and hopefully never will, it does not mean that the Second Amendment's meaning and purpose have changed. Consequently, the citizens of the United States must not have their greatest—perhaps only true—defense against tyranny taken away from them. To do so would be a disservice to the intentions of the Framers, based solely on the pendulum of public opinion. The Framers' intent, rather than current public opinion, is what should guide constitutional interpretation. Such has been the policy of this Court, which has held that, "when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone." *Minneapolis Star,* 460 U.S. 575 at n. 6 (1983).

It has only been in recent years that any challenges to the meaning and purpose of the Second Amendment have arisen. Perhaps it is more the "embarrassing" nature of the Second Amendment in the often politically correct twenty-first century mind that leads opponents of the individual nature of the Second Amendment to attempt to attribute alternative meanings to it. The meaning and purpose of the Second Amendment remains as clear today as it did at the time the Bill of Rights was ratified; what has changed is that the Second Amendment no longer receives the universal support that it once did.

II. The Militarization Of Police Forces Represents A Modern-Day Standing Army

One of the paramount fears of the Founding Fathers was the presence of a standing army. The Framers had experienced the oppression that went with standing armies during the times of King George III, and they were regarded as an instrument of tyranny. The Continental Congress specifically charged the maintaining of a standing army as a specific abuse of King George III: "Resolved, ... 9. That the keeping of a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law."[19] The Framers' distrust of standing armies was shown, for example, by James Madison: "A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence agst. foreign danger, have been always the instruments of tyranny at home..."[20]

Such fears and emotions were eloquently captured by Patrick Henry's rhetorical question: "A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to punish them? Will you order them to be punished? Who shall obey these orders? Will your mace-bearer be a match for a disciplined regiment? In what situation are we to be? ..."[21]

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[19] 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 70 (Oct. 14, 1774) (W.C. Ford ed. 1904-1907).

[20] JAMES MADISON, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 465 (M. Farand ed. 1911).

In consequence of the threats that standing armies posed, the Second Amendment was adopted as a crucial check to preserve the liberty of the individual states. James Madison explained that, "As the greatest danger is that of disunion of the states, it is necessary to guard against it by sufficient powers to the common government; and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia."[22]

The militia in the eighteenth century, of course, was not the same as the modern equivalent. To the Framers, the militia consisted of all able-bodied male citizens, rather than what it would be considered today—the National Guard, which is itself a standing army. An armed citizenry, the Framers thought, was the best means of guarding against the possibility of tyranny that was inherent with standing armies.

Today, these principles are still applicable. The standing armies of King George III have been replaced by an encroaching police state, which is also capable of tyranny. Indeed, there is little *material* difference between the standing armies so abhorrent to the Framers and many modern police forces. Over the past quarter of a century, the U.S. military has supplied intelligence, equipment and training to the police, spawning a culture of paramilitarism in some law enforcement agencies.[23] Moreover, there has been an increased deployment of military forces domestically. In 1998, for example, the Indiana National Guard leveled 42 "crack houses" in and around the city of Gary.[24] Not since Reconstruction has the U.S. military been so intimately involved in U.S. law enforcement.[25]

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[21] Spoken at the Virginia Convention, 3 STATE DEBATES 51-59, quoted at Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of The Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 990 (1975).

[22] ARTHUR TAYLOR PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION: A REARRANGEMENT OF MADISON'S NOTES GIVING CONSECUTIVE DEVELOPMENT OF PROVISIONS IN THE CONSTITUTION OF THE UNITED STATES 524 (Louisiana State University Press 1941).

This militarization would have alarmed the Framers, given their concerns over the concentration of power that accompanied standing armies. Such developments clearly illustrate that the ideology behind the Second Amendment retains its significance and that the right to bear arms continues to remain as a guarantor against the possibility of oppressive government encroachment.

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[23] *See* Diane Cecilia Weber, *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments* (The Cato Institute, Washington, D.C.), August 26, 1999, *available* at http://www.cato.org/pubs/briefs/bp50.pdf.

[24] *Drug House Razed with Federal Money*, N.Y. TIMES, January 19, 1998., *available at* http://query.nytimes.com/gst/fullpage.html?res=9902E7D71238F93AA25752C0A96E958260

[25] *Supra* note 23 at 5.

III. African-American Experiences Show The Necessity Of The Individual Right To Bear Arms

A. Historical Abuses

The Second Amendment is often seen by its detractors as an anachronism, an embarrassing remnant of an earlier age. However, the experiences of African-Americans in the two centuries after Independence suggest that tyranny can take more than one form and that the necessity of the right to bear arms to oppose it and to protect constitutionally guaranteed rights remains a vital ingredient of freedom.

The history of gun control in the United States has a symbiotic relationship with racism. Prior to the abolition of slavery, oppressors needed a disarmed African-American population that could be enslaved without resistance. The "tyranny" that African-Americans faced did not come from King George III's abuses, nor was it a philosophical concern over the potential for abuse of powers by the federal government. Rather, it came from the institution of slavery and, after the Civil War, mob violence and inactive state governments.

As Judge Kozinski noted in *Silveira*, "... tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South." 328 F. 3d at 569.[26] Judge Kozinski further augments this argument by contrasting the northern states, where African-Americans were better able to keep and bear arms, and thus protect their constitutional rights from mob violence.

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[26] *Citing* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 338 (1991).

By its very nature, the institution of slavery required a class of people who lacked the means to resist. In the antebellum period, the southern states limited the rights not only of slaves to bear arms, but also of free blacks. More often than not, slave statutes restricting access to firearms were aimed primarily at free blacks.[27] As free blacks were not under the close scrutiny of whites, there was a concern that they would pose a greater danger to society. Florida, for example, repealed all provisions for firearm licenses for free blacks in February, 1831.[28] After Nat Turner's revolt in Virginia six months later, other southern states immediately followed suit by passing legislation against free blacks possessing firearms.[29] Florida went even further in 1833, enacting a statute authorizing white citizen patrols to seize arms found in the homes of slaves and free blacks and providing for summary punishment for those without proper explanation.[30]

Before the enactment of the Fourteenth Amendment, therefore, southern states passed discriminatory weapons restrictions as an instrument of racial subjugation.[31] Alabama, for example, made it unlawful for any black "to own firearms, or carry about his person a pistol or other deadly weapon."[32] By disarming African-Americans, the southern states were able to maintain this "peculiar institution" and a racially-ordered society thriving, with little alternative for blacks, both free and slave, but to submit.

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[27] *Id.* at 336.

[28] *Id.* at 337-38.

[29] *Id.* at 338.

[30] *Id.*

[31] *See* Robert J. Cottrol and Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity – The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1328 (1995).

Despite the dismantling of slavery after the Civil War and the passage of the Fourteenth and Fifteenth Amendments granting equality, African-Americans continued to be treated as second-class citizens, particularly in the South. For example, various "Black Codes" were enacted, which prohibited African-Americans from bearing arms.[33] As before, the southern states also passed legislation that prohibited African-Americans from carrying firearms without a license, a requirement to which whites were not subjected.[34] The purpose of such nefarious legislation can be shown as late as 1941, for example, in the Florida Supreme Court case of *Watson v. Stone*, 4 So. 2d 700 (Fla. 1941), which concerned the challenge of an African-American man's conviction for having his firearm in the glove compartment of his automobile. Justice Buford's opinion in this case could just as easily have been applied to numerous laws passed to discriminate against African-Americans bearing arms:

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[32] *Id.* at 1329, quoting *The Reconstruction Amendments' Debates*, 209 (Alfred Avins ed. 1967).

[33] Stephen P. Halbrook, *The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the* Framers, originally published as SENATE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE OF THE JUDICIARY, 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS ("OTHER VIEWS") 70 (Comm. Print 1982), quoting W.E. B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 167, 172 & 223 (New York 1962).

[34] *Supra* note 26 at 344.

> The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute... there has never been, within my knowledge, any effort of enforce the provisions of this statute as to white people.

Id. at 703.

African-Americans in the northern states, by contrast, were better able to defend themselves against race riots and mob violence through their ownership of firearms, which were not as restricted to them. Private militia groups consisting of African-Americans, such as the African Greys of Providence, Rhode Island, were created to protect African-Americans from racial violence. It is not clear whether such private black militia groups ever marched on a white mob, but that they may never have been called on to do so may be a measure of their success.[35] The importance of arms to African-Americans in order to prevent racial violence is shown by the words of the abolitionist Cassius Marcellus Clay, one of the Republican Party's founders: "The pistol and the Bowie knife are to us as sacred as the gown and the pulpit."[36]

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[35] *Id.* at 341.

As the twentieth century progressed and African-Americans were able to obtain arms more easily in the southern states, they began to resist racial oppression through the ownership and use of firearms in the South as well. During the civil rights marches and protests of the 1960s, firearms in the hands of African-Americans served a useful purpose in protecting civil rights workers and blacks from mob and terrorist activity.[37] For many, according to Professors Robert Cottrol and Raymond T. Diamond, firearm ownership became "a means of survival in the face of private violence and state indifference."[38]

B. Modern-Day Abuses

Today, gun control measures still target African-Americans (and, increasingly, Hispanics) disproportionately, but on a more facially neutral basis. In the late twentieth century, gun control measures moved from having an overtly racist intent to having a discriminatory effect. Facially neutral gun control legislation, however, often has the greatest impact on marginalized groups in society.

Firearm prohibitions deny all law-abiding citizens the right to effective self-defense. However, they have the greatest effect on poor and minority citizens because of the higher rate of crime in poorer communities and the fact that police presence is often lower than in more affluent neighborhoods.[39] The greater exposure to criminality, combined with less state protection, makes the necessity of firearm ownership even more important in poorer communities. Gun control has a far greater impact on these citizens, especially as gun control legislation does not have a tangible impact on criminal ownership of firearms.[40]

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[36] *Supra* note 33, at 69, quoting 7 THE WRITINGS OF CASSIUS MARCELLUS CLAY 257 (H. Greeley ed. 1848).

[37] *Supra* note 26 at 355.

[38] *Id.* at 349.

The type of firearms targeted for restriction often bears the imprint of discrimination as well, which can be evidenced in the present case. The District of Columbia's ban on handguns is not dissimilar to previous bans on "Saturday night specials"—cheap firearms that are more readily accessible to minorities. Numerous "economic" bans on these types of firearms have previously been passed by several states.[41] Gun control measures that target cheaper firearms, and therefore prevent poor citizens from obtaining a firearm for self-defense, are particularly discriminatory given the realities of these citizens' lives. Such discriminatory impact was emphasized in *Delahanty v. Hinckley*, 686 F. Supp. 920, 928 (D.D.C. 1986):

> The fact is, of course, that while blighted areas may be some of the

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[39] *See* Stefan B. Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. Civ. Rts. L. J. 67, 68 (1991).

[40] *See* T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. Crim. L. & Criminology 764 (1995), discussing the volume of illegally available firearms (at 772) and the ease of manufacturing firearms illegally (at 774).

[41] *See* http://www.pbs.org/wgbh/pages/frontline/shows/guns/maps/state.html.

> breeding places of crime, not all residents of are so engaged, and indeed, most persons who live there are lawabiding but have no other choice of location. But they, like their counterparts in other areas of the city, may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city. Since one of the reasons they are likely to be living in the "ghetto" may be due to low income or unemployment, it is highly unlikely that they would have the resources or worth to buy an expensive handgun for self defense.

Other legislation has revealed the real purpose behind such "economic" bans, as most notably shown by the Gun Control Act of 1968. This, according to the anti-gun journalist Robert Sherrill, was "passed not to control guns but to control blacks... Congress did not want to do the former but were ashamed to show that their goal was the latter..."[42]

Whatever the intentions of such policies, the reality is that those impacted by them are the same groups that have traditionally been deemed "untrustworthy" to own firearms. Such legislation represents a continuation of the racial trend in

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[42] ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL 280 (Penguin 1972).

American gun control legislation, but in the legislation's effect rather than its overt intent.

CONCLUSION

The District of Columbia's ban on handguns strikes at the very heart of the fundamental right of the individual—enshrined in the Second Amendment—to keep and bear arms. To argue or insinuate that the Second Amendment is only a collective right is a grave misreading of the Framers' intentions, while subverting the very basis upon which our rights as a free people depends.

For the aforementioned reasons, therefore, the Court should affirm Respondent's claim and uphold the Court of Appeals for the District of Columbia's ruling.

Date: February 7, 2008

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In The
Supreme Court of the United States

◆

DISTRICT OF COLUMBIA and ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

◆

BRIEF FOR *AMICUS CURIAE* THE PRESIDENT *PRO TEMPORE* OF THE SENATE OF PENNSYLVANIA, JOSEPH B. SCARNATI, III, IN SUPPORT OF RESPONDENT

◆

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the President *pro tempore* of the Senate of Pennsylvania, Joseph B. Scarnati, III, is the highest ranking constitutional officer of the Pennsylvania Senate elected by that body's members.[1] He is sworn to defend the United States and Pennsylvania Constitutions.

Since 1776 Pennsylvania's Constitution has guaranteed an individual right to bear arms in self-defense. Pennsylvanians enshrined this fundamental right in their Constitution after seeing firsthand the fatal consequences of relying solely on government to protect public safety. Before the American Revolution, the government of the Proprietors of Pennsylvania, influenced by Quaker ideals, refused to provide for the defense of the colony's citizens. The colonial government left citizens to their own resources to defend their settlements from marauders, even refusing to defend the colony from hostile forces during the French and Indian War.

Ever since the Proprietors' ouster, Pennsylvanians have safeguarded the right to bear arms in self-defense. The Commonwealth of Pennsylvania has legislation largely preempting local government from adopting gun control measures. The Pennsylvania Supreme Court, emphasizing the constitutionally-preserved right of individuals to bear arms, upheld this legislation against challenges brought by cities seeking to impose local gun control.[2]

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[1] Counsel of record for all parties consented and received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the office of the *amicus* made a monetary contribution intended to fund the preparation or submission of this brief.

Pennsylvania's history informs any inquiry into the meaning of the Second Amendment of the United States Constitution, as the U.S. Court of Appeals for the District of Columbia Circuit recognized in the decision that is before the Court in this case. As the Circuit Court noted, Pennsylvania's history supports a conclusion that the Second Amendment protects an individual right to keep and bear arms for private purposes.

If this Court construes the Second Amendment to protect only a collective right of militias (as opposed to an individual right) to bear arms, Pennsylvania's longstanding constitutional recognition of an individual right to possess arms for self-defense will be at risk. Congress might be encouraged to enact, under the Commerce Clause or the Militia Clauses, or both, a statute prohibiting individual ownership of arms for private purposes. Such a statute would be inconsistent with Pennsylvania's constitutional provision recognizing an individual right to bear arms and might, under the Supremacy Clause, nullify Pennsylvania's provision. It is inconceivable that Pennsylvania would have ratified the federal Constitution, if such an eventuality had been foreseen.

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[2] *See Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996).

As a legislative leader, *amicus* has reviewed proposals for gun control and has considered the data *pro* and *con*. The conclusion is inescapable: the right to bear arms in self-defense is as important today as ever. Reliance solely on government for protection from violence is worse than ineffective: it is dangerous. The more restrictions are imposed on the right of law-abiding citizens to have firearms, the more emboldened become the criminals, who are undeterred by any constraints. The President *pro tempore* submits this brief in support of Respondent.

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SUMMARY OF ARGUMENT

Pennsylvania's longstanding constitutional recognition of an individual right to bear arms in defense of self and state and its colonial and early state history inform any inquiry into the meaning of the Second Amendment. The impetus for adding the Bill of Rights to the Constitution came from the states, among which Pennsylvania was an important motivating force. The right to bear arms in self-defense is as important today as ever. The Second Amendment recognizes an individual, and fundamental, right to own a gun for self-defense.

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ARGUMENT

I. PENNSYLVANIA'S CONSTITUTIONAL HISTORY SUPPORTS THE EXISTENCE OF AN INDIVIDUAL RIGHT TO BEAR ARMS IN SELF-DEFENSE

A. The Pennsylvania Constitution

The first Constitution of the Commonwealth of Pennsylvania, adopted in September 1776, provided in its "Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania" –

> *That the people have a right to bear arms for the defence of themselves and the state*; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

PA. CONST. decl. 13 (1776) (emphasis added).

A generation later, the Constitution of 1776 was supported by Pennsylvania's "Constitutionalists" against efforts by the state's Federalists to revise it to resemble the structure of the United States Constitution. The Federalists prevailed and gave Pennsylvania a new Constitution in 1790. Nevertheless, the new document not only preserved but strengthened the personal right to bear arms. The clause received its own section, which stated: "That the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned." PA. CONST. art. IX, §21 (1790). Those words appear in every subsequent

Pennsylvania Constitution. *See* PA. CONST. art. IX, §21 (1838); PA. CONST. art. I, §21 (1874); PA. CONST. art. I, §21 (1968).

Since 1776, the right to own a gun for defense of self, as well as defense of the Commonwealth, has been a constitutionally-recognized individual right. *See Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996) ("ownership of firearms is constitutionally protected").

B. Pennsylvania Colonial History

1. Early Proprietorship

The royal charter for Pennsylvania authorized Proprietor William Penn –

> to Levy muster and traine all sorts of men of what condicion or wheresoever borne in the said p[ro]vince of Pensilvania for the time being and to make warr and pursue the enemies and Robbers aforesaid as well by Sea as by Land yea even without the Limits of the said p[ro]vince and by Gods assistance to vanquish and take them and being taken to put them to death by the Law of Warr or to save them att theire pleasure and to doe all and every other Act and thing which to the charge and office of a Captaine generall of any Army belongeth or hath accustomed to belong[.]

I The Statutes at Large of Pennsylvania in the Time of William Penn, 1680-1700 at 115 (Gail McKnight

Beckman ed., 1976). Penn, however, did nothing to provide for the defense of the colony.

Penn was a leader in the Society of Friends, a religious denomination commonly known as the Quakers. Samuel J. Newland, *The Pennsylvania Militia: The Early Years, 1669-1792* at 5 (1997) ("Newland"); Philip S. Klein & Ari Hoogenboom, *A History of Pennsylvania* at 21 (2d ed. 1980) ("Klein"). The Quakers were pacifists, who refused to bear arms. *See* Newland at 6-7. Quaker beliefs would have important consequences for the peace and security of Pennsylvanians.

In 1689, the British Crown asked Pennsylvania to form a militia[3] and New York asked Pennsylvania

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[3] Laws providing for militias for defense were common in the colonies. Colonial militia laws typically required *all* able-bodied freemen in an age range of 16 to 60 to register (or be registered), provide themselves with arms and ammunition, gather occasionally for training, and serve when called. *See, e.g.*, David E. Young, *The Founders' View of the Right to Bear Arms* at Appendix II (2007) ("Young") (describing various colonial militia laws from 1619 to the Revolution). This is what the colonists understood as a "well regulated" militia. Arms, however, were commonly kept and used by colonials in their day-to-day lives. *See* Robert Beverley, *The History and Present State of Virginia* at 269 (Louis B. Wright ed., The University of North Carolina Press 1947) (1705) ("The People [in Virginia] are very Skilful in the use of Fire-Arms, being all their Lives accustom'd to shoot in the Woods."); Richard Frothingham, Jr., *History of the Siege of Boston* at 102-03 (2d ed. 1851) (commenting, with respect to gathering of "troops" from New England colonies: "But this ill-appointed army was not entirely unprepared for an encounter. . . . [T]he habitual use of the fowling-piece made these raw

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to provide men or funds to assist in defending against French and Indian attacks. Nathan Ross Kozuskanich, *For the Security and Protection of the Community: The Frontier and the Makings of Pennsylvania Constitutionalism* at 22-23 (2005) (unpublished Ph.D. dissertation, The Ohio State University) (on file with author) ("Kozuskanich"); Newland at 10. Both requests were refused. *Id.* For this, among other reasons, the Crown revoked Penn's charter and installed a royal governor in Pennsylvania. Newland at 10-11; Joseph J. Kelley, Jr., *Pennsylvania: The Colonial Years 1681-1776* at 78 (1980) ("Kelley"). The royal governor proposed militia legislation, but Pennsylvania's Assembly declined to affirm it. Newland at 11-12; Wayland F. Dunaway, *A History of Pennsylvania* at 45 (2d ed. 1948) ("Dunaway").

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militia superior to veteran troops in aiming the musket. They were . . . mostly substantial farmers and mechanics, who had left their homes and pursuits, not for want of employment or to make war a trade, but because they were animated by a fresh enthusiasm for liberty."); Robert H. Churchill, *Gun Ownership in Early America: A Survey of Manuscript Militia Returns*, 60 William and Mary Quarterly 615, 642 (3d Series) (2003) ("[I]t is clear that early Americans owned guns. They owned a lot of them. In 1779, as George Washington was once again lamenting the arrival of unarmed militiamen in his camp, there were 'good guns' sitting on the mantles of almost 40,000 Massachusetts militiamen. Most of these guns were probably longer or shorter or wider or thinner than Washington would have liked. Yet they were in all respects similar to the guns that had decimated four British regiments on the slopes of Breed's Hill in 1775. North and east of Philadelphia, these guns were as ubiquitous as they were lethal.").

In 1694, after convincing the King to return his proprietary charter, Penn appointed another proprietary governor. Kelley at 84; Dunaway at 45-46. Throughout the renewed Proprietorship, Pennsylvania lacked a militia, although it did not lack an armed citizenry.

2. Quaker Aversion to a Militia and Original Associator Movement

The Pennsylvania Assembly was dominated by Quaker influence until 1756. During this period, attempts to pass a law creating a Pennsylvania militia were stifled. This eventually spurred formation of privately-armed voluntary fighting forces.

In 1702, when England and France were again at war, the French made a treaty with the Iroquois, the overlords of most Indian tribes in Eastern Pennsylvania. Newland at 13-14. Pennsylvania's governor believed, because of the treaty, that the Iroquois were a threat to Pennsylvania and asked the Assembly to create a militia. *Id.* at 14. The Assembly refused. *Id.*

In 1704, the governor again asked the Assembly for a militia to defend Pennsylvania, but again the Assembly declined. *Id.*

In 1736, when 300 armed Maryland citizens invaded Pennsylvania to claim Lancaster County for Maryland, there was no Pennsylvania militia to defend the colony. *Id.* at 19.

In 1744, with France and Spain at war with England, the governor stated his intent to raise troops and asked the Assembly to allocate arms and ammunition and to enact a militia law. Newland at 29-30. The Assembly denied all the requests. *Id.*

In July 1747, French privateers came up the Delaware River and landed at two plantations near New Castle, placing Philadelphia in danger of attack. *Id.* at 34. The Assembly still took no action. *Id.* at 34-35.

The Assembly's failure to protect Philadelphia was unacceptable to an emerging leader – Benjamin Franklin. Dismayed by the Assembly's failure, Franklin published a pamphlet under the pseudonym "A Tradesman of Philadelphia." Benjamin Franklin, *Plain Truth* (Nov. 14, 1747), *reprinted in II The Writings of Benjamin Franklin* at 336-53 (Albert Henry Smyth ed., 1905) ("Smyth"). Franklin argued that citizens should act on their own for protection, telling them:

> But to refuse Defending one's self, or one's Country, is so unusual a Thing among Mankind, that possibly [the French] may not believe it, till by Experience they find, they can come higher and higher up our River, seize our Vessels, land and plunder our Plantations and Villages, and retire with their Booty unmolested.

Id. at 344. He wrote that "with very little Notice, the Rich may shift for themselves. . . . But most unhappily circumstanced indeed are we, the middling People, the Tradesmen, Shopkeepers, and Farmers of this Province and City! We cannot all fly with our Families; and, if we could, how shall we subsist?" II Smyth at 346. Franklin encouraged exercising the right of self-defense:

> The Way to secure Peace is to be prepared for War. They that are on their Guard, and appear ready to receive their Adversaries, are in much less Danger of being attack'd, than the supine, secure and negligent. We have yet a Winter before us, which may afford a good and almost sufficient Opportunity for this, if we seize and improve it with a becoming Vigour.

Id. at 352. Franklin estimated there were "at least (exclusive of the Quakers) 60,000 Fighting Men, acquainted with Fire Arms, many of them Hunters and Marksmen, hardy and bold" in Pennsylvania and potentially available for defense. *Id.* at 351. He promised:

> if the Hints contained in this Paper are so happy as to meet with a suitable Disposition of Mind in his Countrymen and Fellow-Citizens, the Writer of it will, in a few Days, lay before them a Form of an ASSOCIATION for the Purposes herein mentioned, together with a practicable Scheme for raising the Money necessary for the Defence of our Trade, City, and Country, without laying a Burthen on any Man.

Id. at 352-53.

Franklin's plan for private citizens to form voluntary associations for self-defense received broad support. Kozuskanich at 29; Newland at 40. Under his plan, the associators organized themselves into companies. *The Pennsylvania Gazette* (Dec. 3, 1747) at 1 ("Gazette"). By 1749, there were 33 companies in Lancaster County, 26 in Chester County, 19 in Bucks County, 12 in the City of Philadelphia, and 8 in other areas of Philadelphia County. Kozuskanich at 29-30; Newland at 42. The movement generated a total of 10,000 volunteers. J. Paul Selsam, *The Pennsylvania Constitution of 1776* at 25 (1971) ("Selsam").

Each associator was to supply himself "with a good Firelock, Cartouch-Box, and at leaſt twelve Charges of Powder and Ball, and as many of us as conveniently can, with a good Sword, Cutlaſs or Hanger, to be kept always in our reſpective Dwellings, in Readineſs, and good Order." *Gazette* at 1. Franklin explained: "[T]he general Word *Firelock* is uſed (rather than *Muſket*, which is the Name of a particular kind of Gun) moſt People having a Firelock of ſome kind or other already in their Hands." *Id.* at 2.

These private associations did not limit themselves to small arms. In Philadelphia they purchased 39 cannon. Newland at 43. By April 1748, they had two batteries of artillery in Philadelphia. *Id.* at 43-44. In September 1750, Philadelphia was further fortified by the arrival of another 14 cannon purchased from England. *Id.* at 44.

As a result of private citizens' initiative, a defense for Pennsylvania finally existed. The associators used their own arms to defend themselves and their property from attack. Beginning in 1755, the defense would be tested.

3. Early Stages of French & Indian War

By 1753 the French were building forts to secure the Ohio River Valley. Newland at 54-55; Klein at 64. Despite this, the Quaker-influenced Assembly did not respond, even when Proprietor Thomas Penn (William Penn's son) and his governor, James Hamilton, asked for a defense for western Pennsylvania. Newland at 59; Klein at 64.

In 1754, a new governor asked the Assembly to "put this Province into a posture of Defence by establishing a Militia (in doing which you will have a due Regard to scrupulous Consciences), that this plentiful Country, situate in the Middle of the British Colonies, may no longer remain open to the enemy." Letter from Robert Hunter Morris to the Provincial Assembly (Aug. 9, 1755), *in II Pennsylvania Archives: Papers of the Governors, 1747-1759* at 456-57 (George Edward Reed ed., 4th Series, 1900). The Assembly refused. Newland at 66-67. Pennsylvania's frontier inhabitants would need to rely on voluntary associations to defend themselves.

France, after initial military successes in the Ohio Valley, prompted its Indian allies to raid frontier settlements. Newland at 70; Klein at 68. Associator companies that had sprung from Franklin's movement began to fight in places like Lancaster and Reading, but did not prevail. *See* Newland at 71-72.

4. 1755 Militia Act

As the Indians attacked Pennsylvania's frontier, Franklin introduced a militia bill in the Assembly. Newland at 75; Klein at 69-70. On November 25, 1755, the bill passed when the Quakers split on their approach – the "principled" Quakers abstained from voting on it while the other Quakers voted with non-Quakers in favor of it. Newland at 75; Klein at 70.

The Act established a militia little different from the associators. Membership in the militia, like membership in an associator company, was voluntary and the militia had limited responsibilities. Act of November 25, 1755, *V The Statutes at Large of Pennsylvania from 1682-1801* at 197-201 (James T. Mitchell & Henry Flanders eds., 1896) ("Statutes at Large"). The primary difference was that, unlike the associators, the militia was government sanctioned. Newland at 76. However, the Crown vetoed the Act, because it was "calculated to exempt Persons from Militia Service [rather] than to encourage and prompt them."[4] Russell F. Weigley, *The Colonial Militia*, *in*

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[4] Franklin, in a December 19, 1756 letter to Peter Collinson, distinguished a militia from provincial troops: provincial troops are "regularly inlisted to serve for a Term, and in the Pay of the

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The First Century: A History of the 28th Infantry Division 17 at 25 (Uzal W. Ent & Robert Grant Crist eds., 1979) (internal quotation omitted).

A companion act, the Supply Act, had been passed on November 27, 1755. *See* Act of November 27, 1755, V Statutes at Large at 201-12. It called for funding, which was used for construction of forts on the Pennsylvania frontier and a full-time regiment to build the forts. *Id.* at 211 (§18); Newland at 85, 89. That regiment, which became known as the Provincial Regiment, is considered to be Pennsylvania's first official military force. Newland at 89.

5. End of French & Indian War, 1757 Militia Act, and Role of Pennsylvania's Earliest Official Fighting Forces

After veto of the 1755 Militia Act, the French and Indian threat to Pennsylvania remained grave. Indians continued to attack settlements on the Pennsylvania frontier. Newland at 80; Klein at 70. Only associator companies were available to fight the

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Province; and do nothing but bear Arms like your Regulars[;]" while members of the militia

> follow their respective Callings at home, muster only on certain Days to learn Discipline, and are to be ready in Case of Invasion etc. by any great Force but are of little Use in hunting Indians; and therefore all the Colonies, in such Wars hire Men for the purpose who are fitter for it, and make it their Business.

III Smyth at 355.

Indians. Newland at 80. Assistance then came from an independent commission created under the 1755 Supply Act, which allocated funds for Pennsylvania's defense. William A. Hunter, *Forts on the Pennsylvania Frontier, 1753-1758* at 197-98 (1960). Governor Morris asked the commission to assist in defending Pennsylvania by raising troops and building forts, and the commission, led by Franklin, successfully did so. Newland at 85-86. In 50 days, it organized a defense for certain frontier areas, including the area surrounding Easton. *Id.* Franklin, commissioned by the governor as a colonel, supervised the construction of four forts in the frontier region, recruited troops, and commissioned officers. *Id.* at 88; *see also* Kelley at 342-43. These efforts were instrumental in creating a defense for Philadelphia and Northampton Counties. Newland at 86-88.

Meanwhile, in 1756, as the Provincial Regiment began to construct the frontier forts required by the Supply Act, Quakers lost influence over the Assembly.[5] Klein at 70.

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[5] The British government proposed a bill that would compel all British and colonial holders of public office to swear an oath to support the government. Newland at 83-84. Quakers in England opposed the bill because, as their religion forbade swearing oaths, it would have made it impossible for a Quaker to hold political office in Britain or the colonies. *Id.* In compromise, British Quakers agreed to persuade the Assembly's Quaker members to resign their offices in exchange for the bill not being introduced. *Id.* By 1756's end, only a few Assembly members were Quakers. *See id.* at 84; Klein at 70.

On March 29, 1757, the Assembly passed Pennsylvania's second militia act. *See* Act of March 29, 1757, V Statutes at Large at 609-35. It required every Pennsylvania citizen who was "not conscientiously scrupling the use of arms" to serve in the Pennsylvania militia and be "sufficiently armed with one good musket, fuzee or other firelock well fixed, a cutlass, bayonet or tomahawk, a cartouch box, filled with twelve or more cartridges of powder, twelve or more sizable bullets, and three good flints."[6] *Id.* at 613.

After the French threat had faded, the threat from Indians continued. Newland at 103-04; Klein at 73. There were Indian attacks on frontier settlements in 1763. Newland at 104; Klein at 73. The then-commander of British forces in North America asked Pennsylvania's governor to provide the Crown with soldiers to respond to these attacks. Newland at 104. The Assembly's response was to introduce legislation that provided for 700 soldiers, not for the King's use, but to "guard their own homes." *Id.*

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[6] The militia act facially relied on private ownership of arms. Private ownership and use of arms was so common in Pennsylvania, that certain non-defensive uses were prohibited for public safety. For example, a statute provided that a person could not –

> shoot at, or kill with a fire-arm, any pigeon, dove, partridge, or other fowl, in the open streets of the city of Philadelphia, or in the gardens, orchards and inclosures, adjoining upon, and belonging to any of the dwelling-houses within the limits of the said city, or suburbs thereof, or any of the boroughs or towns within this province. . . .

Section VII of the Act of April 9, 1760, *General Laws of Pennsylvania, From the Year 1700, to October 1852* at 96 (James Dunlop ed., 3d ed. 1853) ("General Laws").

6. Strife During Interwar Years

The period between the end of the French and Indian War in 1763 and the start of the Revolutionary War in 1774 was punctuated by conflicts with Indians along the Pennsylvania frontier, civil disorder within Pennsylvania, and claims by citizens of other colonies to land that Pennsylvanians likewise claimed. Newland at 109.

An infamous example concerns the "Paxton Boys." Following the French and Indian War, some citizens on Pennsylvania's frontier did not believe the government was adequately protecting them from Indians living nearby who had supported the French during the war. Kozuskanich at 103-04, 106; Newland at 111; Kelley at 489. In December 1763, Matthew Smith and other Paxton residents killed six Indians in Conestoga and then proceeded to a Lancaster home where fourteen Indians were being protected and killed them. Kozuskanich at 114-15, 117-18; Newland at 112; Klein at 74.

Many Pennsylvanians were outraged. Franklin immediately proposed that the Provincial Assembly enact a militia law to replace the expired 1757 act. Newland at 112. When the Assembly failed to do so, he sparked a new associator movement. *Id.* at 112-13.

The movement garnered the services of about 1,000 volunteer fighters who were prepared to defend and protect their city and homes from the Paxton Boys. *Id.* It was known that the Paxton Boys planned to attack Philadelphia to kill a group of Indians receiving protection there. Kozuskanich at 104; Newland at 113; Klein at 74. Franklin and others advanced to meet them and dissuaded them from attacking. Kozuskanich at 104; Newland at 113; Selsam at 41-42. The Paxton Boys' story illustrates again that Pennsylvanians protected themselves by using their own arms and banding together in privately organized units.

C. Revolutionary War Onset

By 1774, as Pennsylvanians became increasingly opposed to oppressive British policies, various voluntary associator companies were created, revived, or bolstered.[7] Newland at 127. The Assembly also passed laws in 1775 authorizing and regulating the associators. *Id.* The Assembly gave the task of organizing the now officially-sanctioned associator companies to the

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[7] Contemporaneously, the Assembly again regulated nondefensive use of firearms, by a law providing that, for the prevention of "mischief" and "disturb[ances] [of] the public peace," a person could not wantonly and unreasonably "discharge and fire off any hand-gun, pistol or other fire-arms . . . to the disturbance of any of his majesty's subjects. . . ." on or around New Year's Eve. Section I of the Act of December 24, 1774, General Laws at 118-19.

Committees of Safety, which were county-level voluntary organizations. Kozuskanich at 316; Newland at 129.

On June 14, 1775, with the Revolutionary War underway, the Continental Congress called for riflemen to assist in the war effort. Newland at 136. Pennsylvania provided nine companies of associators known, collectively, as Thompson's Rifle Battalion. *Id.*; Kelley at 732; Dunaway at 154.

By the end of 1775, five more Pennsylvania battalions, comprised largely of associators, were organized for the war effort. Newland at 137. As the war progressed, many other associators were called to serve. About 4,500 Pennsylvania associators became part of the "Flying Camp," a pool of fighters created by the Continental Congress in July 1776 as a reserve for the Continental Army. *Id.* at 141; Klein at 89. Some of these associators fought under General George Washington against the British in New York and New Jersey. Newland at 142-43. As in prior periods, Pennsylvania's associators proved a valuable means of defense.

D. Development of 1776 Constitution

Elections for Pennsylvania's first constitutional convention were held July 8, 1776; many of those elected were affiliated with the associators. Kozuskanich at 30; Kelley at 764; Selsam at 146. Franklin was chosen president of the convention. Selsam at

147. A committee was established to write a declaration of rights for the constitution. *Id.* at 151.

The thirteenth of sixteen approved declarations in "A Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania" provided:

> *That the people have a right to bear arms for the defence of themselves and the state*; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

PA. CONST. decl. 13 (1776) (emphasis added). With its adoption, Pennsylvania's long and proud history of the voluntary use of privately-owned arms for defense of self and state was manifested in the Commonwealth's first constitution.[8]

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[8] The right was complemented by PA. CONST. §43 (1776), which provided, in pertinent part: "The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not enclosed." This longstanding liberty has been enjoyed since at least Penn's second frame of government. *See* I Statutes at Large at 344. In addition to recognizing an individual right to bear arms, the people gave the new government authority to rely on Pennsylvania's citizens to provide a defense. PA. CONST. §5 (1776) provided for a militia:

> The freemen of this commonwealth and their sons shall be trained and armed for its defence under such regulations, restrictions, and exceptions as the

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E. Actions of Constitutional Government and Remainder of the Revolutionary War

Acting under the 1776 Pennsylvania Constitution, the Assembly passed a militia act. Act of March 17, 1777, IX Statutes at Large at 75-94. The 1777 act required all white males, with some exceptions and exclusions, between the ages of 18 and 53 to serve in the Pennsylvania militia. *Id.* at 77 (§2). It organized the militia into county-based units and gave the executive council (also created by the 1776 Constitution) authority to call the militia into active service. *Id.* at 76 (§1), 81-82 (§10). A militia enrollee was to appear "to be exercised" at regular intervals and was to attend "with his arms and accoutrements in good order." *Id.* at 79-80 (§7).

Pennsylvania's citizen militia were expected to provide their own arms. The Act stipulated that "as soon as convenient," arms and accoutrements for 1/4 of the militia enrollees were to be provided at state expense. *Id.* at 84 (§14). It is doubtful that it ever became "convenient" for the parsimonious counties to supply arms even partially for the militia. At least 3/4 of the militia, and probably all, provided their own arms.

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general assembly shall by law direct, preserving always to the people the right of choosing their colonels and all commissioned officers under that rank, in such manner and as often as by the said laws shall be directed.

Pennsylvania militia units fought in the Revolutionary War, assisting the Continental Army in fighting the British at the battles of Brandywine, Germantown, and Whitemarsh. Newland at 153. And, the Continental Army included many Pennsylvania associator units converted to national service between 1775-1777. *Id.* at 154. When the Revolutionary War ended in September 1783, approximately 60,000 men were in Pennsylvania's militia and approximately 2,210 Pennsylvania troops were serving in the field. *Id.* at 155.

Throughout the colonial and revolutionary periods, it is most likely that a household's firearms were handed down generation to generation. *See generally* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 William and Mary Law Review 1777 (2002). The father's musket, pistol or rifle would be given to a son. It would have been unthinkable that a person could be deprived of the right to keep arms simply for being too old to bear them in a militia call-up.[9] Older citizens would keep arms in the home for self-defense, for hunting or for sport, as well as in trust for the next generation.

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[9] Frontier women would have relied on the right to keep and bear arms in self-defense just as much as the men did. When the men were away, someone needed to protect the homestead and family from marauders, animal and human.

F. Pennsylvania's Ratification of the U.S. Constitution and the Dissent of the Minority

In 1787, after the frame of the future United States Constitution had been worked out, a number of delegates wanted to add a declaration that would identify what they perceived as the key inalienable rights of the people. Their request was defeated. *XIII The Documentary History of the Ratification of the Constitution* at 195-97 (John P. Kaminski & Gaspare J. Saladino eds., State Historical Society of Wisconsin 1981) ("Documentary History"). But their aspiration did not die.

The first ratification convention to meet was Pennsylvania's. Young at 97. The majority of delegates to Pennsylvania's ratifying convention were Federalists; the minority were Antifederalists. Paul E. Doutrich, *To Form a More Perfect Union: The Federal Constitution and Pennsylvania* at 17 (1986) ("Doutrich"). Prominent Federalists were James Wilson (a delegate to the Constitutional Convention) and Thomas McKean (Chief Justice of the Pennsylvania Supreme Court); prominent Antifederalists were John Smilie and Robert Whitehill. *Id.* The Federalists believed it unnecessary to include a bill of rights in the Constitution, because the powers granted to the federal government were specific and limited. The Antifederalists believed that without a bill of rights, the national government would be able to infringe upon individual rights. The debate was not over the existence of individual rights but over whether it was necessary to list them in the federal Constitution, as the majority of the states had done in their state constitutions. Wilson stated the Federalist view:

> [W]hen the attempt to enumerate [the rights of the people] is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted. So it must be with a bill of rights, and an omission in stating the powers granted to the government is not so dangerous as an omission in the recapitulating of the rights reserved by the people.

II Documentary History at 391. Smilie countered:

> It seems however that the members of the [Constitutional] Convention were themselves convinced, in some degree, of the expediency and propriety of a bill of rights, for we find them expressly declaring that the writ of *habeas corpus* and the trial by jury in criminal cases shall not be suspended or infringed. How does this indeed agree with the maxim that whatever is not given is reserved? Does it not rather appear from the reservation of these two articles that every thing else, which is not specified, is included in the powers delegated to the government? This,

> sir, must prove the necessity of a full and explicit declaration of rights. . . .[10]

Id. at 391-92. Whitehill added:

> If indeed the Constitution itself so well defined the powers of the government that no mistake could arise, and we were well assured that our governors would always act right, then we might be satisfied without an explicit reservation of those rights with which the people ought not, and mean not to part. But, sir, we know that it is the nature of power to seek its own augmentation, and thus the loss of liberty is the necessary consequence of a loose or extravagant delegation of authority.

Id. at 393. Wilson agreed with Whitehill "that if our liberties will be insecure under this system of government, it will become our duty not to adopt, but to reject it[,]" but expressed his view that the system would "secure their liberties." *Id.* at 400. McKean agreed with Wilson that inclusion of a bill of rights "might be accompanied with some inconveniency and danger if there was any defect in the attempt to enumerate the privileges of the people." *Id.* at 412.

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[10] Smilie also had concerns that without a bill of rights Congress would be able to disarm the general U.S. population: "Congress may give us a select militia which will, in fact, be a standing army – or Congress, afraid of a general militia, may say there shall be no militia at all. [ ] When a select militia is formed; the people in general may be disarmed." II Documentary History at 509.

On December 12, Whitehill proposed amendments and moved to adjourn the Convention for consideration of the amendments before the ratification vote. II Documentary History at 589, 597. The motion was defeated and the Convention voted 46-23 to ratify the Constitution. *Id.* at 589-91, 600. The proposed amendments were not included in the Convention's Journal, but on December 14 and 15 were printed in the *Pennsylvania Packet* and *Independent Gazetteer* and reprinted once in New York, New Jersey, and Maryland. *Id.* at 591 n.3. The text of the amendments reveals provisions recognizing various individual rights, including rights of conscience, freedom of religion, trial by jury, and against self-incrimination and warrantless searches. *See id.* at 597-99. The seventh proposed amendment concerned the right to bear arms:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

Id. at 597-98.

Twenty-one of the twenty-three delegates voting against ratification signed the Dissent of the Minority that was published on December 18 in the *Pennsylvania Packet* and, by February 9, 1788, had been reprinted in seven other publications. II Documentary History at 617.

The Dissent contained the proposed amendments and commentary related to the signatories' reasons for voting against ratification. It stressed the need for "a BILL OF RIGHTS ascertaining and fundamentally establishing those unalienable and personal rights of men," such as the personal right to bear arms "without the full, free, and secure enjoyment of which there can be no liberty. . . ." *Id.* at 630. It opined that, under the Constitution as it then stood, "[t]he absolute unqualified command that Congress have over the militia may be made instrumental to the destruction of all liberty, both public and private; whether of a personal, civil, or religious nature." *Id.* at 638.

The desire for a bill of rights was not limited to Antifederalists in Pennsylvania. Pennsylvania's proposed bill of rights had influence in Massachusetts, New Hampshire, Virginia, New York, and North Carolina.

In Massachusetts, the lack of a bill of rights was a major topic of debate. *See* VI Documentary History at 1383-84. During the debate, Samuel Adams proposed a number of specific rights to be included in the recommendations for amendment:

> [T]hat the said Constitution be never construed to authorize Congress, to infringe the just liberty of the press, or the rights of conscience; *or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms*; or to raise standing armies, unless when necessary for the defence of the United States . . . or to prevent the people from petitioning in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches & seizures of their persons, papers, or possessions.

Id. at 1453 (emphasis added); *see also id.* at 1490. It was believed that Adams used a copy of the Pennsylvania proposal to make these recommendations. *See* VII Documentary History at 1583-84.

While Adams' proposed bill of rights was not adopted in Massachusetts, three of his proposals were adopted by the New Hampshire convention as recommendations for amendments to be submitted to Congress, including that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." Young at 158, 148; XVII Documentary History at 35.

Virginia's ratifying convention was the first to adopt a bill of rights and other amendments to the Constitution for submission to Congress in connection with its ratification of the Constitution. 2 Bernard Schwartz, *The Bill of Rights: Documentary History* at 765 (Leon Friedman et al. eds., 1971) ("Schwartz").

Virginia's proposed bill of rights, similar to that of Pennsylvania's Dissenters and Adams, included a provision stating: "That the people have a right to keep and bear arms: that a well regulated militia composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state." X Documentary History at 1553.

New York's ratification, on July 26, 1788, adopted the Constitution with recommended amendments, "in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration. . . ." XVIII Documentary History at 300. It included a provision stating: "That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state." *Id.*

North Carolina's initial ratifying convention declined to vote for or against ratification. Instead, it adopted a resolution recommending amendments to the Constitution that included those recommended by Virginia.[11] Young at 156.

Although rejected at the ratification convention, Pennsylvania's proposed bill of rights influenced other states to recommend similar rights to Congress.

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[11] North Carolina did not join in the government of the United States under the Constitution until 1789. It was not represented at the opening of the First Congress.

Ultimately, statements of rights initiated in Pennsylvania became fundamental components of the First and Second Amendments.

II. SECOND AMENDMENT ADOPTION

The First Congress acted to honor the wishes of the substantial body of opinion in states like Pennsylvania that desired a bill of rights. James Madison moved for a committee to be appointed to consider constitutional amendments and then read what he proposed those amendments should be. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in James Madison Writings* at 438 (Jack N. Rakove ed., The Library of America 1999). Madison explained that Congress needed to consider amendments to respect the public's wishes and to pave the way for a favorable reception to Congressional actions. *Id.* at 438-39. Specifically, Madison spoke to the need to consider a bill of rights:

> It will be a desirable thing to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired, of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow citizens; the friends of the federal government will evince that spirit of deference and concession for which they have hitherto been distinguished.

> It cannot be a secret to the gentlemen in this house, that, notwithstanding the ratification of this system of government by eleven of the thirteen United States, . . . there is a great number of our constituents who are dissatisfied with it. . . . There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of federalism, if they were satisfied in this one point: We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution.

Id. at 439.

Among the amendments Madison described as "provisions for the security of rights" was: "*The right of the people to keep and bear arms shall not be infringed*; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." *Id.* at 442. After debate (focused on the final clause), the version the House passed read:

> A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no one religiously scrupulous of bearing arms shall be compelled to render military service in person.

2 Schwartz at 1122. The Senate amended the provision to read as it does now: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." *Id.* at 1154. After a conference committee resolved the differences, the Senate and House approved the amendments for proposal to the states; and, on October 2, 1789, President Washington sent copies to the governors of the states for submission to their legislatures for ratification. *Id.* at 1164-65, 1171-73.

At the same time the Bill of Rights was before the Pennsylvania Assembly for ratification, a convention was drafting a new constitution for Pennsylvania. The Constitutional Convention met from November 24, 1789 through September 2, 1790; Pennsylvania's Assembly ratified the amendments that became the federal Bill of Rights on March 10, 1790. Klein at 111; *Minutes of the Second Session of the Fourteenth General Assembly of the Commonwealth of Pennsylvania* at 177 (Hall and Sellers, 1790).

The delegates to Pennsylvania's constitutional convention resolved early in their deliberations that the Declaration of Rights in the 1776 Constitution "requires alterations and amendments, in such manner as that the rights of the people, reserved and excepted out of the general powers of government, may be more accurately defined and secured." *The Proceedings Relative to Calling the Conventions of 1776 and 1790* at 152 (John S. Wiestling & Francis R. Shrunk eds., 1825). Ultimately, the Declaration became Article IX of the 1790 Constitution, with a preamble stating: "That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare – ." *Compare* Pa. Const. decl. 1-16 (1776) *with* Pa. Const. art. IX (1790). The right to bear arms clause was separated out and placed by itself in Art. IX, §21 and read (as it reads in substantially the same form today): "That the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned." Pa. Const. art. XI, §21 (1790); Pa. Const. art. I, §21 (1968).

Committee members drafting revisions to the Declaration included William Findley and James Wilson. As delegates to Pennsylvania's ratification conference, Findley had vigorously opposed ratification of the federal Constitution for lack of a bill of rights, just as Wilson had supported it. II Documentary History at 35, 122, 323, 601; Klein at 111. At the time of the 1790 Pennsylvania constitutional convention, Wilson was a U.S. Supreme Court Justice. *I The Works of James Wilson* at xiii (James DeWitt Andrews ed., Callaghan and Company 1896) ("Wilson"); Klein at 109.

Wilson was intimately familiar with the federal and Pennsylvania bills of rights. In a lecture concerning criminal law, Wilson addressed the right of individuals to personal safety.[12] His lecture shows that he believed the right to bear arms for self-defense is a natural and fundamental right:

> Homicide is enjoined, when it is necessary for the defence of one's person or house. With regard to the [person], it is the great natural law of self-preservation, which, as we have seen,[[13]] cannot be repealed, or superseded, or suspended by any human institution. This law, however, is expressly recognized in the constitution of Pennsylvania. "The right of the citizens to bear arms in the defence of themselves shall not be questioned." This is one of our many renewals of the Saxon regulations. "They were bound . . . to keep arms for the preservation of the kingdom, and of their own persons."

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[12] In 1790 Wilson became the first law professor at the College of Philadelphia. I Wilson at xvii.

[13] In an earlier lecture addressing the natural law of self-preservation, Wilson stated:

> The defence of one's self, justly called the primary law of nature, is not, nor can it be abrogated by any [law]. This principle of defence is not confined merely to the person; it extends to the liberty and the property of a man: it is not confined merely to his own person; it extends to the persons of all those, to whom he bears a peculiar relation – of his wife, of his parent, of his child, of his master, of his servant: nay, it extends to the person of every one, who is in danger; perhaps, to the liberty of every one, whose liberty is unjustly and forcibly attacked.

II Wilson at 335-36.

II Wilson at 404 (quoting PA. CONST. art. IX, §21 (1790) and Bacon on Government 40).

III. THE INDIVIDUAL RIGHT TO KEEP FIREARMS FOR SELF-DEFENSE IS AS IMPORTANT TODAY AS EVER

In Pennsylvania today, ownership of firearms is widespread. Hunting remains a major use of firearms in Penn's Woods, with over 884,000 deer licenses sold in the 2006-07 season. *See* 2006-2007 Pennsylvania Game Commission Financial Report, www.pgc.state.pa.us/pgc/cwp/view.asp?a=523&q=173295 (last visited Feb. 5, 2008). The right to bear arms in self-defense is also respected by Pennsylvania's concealed-carry law. *See* 18 Pa.C.S. §6109.

Self-defense is still needed, because the law enforcement agencies cannot be everywhere at once. Gun control has tended to disarm the law-abiding, while not impeding violent offenders.[14] Gun-control laws do not appear to prevent criminals from acquiring guns any more than drug laws have prevented many of the same criminals from acquiring illegal narcotics.[15]

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[14] *See, e.g.*, Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?*, 30 Harvard Journal of Law & Public Policy 649, 673 (2007) ("if firearms availability does matter, the data consistently show that the way it matters is that more guns equal *less* violent crime"); U.S. Department of Justice, Federal Bureau of Investigation, *Violent Encounters: Felonious Assaults on Our Nation's Law Enforcement Officers* at 60 (2006) ("The vast majority of the offenders obtained and disposed of their firearms illegally."). The data on this topic are too extensive to cite completely in this brief.

The existence of a substantial body of law-abiding citizens who possess their own firearms is still part of the Commonwealth's statutory scheme for defense. Pennsylvania's Military Code makes its National Guard the "organized militia," which is equipped by the government. However, the Code still provides for an "unorganized militia" of able-bodied citizens, aged 17½ to 55,[16] who can be called up by the Governor, as Commander in Chief, in an emergency. As the National Guard is increasingly sent to serve outside the Commonwealth, it would be short-sighted to assume that the unorganized citizen militia will never need to be called into service to deal with a major disaster or civil disorder. In such an extremity, citizens who keep and bear arms for their own defense may be expected to do so for public protection, under supervision of officers appointed by the Governor.

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[15] Even the United Kingdom, with strict laws and advantages of geography, has been unable to prevent importation of drugs and guns, including automatic weapons, by criminals. Crimes with firearms have been steadily increasing, as law-abiding British subjects have been disarmed. *See generally* Joyce Lee Malcolm, *Guns and Violence: The English Experience* (2002). Between 1997, when private ownership of guns was outlawed, and 2005, the United Kingdom experienced a more than 400% rise in crimes involving firearms. *See* Kathryn Coleman et al., *U.K. Home Office, Violent Crime Overview, Homicide and Gun Crime 2004/2005*, 02/06 U.K. Home Office Bulletin at 76 (Jan. 26, 2006).

[16] *See* 51 Pa.C.S. §301(a).

IV. THE SECOND AMENDMENT PROVIDES AN INDIVIDUAL, AND FUNDAMENTAL, RIGHT TO KEEP HANDGUNS AND OTHER FIREARMS FOR SELF-DEFENSE

The United States exists under a written constitution. Although we cannot perfectly know the minds of those who adopted it, we must strive to give effect to what we best perceive as their understanding. If we do not make that effort, the concept of a written constitution is meaningless.

> [A]s long as [the Constitution] continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.

South Carolina v. United States, 199 U.S. 437, 449 (1905), *overruled on other grounds in Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (internal quotation omitted). To resolve a constitutional question "we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes." *United States v. Classic*, 313 U.S. 299, 317-18 (1941).

The history that preceded the adoption of the Second Amendment leads inescapably to the conclusion that, in providing for "the right of the people to keep and bear arms," the "meaning and intent [of the amendment] when it came from the hands of its framers" was to preserve and protect this basic interest. The Second Amendment protects an individual right to keep and bear arms for any legitimate purpose, not just for use in a state militia.

The individual right to bear arms for self-defense is fundamental. In the 18th and 19th centuries, it would not have ever been questioned, unlike some more recently acknowledged rights such as the fundamental right to interstate travel. Not only is the right to bear arms expressly enumerated in the Second Amendment, it is also, as much if not more than any other right, "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (internal quotation omitted). The interest in private ownership and use of arms traces its lineage to the earliest days in colonial America, when many settlers, acting in a private capacity, used arms for self-defense, defense of their colonies, and hunting (all aspects of ordered liberty). Private ownership and use of arms remain prevalent today.

Because the right to bear arms is fundamental, any infringement by government must be narrowly tailored to serve a compelling interest. *See, e.g., Glucksberg*, 521 U.S. at 721; *San Antonio Indep. Sch.*

Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).[17] The ordinances of the District of Columbia have not been shown to be "narrowly tailored," much less to serve a "compelling interest." Evidence that the ordinances have reduced violent crime in the District is lacking. Studies show that such ordinances hinder law-abiding citizens from self-defense against criminals, who will be as undeterred by these restrictions as they are by other laws.

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CONCLUSION

Amicus curiae requests that this Court affirm the decision of the U.S. Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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[17] *Amicus* respectfully disagrees with the argument of the U.S. Solicitor General that mere "heightened scrutiny" is sufficient when a fundamental right is infringed.

AMICUS
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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA, et al.,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

◆

BRIEF OF SECOND AMENDMENT FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENT

◆

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

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INTEREST OF AMICUS CURIAE[1]

Second Amendment Foundation ("SAF"), a tax-exempt organization under § 501(c)(3) of the I.R.C., is a non-profit educational foundation incorporated in August 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has 650,000 members and supporters residing in every state of the Union.

SAF files this *amicus curiae* brief in order to direct the Court's attention to arguments and authorities that support the judgment of the court below.

◆

SUMMARY OF ARGUMENT

The purpose of the Second Amendment is to prevent Congress from using its Article I authorities, including its authority to regulate the militia, to disarm American citizens. The principal reason for including a preamble praising the militia – a preamble that does not substantively alter the operative prohibition on federal overreaching – was to endorse the traditional citizen militia, which many Americans preferred as an alternative to standing armies. The language, grammar, and history of the Amendment show both that its protection is not limited to militia-related activities, and that the protected right does extend to having arms for self defense against violent criminals.

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

◆

ARGUMENT

I. Petitioners' interpretation of the Second Amendment is untenable, and the legal test suggested in *United States v. Miller* is unworkable

Petitioners' principal claim is that the Second Amendment "protects the possession and use of guns only in service of an organized militia."[2] This interpretation leads to one of three untenable conclusions:

- that the federal government is free to eliminate the people's constitutional right to keep and bear arms by abolishing or failing to maintain an organized militia, a conclusion that is absurd on its face;[3] or
- that American citizens have a right to require the federal government to maintain an

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[2] Pet. Br. 8; see also *id*. 11-12, 21.

[3] For additional detail, see *infra* pages 17-18; Nelson Lund, *Putting the Second Amendment to Sleep*, 8 Green Bag 2d 101 (2004).

organized militia in which they can keep and bear arms, which implies – contrary to all historical evidence – that the Second Amendment substantially amended the provision of Article I giving Congress virtually unfettered authority to regulate the militia;[4] or

- that the Second Amendment forbids Congress to preempt state laws conferring a right to keep and bear arms while serving in a state militia, which has the problems discussed below.

Petitioners appear to adopt this third alternative,[5] which is fatally flawed. First, like the second alternative, it entails an historically unsupported assumption that the Second Amendment substantially altered Congress' Article I authority to regulate the militia. Second, a right of the states to organize and arm their own militias as they see fit conflicts with the constitutional prohibition against their keeping troops without the consent of Congress.[6] Third, this Court has consistently concluded that the federal government has extremely broad powers to preempt state militia regulations, and has never suggested that the Second Amendment has *any relevance at all* to preemption questions. *E.g.*, *Houston v. Moore*, 18 U.S. 1 (1820); *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990).[7] Accordingly, petitioners' interpretation of the Second Amendment is insupportable.

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[4] See U.S. Const. art. I, § 8, cl. 16. For more detail, see Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. L. & Pol. 157, 183-84 (1999).

[5] Pet. Br. 21.

[6] See U.S. Const. art. I, § 10, cl. 3. Some militia organizations, like our modern National Guard, are functionally equivalent to "troops."

United States v. Miller, 307 U.S. 174 (1939), suggests an interpretation that is different from petitioners', and more facially plausible, namely that private citizens might have a right to possess weapons that are "part of the ordinary military equipment or [whose] use could contribute to the common defense." *Id.* at 178. This test (which is not *Miller*'s holding) implies that American citizens have a right to possess at least those weapons that an unaided individual can "bear" and that "could contribute to the common defense." Today this would include, at a minimum, the fully automatic rifles that are standard infantry issue, and probably also shoulder-fired rockets and grenades.

When *Miller* was decided, infantry were typically armed with the same sort of bolt-action rifles that civilians commonly kept for use in everyday life, just as founding-era civilians commonly kept the same kinds of weapons they would need if called for military duty.[8] That has now changed, and the categorical approach tentatively suggested in *Miller* will not generate a workable approach to assessing modern firearms laws. For a discussion of the difficulties entailed in applying *Miller*'s suggested test to the instant case, see Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 Geo. Mason U. Civ. Rts. L.J. 229, 231-36 (forthcoming 2008).

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[7] Dissenting in *Houston v. Moore*, Justice Story noted that the Second Amendment *at most* might confirm that states have a limited concurrent power to regulate their militia "in the absence of, or subordinate to, the regulations of Congress." 18 U.S. at 52-53. Cf. *Hamilton v. Regents*, 293 U.S. 245, 260 (1934) (citing Second Amendment when noting that state militia laws that are not preempted must also transgress "no right safeguarded to the citizens by the Federal Constitution").

Accordingly, the ambiguous opinion in *Miller* should be read to hold only that this Court required further evidence before it could decide whether an unregistered short-barreled shotgun was, in the circumstances presented by that case, covered by the Second Amendment.

As the following discussion will show, the purpose of the Second Amendment is to prevent Congress from using its Article I authorities, including its authority to regulate the militia, to disarm American citizens. The principal reason for including a preamble praising the militia – a preamble that does not substantively alter the operative prohibition on federal overreaching – was to endorse the traditional citizen militia, which many Americans preferred as an alternative to standing armies. The language, grammar, and history of the Amendment demonstrate both that its protection is *not* limited to militia-related activities, and that the protected right *does* extend to having arms for self defense against violent criminals.

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[8] See Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 42 & n.98 (1996).

II. The text of the Second Amendment establishes that the constitutional right extends beyond militia-related weapons and activities

It is self evident that the Second Amendment's preambular phrase alludes to *a* reason for guaranteeing the right of the people to keep and bear arms. The constitutional text, however, does not imply that fostering a well regulated militia is the sole or even principal purpose for protecting that right.[9] The Amendment's preface has a meaningful logical relationship to the right to arms, which is explained in Parts III and IV *infra*, but it is not the relationship suggested by petitioners.

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[9] Eighteenth century state constitutions frequently included explanatory language that was manifestly over- and/or under-inclusive. See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998).

A. The grammatical structure of the Second Amendment does not imply that the purpose of the constitutional right is limited to fostering a well regulated militia

The most significant grammatical feature of the Second Amendment is that its preamble is an absolute phrase, often called an ablative absolute or nominative absolute.[10] Such constructions are grammatically independent of the rest of the sentence, and do not qualify any word in the operative clause to which they are appended.[11] The usual function of absolute constructions is to convey some information about the circumstances surrounding the statement in the main clause.[12]

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[10] This common Latin construction takes the ablative case. In English, where it is less common, it now takes the nominative case. For an historical discussion, see C. T. Onions, *An Advanced English Syntax* 68-70 (1904).

[11] See, *e.g.*, John Wilson, *The Elements of Punctuation* 4 (1857) (nominative absolutes "are grammatically independent of the other portions of the sentence in which they occur"); Virginia Waddy, *Elements of Composition and Rhetoric* 13 (1889) ("The absolute phrase is without grammatical dependence on any other word.").

[12] See, *e.g.*, Onions, *supra*, at 68 ("In English, as in other languages, the Participial Adverb Clause is in origin a simple Adverbial Adjunct, consisting of a noun or noun-equivalent in an oblique case with a participle in agreement with it, and denoting an attendant circumstance, cause, condition, etc.").

A telling example is provided by Article 3 of the Northwest Ordinance:

> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.[13]

This provision – ratified by the same Congress that drafted the Second Amendment – attests to a belief in the beneficent effects of schools and education. But it does not imply that "[r]eligion, morality, and knowledge" are their *only* purpose. Still less could the provision be interpreted to require religious censors in the schools, or to allow the abolition of secular schools if the government came to believe that such education undermines religion and morality.

Another very significant grammatical feature of the Second Amendment is that the operative clause is a command. Because no word in that command is grammatically qualified by the prefatory assertion, the operative clause has the same meaning that it would have had if the preamble had been omitted, or even if the preamble is demonstrably false.

Consider a simple example. Suppose that a dean announces: "The teacher being ill, class is cancelled." Nothing about the dean's prefatory statement, including its truth or falsity, can qualify or modify the operative command. If the teacher called in sick to watch a ball game, the cancellation of the class remains unaffected. If the dean was secretly diverting the teacher to work on a special project, the class is still cancelled. If someone misunderstood a phone message, and inadvertently misled the dean into thinking the teacher would be absent, the dean's order is not thereby modified.

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[13] Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52.

The Second Amendment's grammatical structure is identical, and so are the consequences. Whatever a well regulated militia may be, or even if such a thing no longer exists, the right of the people to keep and bear arms is not to be infringed. What's more, whether or not such a militia can contribute to the security of a free state, the right of the people to keep and bear arms remains unaffected. Indeed, even if it could be proved beyond all doubt that *disarming* the people is necessary to the security of a free state, still the right of the people to keep and bear arms would remain unchanged.

Undoubtedly, new information or changed opinions about the preambular assertion might suggest the need to issue a new command. If, for example, the dean discovered that the teacher wasn't going to be absent after all, he might make a new announcement reversing his earlier decision. Similarly, if the American people came to believe that civilian disarmament laws were necessary to promote public safety, Congress might initiate a repeal of the Second Amendment under Article V. In both cases, a new command would be needed because the truth or falsity of the preambular assertion cannot alter the original, operative command.

It is true, of course, that a grammatically absolute phrase – like countless other forms of contextual evidence – may sometimes help to resolve ambiguities in the operative command to which it is appended. But such contextual evidence cannot change the meaning of the command. And it is true that an absolute phrase – like other kinds of contextual evidence – may sometimes persuade the recipient of a command that he or she may safely disobey it. But that also does not change the meaning of the command.

Lest one suppose that those who adopted the Second Amendment could have been unaware of the implications of its grammatical structure, consider the Patent and Copyright Clause:

> The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[14]

Unlike the Second Amendment, this provision contains an *operative* clause that sets out a purpose (the promotion of useful knowledge) and a subordinate phrase that specifies the means by which that purpose may be pursued (creating patents and copyrights).

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[14] U.S. Const. art. I, § 8, cl. 8.

Because of this grammatical subordination, the authorization to grant copyrights and patents is limited by the goal set out in the operative clause, as this Court has acknowledged. *E.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).[15]

The Patent and Copyright Clause provided an obvious model that the draftsmen of the Second Amendment could have used to limit the right to keep and bear arms to militia purposes. That model was emphatically not followed, for the Second Amendment does not say anything like, "The people shall have a right to promote the security of a free state by keeping and bearing such arms as are suitable for use in a well regulated militia."

The familiar words of the Preamble – which announce that the Constitution was adopted "in [o]rder" to achieve specified goals – offered another grammatical model that might have been adapted to impose some kind of militia limitation on the right to keep and bear arms.[16] But the Second Amendment does not read: "In order to secure the existence of a well regulated militia, which is necessary to the security of a free state, the right of militiamen to keep and bear arms shall not be infringed."

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[15] Even after recognizing the affirmative textual limitation on congressional power that the constitutional text clearly imposes, this Court has been notably restrained in enforcing that limitation. See, *e.g.*, *Eldred*, 537 U.S. at 204-05 ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . ." (internal quotation marks and citation omitted)); *id.* at 205 n.10 (rejecting use of heightened scrutiny). It follows *a fortiori* that this Court should not infer a "militia limitation" that the language of the Second Amendment does *not* impose.

The language of the Second Amendment unequivocally protects the right of the people to keep and bear arms, grammatically unqualified by any militia limitation.[17]

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[16] U.S. Const. pmbl. The operative clause of the Preamble "ordain[s] and establish[s] this Constitution." Accordingly, this Court has warned that the Preamble may not be employed to enlarge the powers given to the federal government elsewhere in the Constitution, *i.e*, apart from the Preamble. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). Similarly, the Second Amendment's preamble cannot contract the right to arms specified in its operative clause.

[17] *Amici* Professors of Linguistics and English assert, as though it were self-evidently dictated by the text, that "the absolute clause affirmatively states *the* cause or reason for the Second Amendment's existence." Br. Am. Cur. Profs. Linguistics and English 10-11 n.6 (emphasis added). This "sole cause" interpretation is not correct, and is certainly not self-evident. Reasoning from this unsubstantiated premise, *amici* mistakenly contend that the preambular phrase "significantly affects the meaning of the main clause" by implying that the Second Amendment "never would have been adopted but for [its framers' belief] that a well regulated militia is necessary to the security of a free state." *Id.*

Whatever the framers may have believed about the importance of a well regulated militia, and whether their beliefs were well founded or not, the Second Amendment's operative clause means what it says. This conclusion does not amount to "omitt[ing]" or "wish[ing] away" the preambular phrase. *Id.* On

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B. The term "bear Arms" in the Second Amendment's operative clause does not imply that the Amendment has an exclusively military purpose

Petitioners and *amici* Professors of Linguistics and English maintain that the term "bear Arms" implies that the Second Amendment refers only to the military use of weapons.[18] If it were true, this would come as a surprise to several members of this Court. See *Muscarello v. United States*, 524 U.S. 125, 142-43 (1998) (Ginsburg, J., dissenting). But it is false.

First, the very dictionaries quoted by *amici* to prove "an overwhelming military meaning" of the word "arms" refute their claim.[19] Noah Webster's 1828 dictionary, for example, says: "In law, arms are any thing which a man takes in his hand in anger, to strike or assault another."[20]

Second, it was perfectly normal to use the term "bear arms" in civilian contexts. James Wilson – a preeminent lawyer and an early member of this Court – used the term in a discussion of homicide in

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the contrary, the analysis presented here and *infra* produces a much more coherent and cogent interpretation of the whole text than the one offered by these *amici* and by petitioners.

[18] Pet. Br. 16-17; Br. Am. Cur. Profs. Linguistics and English 18-27.

[19] Br. Am. Cur. Profs. Linguistics and English 19.

[20] Quoted in *id*. 20 n.18; see also *id*. (quoting a 1730 dictionary that defined arms as "all manner of Weapons made use of by Men either for defending themselves, or for attacking others").

"defence of one's person or house." Interpreting the 1790 Pennsylvania Constitution's guarantee of the right "to bear arms," Wilson characterized this provision as a recognition of the natural law of self-preservation and as a descendant of the Saxons' obligation to "keep arms for the preservation of the kingdom, and of their own persons."[21]

Third, the relevant constitutional term in the instant case is "keep . . . Arms." Only through the wildest exaggeration of the military connotations of "bear arms" could one possibly conclude that "keep arms" has been transmuted through propinquity into a military term.

C. "The people" referred to in the Second Amendment has always been a much larger body of individuals than the militia

Another textual indication that the preambular phrase does not limit the operative language is provided by the Second Amendment's use of "Militia" and

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[21] 2 *Collected Works of James Wilson* 1142 (Kermit L. Hall & Mark David Hall eds., 2007) (internal quotation marks omitted). Additional examples are collected in U.S. Department of Justice, *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel (Aug. 24, 2004), at 16-19; Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237, 255-57, 260-64 (2004); Clayton Cramer & Joseph Olson, *What Does "Bear Arms" Imply?*, Georgetown J.L. & Pub. Pol'y (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081201.

"the people." These are different words with different meanings. Furthermore, the militia and the people are and always have been very substantially noncongruent bodies.

The militia has always been a small subset of "the people" whose right to keep and bear arms is protected by the Second Amendment. James Madison, for example, estimated that the militia comprised about one-sixth of the population when the Constitution was adopted.[22]

Most obviously, women were not part of the eighteenth century militia, nor are they included today (except for female volunteers in the National Guard).[23] Women, however, have always been citizens and thus part of "the people." See, *e.g.*, *Minor v. Happersett*, 88 U.S. 162, 165-70 (1874) (although women did not have voting privileges, they were part of "the people" who ordained and established the Constitution, and they have always been citizens). Just as women have always been covered by the First Amendment's "right of the people" to assemble and petition for redress of grievances, and the Fourth Amendment's "right of the people" to be secure from unreasonable searches and seizures, women have always had the same Second Amendment rights as men.[24]

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[22] *The Federalist No. 46*.

[23] Act of May 8, 1792, ch. XXXIII, 1 Stat. 271; 10 U.S.C. 311(a).

Even if one mistakenly supposed that "the people" referred to in the First, Second, and Fourth Amendments included only those citizens with full political rights (thus excluding women), the militia and the people would still remain substantially noncongruent.[25] Under the Second Militia Act of 1792, for example, the militia included most free able-bodied male citizens who were at least 18 but under the age of 45.[26] This would have included a substantial number of men who were not old enough to vote or who were disenfranchised by property qualifications.[27] Thus, the militia included many men who did not have full political rights.

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[24] The framers of the Bill of Rights knew how to draw precise distinctions between rights appertaining to militiamen and those belonging to the general population. See U.S. Const. amend. V (requiring presentment or grand jury indictment "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"). This example further undermines the supposition that the framers thoughtlessly conflated the militia with the people in the Second Amendment.

[25] Political speeches during the founding period sometimes seemed to equate the militia with the people. Careful attention to the context, however, shows that such statements were not meant literally, but rather served rhetorically to contrast a relatively broad-based militia with narrower variations. See, *e.g.*, 10 *The Documentary History of the Ratification of the Constitution* 1312 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (George Mason at the Virginia ratifying convention); 2 *The Complete Anti-Federalist* 341 (Herbert J. Storing ed., 1981) (Federal Farmer).

[26] Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. The current statutory definition of the militia scarcely differs from the definition adopted in 1792. See 10 U.S.C. 311(a).

The opposite form of noncongruence was also significant. Those who were physically unable to perform militia duties, as well as those aged 45 and older, still had all their political rights, including the right to vote. Besides the numerous men in these categories, many other citizens were legally exempted from militia duties.[28] Thus, many men with full political rights were not subject to militia obligations.

The noncongruence of the militia and the people points to another fatal defect in petitioners' interpretation of the Second Amendment. Nothing in the Constitution purports to forbid Congress from exempting *everyone* from militia duties, as this Court has recognized.[29] It would be absurd to conclude that if Congress effectively abolished the militia by enacting such a universal exemption, the right of "the people" to keep and bear arms would thereby vanish. Congress cannot abolish this constitutional right of the people by abolishing the militia. Neither can the right be limited to contexts in which its exercise contributes to the functioning of an organized militia that Congress is not even required to maintain.

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[27] The minimum age for voting was twenty-one. Property qualifications had been relaxed in some states, but such qualifications were still significant. See, *e.g.*, Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 24 (2000) ("By 1790, according to most estimates, roughly 60 to 70 percent of adult white men (and very few others) could vote.").

[28] See Act of May 8, 1792, ch. XXXIII, § 2, 1 Stat. 271, 272.

[29] The Constitution "left [to the states] an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or *totally disappeared*." *Arver v. United States*, 245 U.S. 366, 383 (1918) (emphasis added).

III. The nature and history of the Second Amendment confirm that its purpose cannot be confined to fostering a well regulated militia

The preceding analysis demonstrates that the text does not impose a "militia-related" limitation on the Second Amendment right. The constitutional language, however, would be nonsensical if one could not specify any relation at all between the right to arms and the desideratum of a well regulated militia. There is such a relationship, though not the one assumed by petitioners, who mistakenly contend that the Second Amendment protects access to arms only in the service of an organized militia.

A. The Second Amendment contributes to a well regulated militia by preventing a specific misuse of Congress' Article I authorities, including its authority to regulate the militia

Article I of the Constitution gives Congress virtually plenary authority to regulate the militia,[30] and the Second Amendment does not purport to shift any of that power to the state governments. The Court has recognized this fact by deciding numerous preemption cases involving state militia laws without so much as mentioning the Second Amendment. See, *e.g.*, *Houston v. Moore*, 18 U.S. 1 (1820); *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990).

This Court's disregard of the Second Amendment in preemption cases makes perfect sense, for the Amendment does not purport to require, authorize, or even allow any kind of regulation by the federal or state governments. Still, it would seem that protecting the right to arms must have *something* to do with the well regulated militia, or the Second Amendment's preamble would be entirely out of place.[31]

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[30] U.S. Const. art. I, § 8, cl. 16.

[31] See, *e.g.*, Alma Blount & Clark S. Northup, *An Elementary English Grammar with Composition* 177 (1912) (although absolute constructions "are not formally connected with the sentence proper" there must be a "thought-relation between this noun-participle group and the sentence proper; otherwise the absolute phrase ought not to be in the sentence").

Let us focus again on the language of the Constitution. One obvious way for a militia to be well regulated is to be well trained or well disciplined as a military organization, and the framers of the Second Amendment no doubt meant to conjure thoughts of such an organization.[32] The Second Amendment, however, added absolutely nothing to Congress' almost plenary Article I authority to provide for military training and discipline. Furthermore, the term "well regulated" also has a broader meaning that is actually more relevant in this context.

To see why, note that any possible contribution of the Second Amendment to a well regulated militia must arise from governmental *inaction* (*viz.*, from *not* adopting regulations that infringe the right of the people to keep and bear arms). Note also that – while it may not be immediately obvious to readers conditioned by experience with the modern regulatory Leviathan – the term "well regulated" need not mean *heavily* regulated or *more* regulated. On the contrary, it is perfectly possible for the government to engage in *excessive* regulation or *inappropriate* regulation, and such regulations are just what the Second Amendment forbids.

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[32] See, *e.g.*, *The Federalist No. 29*:

> It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects. . . . If a well regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation, and at the disposal of that body, which is constituted the guardian of the national security.

As its operative clause makes clear, the Second Amendment simply forbids one kind of inappropriate regulation (among the infinite possible regulations) that Congress might be tempted to enact under its sweeping authority to make all laws "necessary and proper" for executing its Article I militia powers (or perhaps other delegated powers).[33] What is that one kind of inappropriate regulation? Disarming the citizens from among whom any genuinely traditional militia must be constituted.[34]

Congress is permitted to omit many things that are required for a well regulated militia, and may even take affirmative steps to ruin the militia. Congress may organize the militia so as to create the functional equivalent of an army,[35] or it may so neglect the militia as to deprive it of any meaningful existence. The Second Amendment does not purport to interfere with the general discretion of Congress to regulate, or fail to regulate, or perversely regulate the militia. All it does is forbid one particularly extravagant extension of Congress' Article I powers, namely *disarming American citizens*, which might otherwise have been attempted under color of regulating the militia (or of exercising some other Article I authority).

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[33] See U.S. Const. art. I, § 8, cl. 18.

[34] Traditionally the militia was a broad body of civilians who could be summoned to meet public emergencies, in contradistinction to armies made up of paid troops. Accordingly, the Constitution systematically distinguishes the two. For further detail, see Lund, *Past and Future*, *supra*, at 22-24.

[35] Congress has done exactly that in modern times, and this Court has upheld its authority to do so. *Perpich*, 496 U.S. 334.

B. The Second Amendment's background and drafting history confirm that the constitutional right is not limited to militia-related purposes

The history of the Second Amendment confirms this limited and indirect – though real – relationship between a well regulated militia and the constitutional right to arms.

At the Philadelphia Convention, qualms were repeatedly expressed about the danger of standing armies in peacetime, along with a preference for maintaining the militia as an alternative to such armies.[36] It was also recognized, however, that a traditional militia could not by itself adequately provide for the nation's security, even in peacetime.[37]

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[36] See, *e.g.*, 2 *The Records of the Federal Convention of 1787* (Max Farrand ed., rev. ed. 1937), at 326 (Mason), 329 (Gerry), 509 (Gerry), 563 (Randolph).

[37] See, *e.g.*, Letter from George Washington to the President of Congress (Sept. 24, 1776), in *Writings of George Washington* 67, 71-74 (Lawrence B. Evans ed., 1908); 2 *Records of the Federal Convention*, *supra*, at 332 (Charles Pinkney); *The Federalist No. 25*; Letter from Gouverneur Morris to Moss Kent (Jan. 12, 1815), in 3 *Records of the Federal Convention*, *supra*, at 420.

Accordingly, the delegates put no significant limits on federal military authority in the constitution they proposed.[38]

Near the end of the Convention, however, George Mason recurred to the uneasiness he and others had expressed. Recognizing that "an absolute prohibition of standing armies in time of peace might be unsafe," Mason proposed that the clause giving the federal government almost plenary authority over the militia be prefaced with the following words: "And that the liberties of the people may be better secured against the danger of standing armies in time of peace."[39]

James Madison himself spoke in favor of this proposal, arguing that the proposed addition would not actually restrict the new government's authority, but would constitute a healthy disapprobation of unnecessary reliance on armies.[40] The only recorded objection, offered by Gouverneur Morris, was that this language set "a dishonorable mark of distinction on the military class of Citizens."[41]

Mason's motion failed. When one reads the Second Amendment with this history in mind, it is apparent that its text incorporates what Madison had seen as the virtue of Mason's suggestion at the Convention, while avoiding aspersions on military men.

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[38] Limitations on congressional power are slight. U.S. Const. art. I, § 8, cl. 12 (army appropriations limited to two years), cl. 16 (states retain right to appoint officers and administer congressionally-dictated militia training).

[39] 2 *Records of the Federal Convention*, *supra*, at 616-17.

[40] See *id*. at 617.

[41] *Id*.

During the subsequent ratification debates, the massive transfer of military authority to the federal government became one of the chief Anti-Federalist complaints.[42] The Federalists who controlled the First Congress, however, were no more willing than the Philadelphia Convention had been to curtail federal authority in this field. As Madison noted when introducing his initial draft of the Bill of Rights in the House of Representatives, he was averse to reconsidering "the principles and substance of the powers given" to the new government, but he was quite prepared to incorporate noncontroversial "provisions for the security of rights."[43]

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[42] See, *e.g.*, Letter from the Federal Farmer (Oct. 10, 1787), in 2 *Complete Anti-Federalist*, *supra*, at 241-43; Brutus, Essay (Jan. 10, 1788), in 2 *Complete Anti-Federalist*, *supra*, at 405, 406-08; The Impartial Examiner, Essay (Feb. 27, 1788), in 5 *Complete Anti-Federalist*, *supra*, at 180, 181-82; Luther Martin, "Genuine Information" (Nov. 29, 1787), in 3 *Records of the Federal Convention*, *supra*, at 172, 208-09; *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* 191-92, 192-94, 196-99 (Neil H. Cogan ed., 1997) (John Smilie and William Findley at the Pennsylvania ratifying convention, George Mason at the Virginia ratifying convention, and Patrick Henry at the Virginia ratifying convention, respectively).

[43] 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 1025 (1971).

Consistent with Madison's view – though not with petitioners' interpretation of the Second Amendment – Congress rejected proposals to put substantive limits on congressional authority over armies and the militia.[44] What the First Congress was quite willing to do, and what it did do in the Second Amendment, was to make explicit the utterly noncontroversial denial of federal power to infringe the right of the people to keep and bear arms.

Much like George Mason's proposal at the Philadelphia Convention, Madison's initial draft of a right-to-arms provision in the First Congress sought to give comfort to those who worried about abuses of the federal military power, but without diminishing that power:

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.[45]

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[44] *Complete Bill of Rights, supra,* at 169-70 (Sherman), 172 (Burke), 173-74 (unidentified Senator); 2 Schwartz, *supra*, at 1152 (unidentified Senator).

[45] *Complete Bill of Rights, supra,* at 169. This proposal resembles a provision in a bill of rights, written by a committee on which Madison and Mason had both served at the Virginia ratifying convention, and proposed by that convention to the First Congress. See 2 Schwartz, *supra*, at 764-65 (members of the committee), 842 (reprinting the proposal). What it does *not*

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Like the Mason proposal that Madison had supported at the Philadelphia Convention, though more subtly, Madison's initial draft in the First Congress lauded the militia without diminishing federal authority to keep up standing armies, and without requiring the federal government actually to maintain a well regulated militia.

In the Madison draft, however, the comment about the militia's value was attached to a provision guaranteeing a right of the people rather than to a provision about congressional authority to regulate the militia, as Mason's proposal at Philadelphia had been. This created the potential for confusion, and virtually all of the modifications made in Congress to Madison's initial draft had the effect of clarifying that the right of the people to keep and bear arms was not confined to the militia context.

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resemble is a completely separate proposal, written by the same committee and proposed by the same Virginia ratifying convention, which said in plain words essentially what petitioners claim is implied through indirection by Madison's initial draft and by the Second Amendment itself:

> That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.

Id. at 843. Although Madison was obviously quite familiar with this proposed amendment, he offered nothing like it to the First Congress. (An unidentified Senator did offer an amendment with the same wording, which was voted down. *Id.* at 1151, 1152.)

First, the House deleted the reference to a "well armed" militia, which might have misleadingly suggested that the sole purpose of protecting the people's right to arms was to ensure that the organized militia would be well armed. The text sent to the Senate read:

> A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed; but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.[46]

The Senate went further. It deleted the conscientious objector clause and the reference to a militia "composed of the body of the people," both of which might have suggested that the right to arms was somehow confined to the militia context.[47] The Senate also specifically *rejected* a proposal to qualify the right to keep and bear arms by adding the phrase "for the common defence."[48]

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[46] *Complete Bill of Rights*, *supra*, at 172. The change from "free country" to "free state" was purely stylistic. See Eugene Volokh, "*Necessary to the Security of a Free State*," 83 Notre Dame L. Rev. 1 (2007).

[47] *Complete Bill of Rights*, *supra*, at 173-74. The Senate also replaced "the best security of a free state" with "necessary to the security of a free state." *Id.* at 175-76. This strengthened the declaratory force of the preambular endorsement of the militia by eliminating any suggestion that standing armies might be an acceptable, even if imperfect, substitute for a well regulated militia. Elbridge Gerry had worried about such an inference during the House debates. *Id.* at 187-88. The change had no effect on the meaning of the operative clause.

Having stripped Madison's initial draft of several potentially misleading cues, Congress adopted the text that is now a part of the Constitution:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

This text offered nothing to satisfy Anti-Federalist desires for actual limits on federal authority over military affairs, and the *only* contemporaneous criticisms of the Second Amendment were complaints that it did not satisfy these desires.[49] The private right protected by the Second Amendment caused no controversy, precisely *because* it is a private right.

The drafting history of what became the Second Amendment thus confirms that its endorsement of the traditional militia does not imply that the people's right to arms is contingent on the manner in which Congress exercises its authority to organize and regulate the militia.

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[48] *Id.* at 174-75.

[49] See Stephen P. Halbrook, *The Right of the People or the Power of the State*, 26 Val. U. L. Rev. 131, 184-85, 192-94 (1991).

C. This Court has recognized that the Constitution contains declaratory language that does not change the legal effects that the Constitution would have had without that language

When Congress sent the Bill of Rights to the states for ratification, it described its provisions as "declaratory and restrictive clauses" meant to "prevent misconstruction or abuse of [the Constitution's] powers."[50] The Second Amendment has both declaratory and restrictive elements. The words of praise for the militia in the Second Amendment are a *declaration* of respect for the traditional militia system, which might – or in practice might *not* – provide an alternative to the standing armies that many citizens feared. That explains both why the declaratory, preambular language was included, and why the Amendment was so carefully drafted to ensure that the *restriction* on federal infringement of the people's right to arms is not dependent on its actually contributing to the maintenance of a well regulated militia.

This Court has often recognized that the Constitution contains language whose omission would not have changed the meaning of the document. As early as *Marbury v. Madison*, 5 U.S. 137, 174 (1803), the Court acknowledged that an entire constitutional clause might be interpreted to be without effect if

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[50] 2 Schwartz, *supra*, at 1164.

"the words require it."[51] *McCulloch v. Maryland*, 17 U.S. 316, 420-21 (1819), went even further: *without* claiming that the words *required* such an interpretation, the Court concluded that the Necessary and Proper Clause may not augment and certainly does not diminish the incidental powers elsewhere conferred by implication on Congress.

Perhaps the best example of constitutional language that was not meant to change the meaning of the Constitution came from the very same draftsmen who gave us the Second Amendment. The Tenth Amendment simply reaffirms what was already established by the original Constitution. Citing relevant historical documents, this Court concluded that its purpose was simply to provide reassurance to the public that the new government was meant to be one of limited, enumerated powers:

> The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than *declaratory* of the relationship between the national and state governments as it had been established by the Constitution before the amendment *or that its purpose was other than to allay fears* that the new national

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[51] The full sentence in *Marbury* reads: "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." Petitioners quote only the first clause. Pet. Br. 17.

> government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e.g., II Elliot's Debates, 123, 131; III *id.* 450, 464, 600; IV *id.* 140, 149; I Annals of Congress, 432, 761, 767-768; Story, Commentaries on the Constitution, §§ 1907-1908.

United States v. Darby, 312 U.S. 100, 124 (1941) (citations in original) (emphasis added); see also *New York v. United States*, 505 U.S. 144, 156 (1992) (reaffirming *Darby*'s characterization of the Tenth Amendment and quoting Justice Story's *Commentaries on the Constitution*).

Thus, this Court has concluded that an *entire constitutional amendment* was adopted only to allay what were regarded as unfounded fears, without changing or qualifying anything in the Constitution to which it was appended. It is therefore not at all anomalous that the Second Amendment – drafted by the same Congress and adopted at the same time – includes a reassuring preambular comment that was not meant to change or limit the effects of the operative clause to which it was appended.

IV. The purpose of the Second Amendment includes protection of the fundamental natural right of self defense against criminal violence

Respect for the original meaning of the Second Amendment requires that its language be applied – faithfully and appropriately – to contemporary society, which is in important respects quite different from that of two centuries ago.

Petitioners emphasize the paucity of debate during the founding period about the relevance of the Second Amendment to the right of self defense against criminal violence.[52] The fact that public debates focused on questions about the Second Amendment's adequacy as an obstacle to tyrannical exercises of federal military power does not so much as suggest that *anybody* thought the new federal government did or should have the authority to disarm its citizens in the name of crime control. Such illogical inferences have long been rejected. *E.g., Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 644-45 (1819) (specific cases contemplated by the framers do not limit the reach of constitutional provisions); *Weems v. United States*, 217 U.S. 349, 373 (1910) (general language not restricted by "the mischief which gave it birth"); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

With respect to the right to arms, the concern that was foremost for the founding generation – fear of a tyrannical federal government – has understandably subsided. At the same time, the military power of the government has become overwhelming, which greatly diminishes the potential of an armed citizenry to deter such tyranny. It remains true that a large stock of arms in private hands raises the expected cost to the government of engaging in seriously oppressive actions, and thereby makes such oppression less likely to occur.[53] But whereas Madison could plausibly argue that the new federal government would be incapable of raising an army capable of subduing America's armed populace,[54] today's armed forces have the technical ability to inflict unthinkable mayhem on the civilian population.

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[52] *E.g.*, Pet. Br. 28.

Even more important, a significant gap has developed between civilian and military small arms. Eighteenth century Americans commonly used the same arms for civilian and military purposes, but today's infantry and organized militia are equipped with an array of highly lethal weaponry that civilians do not employ for self defense or other important lawful purposes. The Constitution does not require this Court to blind itself to that post-*Miller* reality, or to hold that the civilian population has a right to keep every weapon that the militia can expect to find useful if called to active duty.

Nor should the Court blind itself to other contemporary realities, the most important of which is the problem of criminal violence, and the inability of the government to control it. Rather than focus exclusively on eighteenth century comments about maintaining an armed counterweight to the armies of a potentially tyrannical federal government, the Court should recognize that the broader purpose of the Second Amendment emerges readily from the Constitution's founding principles.

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[53] For further detail, see Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 115 (1987); Lund, *Past and Future*, *supra*, at 56-58.

[54] *The Federalist No. 46*.

Those founding principles are summed up in the familiar liberal axioms set out in the Declaration of Independence. In liberal theory, the most fundamental of all rights is the right of self defense. Thomas Hobbes, the founder of modern liberalism, advanced this proposition with his customary forcefulness when he acknowledged only one natural right, and described it as "the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life."[55]

Among the political theorists most often cited by major American writers during the founding period,[56] there was unanimous agreement about the centrality of the right of self defense:

> ***Locke***: "[B]y the Fundamental Law of Nature, Man being to be preserved, as much as possible, when all cannot be preserved, the

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[55] *Leviathan*, ch. 14 (first paragraph) (1651).

[56] See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Pol. Sci. Rev. 189 (1984).

> safety of the Innocent is to be preferred: And one may destroy a man who makes War upon him, or has discovered an Enmity to his being for the same Reason, that he may kill a Wolf or a Lion . . . ."[57]

> ***Montesquieu***: "The life of states is like that of men. Men have the right to kill in the case of natural defense; states have the right to wage war for their own preservation."[58]

> ***Blackstone***: "Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society."[59]

The exchange of rights that constitutes the social contract does not diminish the central importance of the natural right to self defense. Rather, political or legal limitations on the exercise of that right must be understood as efforts to *enhance* the citizens' ability to protect their lives effectively. For that reason alone, the Second Amendment should be applied vigorously with respect to governmental restrictions on the liberty of citizens to defend themselves against the violent criminals whom the government cannot control.

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[57] *Second Treatise of Government* § 16 (1690).

[58] *The Spirit of the Laws*, bk. X, ch. 2, at 138 (Anne M. Cohler et al. eds. & trans., 1989) (1748).

[59] 3 *Commentaries* *4.

This corollary to the central premise of liberal political theory is consistent with evidence about eighteenth century attitudes. William Blackstone, for example, characterized the English right to arms as a "public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[60] Just as one would expect from the fundamental principle of liberal theory, Blackstone makes no distinction between oppression by the government itself and oppression that the government fails to prevent. If anything, his language seems to refer more easily to the ineradicable phenomenon of criminal violence, experienced by all free societies, than to the extraordinary instances of governmental oppression that call for armed resistance.

In America, a similarly broad understanding of the purpose of the right to arms was articulated repeatedly during the founding period. Post-Revolution constitutions in Pennsylvania and Vermont, for example, proclaimed that "the people have a right to bear arms for the defence of *themselves* and the state."[61] Similarly, the Anti-Federalist minority at

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[60] 1 *Commentaries* *139.

[61] Pa. Const. of 1776, ch. I, art. XIII (emphasis added), Vt. Const. of 1777, ch. I, art. XV (emphasis added), in *Complete Bill of Rights*, *supra*, at 184, 184-85, respectively. The Pennsylvania Constitution of 1790 similarly provided that "the right of citizens to bear arms, in defence of themselves and the state,

(Continued on following page)

the Pennsylvania ratifying convention proposed a bill of rights including this provision:

> That the people have a right to bear arms for the defense of *themselves* and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people *or any of them*, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and governed by the civil power.[62]

Similarly, the New Hampshire ratifying convention proposed an amendment specifying that "Congress shall *never disarm any Citizen* unless such as are or have been in Actual Rebellion."[63] And the minority at

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shall not be questioned." Pa. Const. of 1790, art. IX, § 21, in *Complete Bill of Rights, supra*, at 184.

[62] *Complete Bill of Rights, supra*, at 182 (emphasis added). It would be anachronistic to think that the reference to "killing game" in this proposal reflected a passion for sport. Apart from the role of hunting as a food source at that time, Americans would have been acutely aware, from Blackstone if from nowhere else, of the English game laws behind which the "preventing of popular insurrections and resistance to the government, by disarming the bulk of the people . . . [was] a reason oftener meant, than avowed, by the makers of forest or game laws." 2 *Commentaries* *412 (footnote omitted).

[63] *Complete Bill of Rights, supra*, at 181 (emphasis added).

the Massachusetts ratifying convention proposed that the federal Constitution:

> be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from *keeping their own arms*; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them . . . .[64]

The natural right of self defense is the most fundamental right known to liberal theory, and the Second Amendment is our Constitution's most direct legal expression of Blackstone's insight that "in vain would [basic rights such as that of personal security] be declared, ascertained, and protected by the dead letter of the laws, if the [English] constitution had provided no other method to secure their actual enjoyment."[65]

It would not be easy to find a more vivid illustration of Blackstone's point than the District of Columbia, where every effort has been made to disarm the citizenry. According to what Blackstone calls "the dead letter of the laws," personal security must be very well assured in a city where almost nobody except agents of the government is authorized to possess an operable firearm. The reality is rather different, and nothing in the Constitution requires this Court to ignore that reality.

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[64] *Id.* (emphasis added). Note that the right-to-arms provision is as separate from the standing-army provision as it is from the provision dealing with freedom of the press and religion.

[65] 1 *Commentaries* *136. "Personal security" is listed as the first of the three great primary rights. *Id.* *125. The right to arms is one of five auxiliary rights that help to secure the great primary rights. *Id.* *139.

In the twenty-first century, the most salient purpose of the Second Amendment is to protect the people's ability to defend themselves against violent criminals. Accordingly, the federal government must be required to offer justifications for gun control statutes that go far beyond fashionable slogans and unsubstantiated appeals to hypothetical salutary effects on public safety. Any other approach would trivialize the fundamental right protected by the Second Amendment.

Petitioners have not satisfied the standard of exacting scrutiny to which the District of Columbia's disarmament laws should be subjected, and this failure is fatal to their case. Nor should this Court accept the Solicitor General's beguiling invitation to remand the case for application of some lower level of scrutiny loosely derived from an inapt analogy to governmental regulation of elections that the government itself conducts.[66] The D.C. Code unequivocally forbids American citizens to keep an operable firearm in their own homes for the protection of their own lives. Under no standard or review that respects the fundamental nature of the Second Amendment right could this prohibition possibly be upheld.

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[66] U.S. Br. Am. Cur. 24.

◆

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
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In The
Supreme Court of the United States

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DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

◆

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, INC., SECOND AMENDMENT SISTERS, INC., WOMEN AGAINST GUN CONTROL, 60 PLUS ASSOCIATION, INC., ROBERT B. SMITH, J.D., CHRISTIE DAVIES, M.A., Ph.D., JOE MICHAEL COBB, AND MRS. MINNIE LEE FAULKNER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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INTERESTS OF *AMICI CURIAE*

Amici curiae, the Southeastern Legal Foundation, Inc., Second Amendment Sisters, Inc., Women Against Gun Control, 60 Plus Association, Inc., Professor Robert B. Smith, Dr. Christie Davies, Professor Joe Michael Cobb and Mrs. Minnie Lee Faulkner are four non-profit public interest organizations and four private individuals that share and promote the public interest in the proper construction and enforcement of the laws and the Constitution of the United States.[1]

Southeastern Legal Foundation, Inc. [hereinafter SLF], founded in 1976, is a national public interest law firm and policy center that advocates for constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court of the United States.

Second Amendment Sisters, Inc. and Women Against Gun Control were formed to foster the interests of women's use of firearms and to promote their rights embodied in the Second Amendment.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received written notice on February 1, 2008, of intent to file this brief. No counsel for a party authored the brief in whole or in part. No counsel or party made any monetary contribution intended to fund the preparation or submission of the brief.

60 Plus is a non-partisan senior citizen advocacy group. It has an interest in promoting the rights embodied in the Second Amendment, so government regulation will not adversely affect senior citizens.

Professor Robert B. Smith of the University of Oklahoma College of Law retired from the United States Army as a Colonel in 1981 after serving 20 years in the Judge Advocate General's Corps. He also served as the deputy attorney general of California. In 1981, he began directing the Oklahoma College of Law's research and writing program before becoming Associate Dean for Academics. Professor Smith is 74-years-old and owns a handgun for the reasons set out in this brief.

Christie Davies graduated from Cambridge University, England, M.A. (double first and Wrenbury Scholar) Ph.D. For eighteen years, he was a full Professor at Reading University. He is the author of several books and many academic articles in scholarly peer-reviewed journals in several countries.

Joe Michael Cobb is a retired professor from Orange Coast College and Concordia University. He is a former Senior John M. Olin Fellow in Economics at the Heritage Foundation, Washington, D.C.

Minnie Lee Faulkner is an elderly resident of Elbert County, Georgia, who defended herself with a handgun to stop an invasion of her home by a younger male perpetrator.

In particular, the entities and the individuals have a vital interest in protecting the Second Amendment's individual right of armed self-defense from unconstitutional regulation and infringement. In the action at bar, the District of Columbia has extinguished by legislative fiat individuals' Second Amendment protections by banning handgun ownership. The Second Amendment guarantees such government action shall not "infringe" on the people's right "to keep and bear Arms." The *amici* seek to protect this individual right to safeguard the citizens' use of firearms for self-defense. Advocating on behalf of women, the elderly and the physically disabled, the *amici* herein argue the actions of the District of Columbia have harmed the members of society most physically vulnerable to criminal attack.

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SUMMARY OF ARGUMENT

This right to use a handgun or firearm for self-defense is especially important to women, the elderly and the physically disabled because their physical characteristics make them the most vulnerable to attack. A firearm makes women, the elderly and the physically disabled an equal match to their attacker, grants them the ability to deter crime before it occurs or frustrate its completion, and enables them to protect life and property. To illustrate the significance of this individual right to these groups' members, this brief reviews empirical research demonstrating women, as a group, and the elderly and the physically disabled by analogy, possess and use firearms defensively. This use of handguns or firearms occurs frequently and has quantifiable positive effects. The evidence shows the presence of handguns deters crime and, from a psychological standpoint, possession of a firearm gives these groups' members a greater sense of well-being when faced with danger. When the government strips the individual right from these groups' members, evidence shows that they, more than others, are vulnerable to predators because they are perceived to be weak.

The right "to keep and bear Arms" embodied in the Second Amendment is an individual right based not only on the interest of a free state in the security guaranteed by a trained and armed citizenry, but also in the ancient right of self-defense – a basic component of ordered liberty. The origins of the right of self-defense are articulated in applicable case law and highlighted by commentators from before the time of the Constitution's adoption. The historical record reflects no disagreement as to the existence of self-defense as a fundamental individual right, versus a collective right.

To annotate the scholarly observations and to provide clear illustrations of the critical meaning of the right of self-defense with a handgun or other firearm, this brief presents critical anecdotal evidence in the form of stories of women, the elderly and the physically disabled and their vital defensive use of handguns for self-protection. These stories demonstrate the critical human component that real people

– as would-be victims of violent crime – stand behind each statistical sample.

The *amici* believe the evidence and authority presented in this brief will assist the Court in preserving the right "to keep and bear Arms" for self-defense, a right that preexisted its recognition within the Second Amendment.

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ARGUMENT

I. The Brief's Structure.

The brief focuses on personal security for women, the elderly and the physically disabled through the use of handguns. While the word "security" in the Second Amendment has been interpreted to mean that an armed citizenry will necessarily balance an overreaching government, THE FEDERALIST NO. 46, at 321 (James Madison), security has a broader meaning within the law. It means these individuals are entitled to possess and use handguns to protect themselves and their families.[2]

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[2] Such security involves not just the capacity to resist actual attack – which only a firearm provides – but the deterrent effect of victim handgun ownership in dissuading criminals from confrontation crime. Moreover, security has been defined as "Protection; effectual defense or safety from danger of any kind . . . Freedom from fear or apprehension; confidence of safety . . . " *Webster's American Dictionary of the English Language*, http://1828.mshaffer.com/d/search/word,security (1828 ed.) (last visited February 5, 2008).

This brief is divided into three main sections. First, the brief will survey the compelling empirical research which shows women, as a group, possess and use firearms defensively in significant numbers each year, deterring crime and the completion of crime. Second, the brief will explore the historical context of the Second Amendment which demonstrates it preserved the right of self-defense embedded in English common law and understood at the time of the founding to be preexisting. Finally, the brief will present relevant, flesh-and-blood examples of women, the elderly and the physically disabled defending themselves with handguns against attack, adding an important dimension to the statistical review.[3]

One anomaly uncovered in approaching this issue from the viewpoint of women, the elderly and the physically disabled is that not all of these groups are equally represented in the literature. Studies referencing women are more prevalent. However, what is apparent from the anecdotal examples presented with this brief are the groups' members' characteristics for this discussion overlap to a great degree. Arguments asserted on behalf of women can be made, by analogy, on behalf of the members of the other two groups. This reinforces the main theme that all three groups' members occupy a physically inferior position relative to their potential attackers and benefit from defensive use of handguns.

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[3] Statistics are useful and compelling; however, statistics are sterile, sometimes failing to represent adequately a citizen's fear and dread of hearing an intruder in the night, or the sense of security when possessing a handgun for defense that makes her more than equal to her assailant.

II. Empirical Research Illustrates the Use of the Individual Right of Armed Self-Defense Embodied in the Second Amendment for the Benefit of Women, the Elderly and the Physically Disabled.

A. Empirical Research Supports the Common Sense Argument That the Use of Handguns Protects Women, the Elderly and the Physically Disabled from Greater Physical Threat.

It is well-recognized that the disparity in size and strength between men and women generally provides men with an advantage during physical combat. In her note *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, Inge Anna Larish supported this general statement with the following:

> On average women are weaker than men of comparable height. Muscles form a lower proportion of female body weight than of male body weight (36% and 43%, respectively). Kenneth F. Dyer, *Challenging the Men: The Social Biology of Female Sporting Achievement* 71-72 (1982). Women can develop arm muscles only 75% to 85% the strength of men's muscles. Generally, actual differences in average strength tend to be

> greater because women do not exercise their upper bodies adequately to develop their potential strength while men are more likely to engage in vigorous exercise to develop strength closer to their potential. *Id.* Men also have more power available for explosive events than women. *Id.* at 74.
>
> Women are on average smaller than men. The average height of men in the United States ranges from 5' 7.4" to 5' 9.7" and from 163 to 178 pounds; the average height for women ranges from 5' 2.2" to 5' 4.3" and from 134 to 150 pounds. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 108 (107th ed. 1987).

Larish, Inge Anna, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467, 494, fn. 213 (1996).

In light of the differences, Larish concludes the possession of a gun not only serves to "equalize the differences between men . . . ," but also serves to "eliminate the disparity in physical power between the sexes." *Id.* Furthermore, she posits, "*The available information on civilian restriction of gun ownership indicates that one of the groups most harmed by restrictions on private gun ownership will be women.*" *Id.* (emphasis added). Larish further states, "Analysts repeatedly find that guns are the surest and safest method of protection for those who are most vulnerable to 'vicious male predators.' Guns are thus the most effective self-defense tools for women, the elderly, the weak, the infirm and the physically handicapped." *Id.* 498 (citing Edgar A. Suter, *Guns in the Medical Literature – A Failure of Peer Review*, 83 J. MED. ASS'N GA. 133, 140 (1994)).

Commenting on the effectiveness of gun control and women's firearm ownership, Professor Hans Toch, a distinguished social psychologist in the areas of criminology and criminal justice administration and consultant to the National Commission on the Causes and Prevention of Violence, which advocated Federal gun control, observed that, "There are perhaps 20,000 gun laws now in effect in this country. That these laws have had limited or no effect is apparent." Toch and Lizotte, *Research and Policy: The Case of Gun Control*, PSYCHOLOGY AND SOCIAL POLICY, 223, 224 (1992). Professors Toch and Lizotte go on to characterize that what seemed simple about the advantages of handgun control before informal recommendations were made to the National Commission in the late 1960s or early 1970s have now been rendered complicated by the facts present now. *Id.* at 223. In fact, the authors advocate an approach to gun control based on the "historical, political, psychological, cultural, and sociological parameters of the phenomenon to be regulated, as well as the costs and benefits. The monetary, civil liberty, and other costs must be balanced against related benefits before accepting or rejecting a policy initiative." *Id.* at 236.

With regard to female firearms ownership, Dr. Toch found the following:

> When violent crime rates are below average, women's gun ownership looks like men's – low

crime is associated with high rates of female ownership. When violent crime rates are above average, however, quite the opposite is true, and rates of female firearms ownership come to be positively associated with violent crime rates. This does not imply that urban women are responsible for the urban crime problem; it demonstrates that when violent crime rates are high, women arm themselves for protection.

There is some reason to believe that young, Black, urban women who live in high crime areas are the most likely to own firearms for protection (Bordua & Lizotte, 1979), and this is, of course, a group at high risk for victimization. In addition to the efficacy of keeping a gun for protection, we have mentioned that gun owners presumably enjoy some psychological benefit as well. This is so because those who keep guns for protection are less fearful of crime than those who do not (Lizotte & Bordua, 1980; Lizotte, Bordua, & White, 1981).[4]

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[4] Bordua, D.J. and Lizotte, A.J., *A Subcultural Model Of Firearms Ownership In Illinois*. LAW AND POLICY QUARTERLY, 2, 147-175 (1979).

Lizotte, A.J., and Bordua, D.J., *Firearms Ownership For Sport And Protection: Two Divergent Models,* AMERICAN SOCIOLOGICAL REVIEW, 45, 229-244 (1980).

Lizotte, A.J., Bordua, D.J and White, C.S., *Firearms Ownership For Sport And Protection: Two Not So Divergent Models,* AMERICAN SOCIOLOGICAL REVIEW, 46, 497-503 (1981).

Toch and Lizotte, *Research and Policy: The Case of Gun Control*, PSYCHOLOGY AND SOCIAL POLICY, 223, 233 (1992).

In addition, Dr. Toch noted the following in connection with the preceding passage concerning sexual assaults against women:

> Women who are confronted with a sexual assault are *significantly less likely to experience a completed rape if they resist with a weapon* (Lizotte, 1986). *See also* Kleck (1988) on the protective efficacy of firearms.[5]

Id. (emphasis added).

Dr. Toch also observed concerning the following the costs of gun control:

> There may also be crime control costs to banning firearms. Kleck (1988) argues that armed citizens are actually more likely than the police to deter crimes, catch criminals, and interrupt victimizations, and Wright and Rossi (1986) report that felons are more concerned about armed citizens than they are about the police. Elsewhere, Kleck (1985) points out other tantalizing crime control costs of gun control. He notes that armed criminals have the luxury to victimize hardened targets where the payoff is larger.

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[5] Lizotte, A.J., *Determinants of Completing Rape and Assault*, JOURNAL OF QUANTITATIVE CRIMINOLOGY, 2, 203-218 (1986).

Kleck, Gary, *Crime Control Through the Private Use of Armed Force*, SOCIAL PROBLEMS, Vol. 35, No. 1, 1-21 (February 1988).

> Without the gun, however, they might be forced to prey on weaker targets where the payoff is smaller. This might result in an increase in the crime rate, because more offenses would be necessary to generate the same amount of money. In addition, weaker targets are those who can least afford victimization, such as the poor and aged.

Id. at 237.[6]

Women and the physically disabled, due to the physical differences discussed above, would logically be included within the "weaker targets."

In addition to the above authority, the scholarship of Dr. Gary Kleck provides hard factual bases that defensive gun use affects crime.[7] Kleck, a professor in

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[6] Wright, J.D. and Rossi P., *Armed And Considered Dangerous: A Survey Of Felons And Their Firearms*, Hawthorne, NY (Aldine de Gruyter 1986).

Kleck, Gary, *Policy Lessons From Recent Gun Control Research*, LAW AND CONTEMPORARY PROBLEMS, Vol. 49, No. 1 35-62 (Winter, 1986).

[7] In *A Tribute to a View I Have Opposed,* Dr. Marvin E. Wolfgang, the doyen of American criminologists until his death, evaluated Kleck's research: "I have guns – ugly nasty instruments designed to kill people. Can it be true that about two million instances occur each year in which a gun was used as a defensive measure against crime? It is hard to believe. Yet, it is hard to challenge the data collected. We do not have contrary evidence." Wolfgang, *A Tribute to a View I Have Opposed,"* THE JOURNAL OF LAW AND CRIMINOLOGY, at 188. He concluded, "The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be

(Continued on following page)

the School of Criminology and Criminal Justice at Florida State University, offered the following description of himself:

> The author is a member of the American Civil Liberties Union, Amnesty International USA, Independent Action, Democrats 2000, and Common Cause, among other politically liberal organizations. He is a lifelong registered Democrat, as well as a contributor to liberal Democratic candidates. He is not now, nor has he ever been, a member of, or contributor to, the National Rifle Association, Handgun Control, Inc. nor any other advocacy organization, nor has he received funding for research from any such organization.

Targeting Guns: Firearms and Their Control (Aldine de Gruyter 1997).

According to Dr. Kleck's findings, firearms are used defensively 2.2 to 2.5 million times a year, with *handguns accounting for 1.5 to 1.9 million of the instances.* Kleck and Gertz, *Armed Resistance to Crime: The Prevalence And Nature Of Self Defense With A Gun*, THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Vol. 86, No. 1, 164 (1995) (emphasis added). Of the sample used to calculate the number of times a gun was used defensively during a year, women made up 46 percent. *Id.* at 178. Of the 2.5

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useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well."

million defensive gun uses each year, 8.2 percent involved sexual assault. This translates to approximately 205,000 occurrences each year. *Id.* at 185. In addition, overall, with a handgun, the odds in favor of reducing serious injury to the victim increase. Tark and Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, CRIMINOLOGY, Vol. 42, No. 4, 861-909, 902 (November, 2004).

The empirical literature is unanimous in portraying defensive handgun use as effective, in the sense that gun-wielding victims are less likely to be injured, lose property, or otherwise have crimes completed against them than victims who either do nothing, resist or who resist without weapons. Kleck and Gertz, *Carrying Guns for Protection: Results from the National Self-Defense Survey*, JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY, Vol. 35, No. 2, 193-224, 194 (May, 1998).[8]

With regard to the implications of gun control measures and self-protection, Kleck concludes:

> The policy-related reasons are obvious: if self-protection with a gun is common place, it means that any form of gun control that disarms large numbers of prospective victims, either altogether, or in certain times and places victimization might occur, will carry

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[8] *See generally* Brief for International Law Enforcement Educators and Trainers Association, *et al.* as *Amici Curiae* Supporting Respondents at 12-17, *District of Columbia, et al. v. Dick Anthony Heller*, No. 07-290 (February 11, 2008).

> significant social costs in terms of lost opportunities for self protection.

Kleck and Gertz, *Armed Resistance to Crime*, THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Vol. 86, 150-187, 151 (1995).

Likewise, he finds:

> In sum, measures that effectively reduce gun availability among the noncriminal majority also would reduce DGUs (Defensive Gun Uses) that otherwise would have saved lives, prevented injuries, thwarted rape attempts, driven off burglars, and helped victims retain their property.

Id. at 180.

On the contrary, when there is widespread gun ownership, the *deterrent* effect functions to keep communities safer for all. For example, after the City of Kennesaw, Georgia, a suburb of Atlanta, passed an ordinance requiring heads of households to own a gun, the rate of burglaries declined 89 percent in the seven months after passage of the ordinance. This drop dwarfed the rates of decline during the same time for the entire State of Georgia, the South Atlantic states and the United States for similarly situated cities. Kleck, *Crime Control Through the Private Use of Armed Force*, SOCIAL PROBLEMS, Vol. 35, No. 1, 1-21, 15 (February 1988).

Dealing directly with issues affecting women, Constitutional scholar Don B. Kates noted, like to the Kennesaw example cited by Kleck that:

> Similar results appeared from a highly publicized 1966 program in which 3,000 civilian women received defensive handgun training from Orlando, Fl. police. As of 1967, rape had dropped 88.2% in Orlando and aggravated assault and burglary 25%. While rape gradually increased again after the year-long program ended, five years later the rate was still 13% below the pre-program level; during that same period rape had increased 64% nationally, 96.1% in Florida and over 300% in the immediate area around Orlando.

Don B. Kates, *Firearms and Violence: Old Premises, Current Evidence, Violence in America*, Vol. 1, 208 (T. Gurr ed. 1989).

The empirical evidence is clear: the presence of guns deters crime, women possess guns in large numbers and they use them for defense, and the possession of a handgun or other firearm can provide significant psychological confidence. When gun prohibitions are present, the aforementioned positive aspects are reduced, providing only marginal ability to defend self, family and property. These findings translate by analogy to the elderly and the physically disabled.

B. The *Amici Curiae* Brief Filed By Violence Policy Center in Support of Appellants Incorrectly Characterizes the Value of the Handgun as an Effective Means of Self-Defense.

On pages 29-31 of the brief submitted in this case by Violence Policy Center [hereinafter VPC], it argues that handgun use is the least effective method for self-defense and that shotguns and rifles are better suited for this purpose. Brief for Violence Policy Center, *et al.* as *Amici Curiae* Supporting Petitioners at 29-31, *District of Columbia, et al. v. Dick Anthony Heller*, No. 07-290 (January 11, 2008). VPC further states that this argument is supported by a "wealth of evidence." *Id.* at 30.

The problem with this contention is VPC fails to cite *any* evidence supporting its proposition. Moreover, for women, the elderly and the physically disabled, VPC's "one-size-fits-all" approach ignores the physical requirements necessary to use shotguns or other long guns. Finally, the argument disregards the obvious: a handgun's compact nature lends itself to easier use by individuals with lesser physical ability, including but not limited to persons who are unable to brandish a shotgun when threatened.

VPC cites to "[f]irearms expert" Chris Bird, quoting from his book *The Concealed Handgun Manual, How to Choose, Carry and Shoot a Gun in Self Defense* in support of its assertion that the "handgun is the least effective firearm for self defense."[9] The absurdity of pretending a book advocating the use of handguns *really* contains the opposite conclusion does not go unnoticed. The quote used by VPC, "a handgun 'is the least effective firearm for self defense' and in almost all situations 'shotguns and rifles are much more effective in stopping a [criminal],'" however will be examined. The quote is drawn from *Chapter 5, Choosing a Handgun: Semi-automatics and Revolvers* and reads in its entirety:[10]

> Like many things in life, a handgun is a compromise. It is the least effective firearm for self-defense. Except at very close quarters – at arm's length – shotguns and rifles are much more effective in stopping a drug-hyped robber or rapist intent on making you pay for his lack of social skills. A handgun is the hardest firearm to shoot accurately, and, even when you hit what you are shooting at, your target does not vaporize in a red mist like on television.

Id. at 114.

Contrary to VPC's assertion, Bird's point is not that handguns are ineffective, but their effectiveness depends on the ammunition's stopping power. He states in the same section:

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[9] Chris Bird, *The Concealed Handgun Manual: How to Choose, Carry and Shoot a Gun in Self Defense* (2007).

[10] The edition cited by VPC is dated 1998, but the current edition is the fourth edition from 2007.

> In choosing a handgun for self defense, remember that the gun has two functions. In some cases, presentation of the gun, coupled with a shouted order to "STOP, GO AWAY, BACK UP," will be enough, to diffuse the threat. It reminds the potential robber or rapist he has urgent business in another county. . . . While any handgun will do, a large gun with a hole in the business end as big as a howitzer reinforces the seriousness of your intentions.
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> In cases where the threat is not enough, the gun is a delivery system for those little missiles, scarcely bigger than a cigarette filter, that rip and tear your attacker's anatomy. It is the bullet that stops the attack, not the gun. The size and weight of the bullet depend mostly on the caliber of the gun from which it is fired. So one of your first decisions on picking a gun is deciding on a caliber.

Id. at 115.

None of this material, nor the balance of Bird's book, supports VPC's assertion that handguns are ineffective to deter crime or as a means of self-defense.

Moreover, VPC fails to support its additional argument that handguns are hard to shoot accurately because when characterized correctly, the cited work by noted firearms instructor Massad Ayoob, *In the Gravest Extreme, The Role of the Firearm in Personal*

Protection, is contrary to VPC's contention.[11] First, the section of Ayoob's book to which VPC refers has nothing to do with personal defense of the individual or the homeowner; instead, the quote comes from *Chapter 6, How and When to Use Firearms in Your Store. Id.* at 43. Thus, this section is concerned with the proficiency of handgun use to avoid "wild shots" in order to avoid endangering customers or other persons. *Id.* at 47. Individual defense of the person and deterrence are treated in other chapters. *Id.* at 51, 75.

Second, the "accuracy" argument ignores that a criminal encounter is not a target shoot or practice. Moreover, it ignores a handgun's deterrent effect. Ayoob corrects, qualifies and explains VPC's mischaracterization of his statements in his declaration. He attests that:

> The statements in question in the VPC brief glaringly ignore the well-established fact that the great majority of times when a private citizen draws a gun on a criminal suspect, the very presence of the gun suffices to end hostilities with no shots fired. This simple fact makes marksmanship skill under stress a moot point in the majority of instances when defensive firearms are brought

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[11] Massad F. Ayoob, *In the Gravest Extreme, The Role of the Firearm in Personal Protection* 47 (Massad F. and Dorothy A. Ayoob 1980).

> into action by private citizens acting in defense of themselves or others.

See Declaration of Massad F. Ayoob *infra* p. App. 4.

Further, Ayoob observes, from a practical standpoint the use of a handgun, as opposed to a long gun, is superior in that long guns are more easily taken away during defensive use. He states:

> The VPC brief falsely attributes its imputation that rifles and shotguns are superior to handguns for defensive purposes, to me among others. Yet in going through "In the Gravest Extreme" carefully enough to cherry-pick the misleading out-of-context quotes, that brief pointedly ignores my flat statements on Page 100 of the book in question: "High powered rifles are not recommended for self-defense . . . A major problem with any rifle or shotgun is that it is too awkward to get into action quickly, or to handle in close quarters. A burglar will find it much easier to get a 3 ½ foot weapon away from you, than a pistol you can hold and fire with one hand." This is especially true with regard to any person who may be at a physical disadvantage when contrasted with the physical ability of their attacker, such as a woman, an elderly person or someone who is physically disabled.

Id. at pp. App. 4-5.

In addition, VPC's argument fails to acknowledge the logical proposition that one may dial 911 when holding a handgun, but it is difficult to do so with two hands occupied with a long gun.

VPC, as shown above, incorrectly characterizes the substance of its cited materials resulting in a misguided presentation of valid and authoritative studies. Most importantly to *amici* is that these substantive mischaracterizations attempt to diminish the utility of handguns as a defensive tool to victims of attack generally, but to the greater detriment of women, the elderly and the physically disabled. When the salient facts are presented accurately and sources are used properly in analyzing the defensive use of handguns, there is but one conclusion: handguns are an effective tool for defense of person and home.

III. The Historical Context of the Second Amendment Conclusively Demonstrates the Preexisting Right of Personal Armed Self-Defense.

The historical context of the Second Amendment reveals that the Framers knew the right of self-defense was established in the common law and recognized in the English Bill of Rights.

Judge Silberman, writing below for the majority, correctly held that the Second Amendment preserved and recorded a preexisting right. For this finding, he relied heavily on commentary contemporary with the adoption of the Constitution, the Bill of Rights and on other 19th Century commentary and sources.

Likewise, regarding the Founders' emphasis on self-defense within the Second Amendment, Justice Janice Rogers Brown, then on the California Supreme Court, made a similar observation in her concurrence in *Kasler v. Lockyer*, 23 Cal. 4th 472 (2000). Justice Brown observed:

> The founding generation certainly viewed bearing arms as an individual right based upon both English common law and natural law, a right logically linked to the natural right of self-defense. Blackstone described self-defense as the "primary law of nature," which could not be taken away by the law of society. (2 Jones's Blackstone (1976) p. 4.) "[T]he peaceable part of mankind will be continually overrun by the vile and [the] abandoned, while they neglect the means of self defence. . . . The supposed quietude of the good man allures the ruffian; . . . (but) arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world. . . . Horrid mischief would ensue were [the good] deprived of the use of [weapons] . . . the weak will become a prey to the strong." (1 Paine, *The Writings of Thomas Paine* (Conway edit. 1894) p. 56.) Extant political writings of the period repeatedly expressed a dual concern: facilitating the natural right of self-defense and assuring an armed citizenry capable of repelling foreign invaders and quelling tyrannical leaders.

Kasler at 505.

When the Bill of Rights was adopted in 1791, the United States and its citizens faced threat of attack from without and within. Citizens needed to be ready to respond quickly to numerous and varied threats because, for the most part, the government offered little or no protection. The individual right "to keep and bear Arms" for self-defense functioned to fill the gap, and acted to reduce and deter the threat of personal violence.

Although technology and advances in law enforcement have made society more stable and arguably safer, danger to the individual in the form of criminal activity justifies the use of handguns or other firearms for self-defense. This is true for all citizens, but particularly true for those who are physically disadvantaged relative to their attacker.[12]

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[12] The need for self-defense with handguns is underscored by the fact that citizens do not have a guarantee of adequate police protection. *Warren v. District of Columbia,* 444 A.2d 1 (D.C. Appeals 1981); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S.Ct. 998 (1989). Thus, these cases show that government cannot protect all the people all the time.

IV. Anecdotal Evidence and Declarations Illustrate the Critical Importance of the Individual Right of Armed Self-Defense Embodied In the Second Amendment for Women, the Elderly and the Physically Disabled.

Although statistics and empirical data are critical to understanding the broad spectrum of what defensive gun use means to society, the actual flesh-and-blood people, who have had to defend themselves or their families with handguns or other firearms, stand behind the data.

A printed compilation of the instances when women, the elderly or physically disabled defensively used guns in the United States would be unwieldy (though compelling), so the efficacy of statistics is obvious. Behind the rows and columns of data analyzed as statistics, however, are the faces of real, frightened and vulnerable people who have reached for their handguns after hearing the sounds of intruders in the night. These individuals, discussed below, avoided injury or death because they resisted their attackers with handguns. But, sadly, the same may not have been true if their homes were in the District of Columbia.

A. Recent Anecdotes Effectively Illustrate the Importance of the Personal Right of Armed Self-Defense for Women, the Elderly and the Physically Disabled.

The following includes instances where women, the elderly and the physically disabled defended themselves during home invasions as well as attacks outside the home. The attacks were perpetrated by younger, stronger assailants. Moreover, the victims in some instances protected not only themselves, but also loved ones.

The anecdotes are arranged in reverse chronological order and by type. The home invasions come first, followed by parking lot incidents.[13]

1. Home Invasions

On January 25, 2008 in Atlanta, Georgia, an intruder assaulted a wheelchair-bound homeowner at the homeowner's front door. During the struggle, the homeowner was able to use his handgun to shoot the attacker.[14]

In December 2007, there were numerous instances of home invasion attacks on women and the elderly. On December 14, 2007 in Lexington, Kentucky, two women were inside their home when they heard a man trying to break in. They dialed 911, keeping the dispatcher on the phone while they warned the man to stop. When he would not stop, one of the women shot him. Investigators ruled the shooting self-defense.[15] On December 8, 2007 at Hialeah Gardens, Florida, four armed men attacked a 74-year-old heart patient, Jorge Leonton, in his driveway. After he withdrew money from an ATM, the four followed him home and choked him after he got out of the car, demanding money. While being choked by one of the attackers, Leonton took out his gun, for which he had a concealed weapon permit, and told the attacker three times he had a heart condition, could not breathe and the assailant was killing him. When the attacker would not let go, Leonton shot him. The other three men fled. Leonton's wife said, "If he wouldn't have been armed, I think he would have been killed."[16]

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[13] In addition, other anecdotes may be found in the National Rifle Association's *Armed Citizen* column. The NRA has collected these stories and offers them in paperback form.

[14] Christensen, Tracy, 11 Alive News Home Page, *Wheelchair-Bound Man Shoots Attacker,* http://www.11alive.com/news/article_news.aspx?storyid=110152 (last visited February 5, 2008).

In November 2007, there were several attacks against all groups' members. On November 27, 2007 in Carthage, Missouri, a 63-year-old grandmother brandishing a handgun caused two burglars to run away after they broke down her back door. Her grandchild was in the house at the time.[17] Two weeks earlier, on November 16, 2007 in Waynesville, Missouri, a disabled man chased one intruder away and took one prisoner for the police with his handgun. Before breaking into the disabled man's trailer, the two male assailants had broken into a local motel room where they had beaten two people with a baseball bat so severely that one had to be taken by "life flight" to the hospital. Later, the two intruders entered the trailer and confronted the disabled man and his wife. One intruder pulled a pellet gun, but the homeowner pulled a "real gun." The pellet gun-wielding intruder fled while the other was held until the police arrived.[18]

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[15] Lex 18 News Home Page, *Police Investigate Bizarre Shooting*, http://www.lex18.com/Global/story.asp?S=7496356&nav=menu203_2 (last visited February 5, 2008).

[16] Stone, Shomari, CBS 4 Home Page, *Man Turns on Would-Be Robbers, Kills One*, http://cbs4.com/local/crimestoppers.home.invasion.2.606903.html (last visited February 5, 2008).

[17] Fox News Home Page, *Pistol-Packing Grandma Stops Would-Be Burglars*, http://www.foxnews.com/story/0,2933,313148,00.html (last visited February 5, 2008).

Two days earlier, on November 14, 2007 in Hessville, Indiana, a woman who was being stalked had her door kicked in by a former date. Later, when he returned to her home, she called 911 and was told to lock herself in the bedroom. When she retreated to the bedroom, she found a pistol which had been given to her for protection. She hid in a closet, the stalker opened the door, she told him to stop, but when he advanced toward her, she fired three times. She struck the stalker in the abdomen and he died from his wounds.[19] On November 5, 2007 in Bartlett,

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[18] Waynesville Daily Guide Home Page, *Disabled Man Pulls Gun, Ends Violent Armed Robbery Spree*, https://secure.townnews.com/shared-content/subscription/authenticate/index.php?mode=start&domain=waynesvilledailyguide.com&usereg=&url=http%3A%2F%2Fpulaskicountyweekly.com%2F%2Farticles%2F2007%2F11%2F16%2Fnews%2Fnews02.txt&discover=0&amex=0 (last visited February 7, 2008).

[19] NBC 5 Home Page, *Police: Woman Shoots Stalker to Death After Break-In,* http://www.nbc5.com/news/14596016/detail.html?rss=chi&psp=news (last visited February 5, 2008).

Tennessee, Dorothy "Bobbi" Lovell's charges were dropped after a review of the evidence indicated self-defense in the shooting of her husband. Mrs. Lovell shot her husband with a .357-caliber magnum handgun after he held Mrs. Lovell and her 21-year-old son hostage, threatening their lives.[20]

October 2007 was replete with the defensive use of handguns. On October 27, 2007 in Gainesville, Florida, a 28-year-old male tried to kick down the door of a home owned by Arthur Williams, a 75-year-old, legally blind, retired taxi dispatcher. The homeowner fired on the intruder, striking him in the neck. Local officials praised Williams for defending himself.[21] On October 24, 2007 in Wichita, Kansas, a 76-year-old man shot his 52-year-old live-in girlfriend after she poured bleach on him, sprayed him with mace and beat him with a frying pan. The police called the use of the weapon self-defense.[22] On October 15,

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[20] Lawrence Buser, *Charges Against Bartlett Wife Dropped in Shooting of Husband,* COMMERCIAL APPEAL, Home Page, http://www.commercialappeal.com/news/2007/nov/05/charges-against-bartlett-wife-dropped-shooting-hus/ (last visited February 5, 2008).

[21] WESH Home Page, *Blind Man Shoots Home Intruder in Neck,* http://www.wesh.com/news/14437963/detail.html?rss=orl&psp=news (last visited February 5, 2008).

[22] Kansas Home Page, *Woman Shot, Man Injured in Domestic Dispute,* http://nl.newsbank.com/nl-search/we/Archives?p_product=WE&p_theme=we&p_action=search&p_maxdocs=200&s_dispstring=76-year-old%20man%20asked%20his%2052-year-old%20girlfriend%20AND%20date(all)&p_field_advanced-0=&p_text_advanced-0=(76-year-old%20man%20asked%20his%2052-year-old

(Continued on following page)

2007 in Kansas City, Missouri, a 69-year-old man thwarted a home invasion by firing a shot from his .40-caliber handgun at his bedroom door when he heard an intruder approaching after his front door had been pried open. The intruder fled without apparent injury.[23]

In July 2007, there were several reported attacks against the elderly and the disabled. On July 30, 2007 in Limestone County, Alabama, a disabled man who collected aluminum cans to supplement his income confronted two men, ages 20 and 24, stealing his cans. He immediately called the sheriff's office. The men thought he had left, walked back onto the property and, when they discovered him in his truck, one of them came toward the homeowner and threatened him. The homeowner told him to stop. When he did not, the homeowner showed his gun and demanded the two men lie on the ground to wait for the sheriff.[24] On July 27, 2007 in El Dorado, Arkansas, a 24-year-old intruder beat 93-year-old Mr. Hill with a soda can, striking him 50 times before he passed out. Covered with blood, the elderly man awoke and

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%20girlfriend)&xcal_numdocs=20&p_perpage=10&p_sort=YMD_date:D&xcal_useweights=no (last visited February 7, 2008).

[23] Kansas City Home Page, *Shots Exchanged During KC Home Invasion*, http://www.kansascity.com (last visited February 7, 2008).

[24] WAFF 48 News Home Page, *Two Men Arrested For Stealing Garbage*, http://www.waff.com/global/story.asp?s=6861004 (last visited February 7, 2008).

retrieved a .38-caliber handgun. The assailant charged at him, forcing Hill to shoot him in the throat. Police arrived and took both Hill and the intruder to the hospital.[25] On July 4, 2007 in Hickory, North Carolina, a 79-year-old man shot a 23-year-old intruder in his bedroom. After the intruder broke into the house, the homeowner's wife escaped to the neighbors and the homeowner shot the intruder. The intruder was expected to survive.[26]

On April 26, 2007 in Augusta, Georgia, an assailant awakened his 57-year-old neighbor, Theresa Wachowiak, putting a knife to her throat. She resisted and managed to grab her .357-caliber handgun, and she shot the intruder in the stomach. The intruder survived. *See* Declaration of Theresa M. Wachowiak *infra* pp. App. 21-23.[27]

2006 saw notable examples of defensive gun use. On December 2, 2006 in Zion, Illinois, a 55-year-old wife heard her kitchen doorjamb shatter. She grabbed her pistol and shot the intruder in the chest after he forced his way into her house. The intruder was wearing a black ski mask and gloves.[28]

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[25] PINE BLUFF COMMERCIAL, *Police: El Dorado Man, 93, Shoots Robber After Beating* (July 27, 2007).

[26] WSOC TV Home Page, *79-Year-Old Man Shoots Intruder During Hickory Home Invasion,* http://www.wsoctv.com/news/13621816/detail.html (last visited February 5, 2008).

[27] WJBF Home Page, *Homeowner Fights Back,* http://www.wjbf.com/midatlantic/jbf/news_index.apx.-content-articles-JBF-2007-04-26-0001.html (last visited February 7, 2008).

On October 18, 2006 in Santa Clarita, California, an intruder broke the lock on Nadine Teter's back door and barged into her home. She fled to her backyard with a gun, but he followed and charged at her. She shot him. The intruder fell, got back up and advanced again, requiring her to shoot him two more times. The attacker then jumped over a fence and ran away. He was later apprehended when the intruder's mother, who was driving the "get-away" car, flagged down law enforcement for medical attention. The intruder survived, and he and his mother were convicted in December 2007 of charges arising out of the attack. With regard to the use of the firearm, Teter said she thinks every woman should carry a gun. She also said:

> Never in a million years, did I think I would use (the gun) – never. And whatever higher power, whatever gave me the strength to pull that trigger . . . You're looking at him or me. My life or his life. I was not going to get raped. I was not going to get murdered. There was no way – and I didn't.[29]

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[28] CHICAGO TRIBUNE Home Page, *Cops: Zion Woman Killed Armed Home Invader*, www.chicagotribune.com (last visited February 7, 2008).

[29] KNBC Home Page, *Woman Who Shot Intruder Three Times Talks to KNBC,* http://www.knbc.com/news/14842132/detail.html (last visited February 5, 2008).

On April 27, 2006 in Red Bank, Tennessee, at 1:30 a.m., a disabled man saw a masked man crawling through his bedroom window. After he was awakened by the window breaking, David McCutcheon, the disabled homeowner, reached for his .32-caliber revolver and fired four times, forcing the masked man to flee. The intruder was arrested.[30]

2005 saw attacks on the elderly thwarted by defensive handgun use. On May 31, 2005 in Indialantic, Florida, Ms. Judith Kuntz, a 64-year-old widow armed with a .38-caliber revolver shot an intruder in the chest after he broke into her home. She fired at him as he entered her bedroom with a flashlight. She stated, "I'm doing fine under the circumstances . . . I don't take any joy in somebody being dead. My self-preservation instinct took over." *See* Declaration of Judith Kuntz *infra* pp. App. 19-20.[31] On March 30, 2005 in Kingsport, Tennessee, an 83-year-old woman wrestled with a home intruder. Although he left with her purse, she was able to fire her handgun at him during the struggle, causing him to flee.[32]

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[30] Chattanoogan Home Page, *Disabled Red Bank Man Gets Off Four Shots at Home Invader,* http://www.chattanoogan.com/articles/article_84691.asp (last visited February 5, 2008).

[31] Orlando Sentinel Home Page, *Widow Uses Gun, Instincts to Fend Off Burgler (sic)*, http://www.orlandosentinel.com (last visited February 7, 2008).

[32] WMC TV Home Page, *83-Year-Old Woman Wrestles, Shoots at Burglar*, http://www.wmcstations.com/global/story.asp?s=8945 (last visited February 7, 2008).

Women and the elderly used handguns to stave off assailants in 2004. On March 22, 2004 in Springfield, Ohio, 49-year-old Melanie Yancey shot and killed a 21-year-old intruder when he and an accomplice broke into her home after kicking in her door. She sealed herself in her bedroom, but the two tried to break in. She then fired a shot at them from her .40-caliber handgun and they returned fire. When she heard them go into another unoccupied bedroom, she ran out of the room and fired at them as she ran out of the house. Later, one of the intruders was found lying on a nearby driveway.[33]

On November 4, 2004 in Pensacola, Florida, a 77-year-old retired oil worker, James Workman, shot an intruder who entered the trailer where Workman and his wife, Kathryn, were at home. The intruder advanced toward the trailer despite a warning shot, and Workman struggled with the intruder inside the trailer, shooting him in the process. *See* Declaration of James H. Workman, Jr. *infra* pp. App. 24-25.[34]

2. Parking Lot Incidents

On December 27, 2007 in Orlando, Florida, a 65-year-old man fought off five thugs with a handgun.

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[33] SPRINGFIELD NEWS-SUN Home Page, *Woman Kills Intruder*, http://www.springfieldnewssun.com (last visited February 7, 2008).

[34] LOCAL 6 Home Page, http://www.local6.com/news/3889532/detail.html (last visited February 7, 2008).

He was collecting money for parking at a church when a man, accompanied by four other men, put a gun to his head. The victim reached inside his jacket as if to pull out money, but instead, pulled out a handgun and started firing. The men ran away. The elderly man reported he obtained a concealed weapon permit after he was previously attacked by eight teens who tried to rob him with a pipe.[35]

On July 1, 2007 in Dallas, Texas, a 31-year-old man stopped Amor Kerboua, a 79-year-old man, in Kerboua's apartment parking lot. The man put a gun in Kerboua's face and demanded money. Thinking the attacker was joking, Kerboua pushed the gun away. Again, the man put the gun in his face and Kerboua handed him a cup containing $242.50. The assailant then told Kerboua he was going to kill him, pointing the gun at his stomach. Instead, Kerboua, who had a concealed weapon permit, drew his .38-caliber revolver and shot the assailant in the throat. The assailant fell, but maintained his gun aim at Kerboua, forcing Kerboua to fire two more times. The police determined Kerboua acted in self-defense. The assailant survived.[36]

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[35] Florida Today Home Page, *Gun-Packing Man, 65, Fights Off 5 Thugs,* http://www.floridatoday.com/apps/pbcs.dll/article?AID=/20071227/BREAKINGNEWS/71227025/1086 (last visited February 7, 2008).

[36] Dallas News Home Page, *Senior: Man I Shot Robbed Me,* http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-robberyshoot_01met.ART.North.Edition1.43b8c05.html (last visited February 7, 2008).

B. Nancy Hart and Minnie Lee Faulkner: Historical and Present Day Illustrations of How Firearms Deter Assailants.

1. Nancy Hart: Revolutionary War Notable Used Firearms for Personal and Family Security.

During the war for American Independence, there lived a six-foot-tall, red-haired woman with a fiery temper named Nancy Hart in what is now Elbert County, Georgia. Bernice McCullar, *This is Your Georgia* 284 (The American Southern Publishing Company 1966). During this time, she was married and had children. Loula Kendall Rogers, *A True Story of Nancy Hart*, ATLANTA JOURNAL, October 14, 1901. The war in upcountry Georgia was more in the nature of a civil war, pitting neighbors, Tories and patriots, against one another. During one brutal incident, the Tories murdered one of Nancy's neighbors, a patriot hero named John Dooley, in front of his family. McCullar, *supra*, at 277. Nancy had to call on her abilities with a rifle to protect her family. Clay Ouzts, *Nancy Hart (ca. 1735-1830), History and Archeology, The New Georgia Encyclopedia*, http://www.newgeorgiaencyclopedia.org/nge/Article.jsp?id=h-2876&hl=y (last visited February 7, 2008).

Historical records reflect that, while her husband Benjamin was away, Nancy was working at her cabin when a band of Tories, part of the same group that murdered John Dooley, surprised her and forced her to cook a meal for them – the meal being her prized turkey. *Id.*, McCullar, *supra*, 285. While Nancy cooked and liberally supplied corn whiskey to the intruders, she surreptitiously passed their weapons through a space between the hewn logs of her home to one of her children. Nancy had already sent another of her children to call for her neighbors on a conch shell used for raising the hue and cry. Ouzts, *supra*. When the intruders discovered what Nancy had been doing, they demanded their guns. *Id.* Nancy had possession of at least two of their rifles and fired. One Tory fell dead and, with a second shot, another fell wounded. Nancy's husband and other neighbors arrived soon after. *Id.*

Although the rifle may have been of more utility to Nancy's generation, low-maintenance revolvers and self-loading handguns are now prevalent. Handguns are also more useful in close quarters where the handgun's size and ease of use not only recommends its general employment, but also makes it particularly suited for women, the elderly and the physically disabled. A rifle or shotgun as a primary defensive weapon is simply not as manageable as a handgun because either of these weapons weigh more and the barrels can be cumbersome.

Despite the differences in technology, the constant factor both historically and now is that the presence of firearms in the hands of women, the elderly and the physically disabled, at a minimum, serve as an equalizer between the victims and their attackers.

2. Minnie Lee Faulkner: A Modern Illustration That the Use of a Firearm Deters an Attacker.

Living in almost the exact geographical spot as Nancy Hart, Mrs. Minnie Lee Faulkner, 88, lives alone in her home in Elbert County, Georgia near the Savannah River. Elbert County is still rural though settled early in the State's history. *See* Declaration of Minnie Lee Faulkner *infra* pp. App. 26-29.

Faulkner purchased a handgun for personal defense and home protection after the death of her husband in 1993. Faulkner chose a handgun over a rifle or shotgun because it was small, maneuverable and easy to use for home defense by someone of her age, size and strength. *Id.* at p. App. 26.

On October 10, 2004, Faulkner's doorbell rang at one o'clock in the morning. From the porch, a voice called, "Minnie Lee, I've got car trouble – open the door." Faulkner replied that she was not going to open the door, and the man on her porch started kicking the door. He split the door and Faulkner called 911. *Id.* at p. App. 27.

Faulkner told the man that she had called 911 and he stopped kicking. With pistol in hand, Faulkner then peered out the window and she saw a young man's face with a clear complexion. Faulkner said in a stout voice, "I have my gun and I have it trained right on you." *Id.* The intruder left. Later, when the front door was examined, it was determined that one more kick would have broken the door. Later that night, the intruder broke into a nearby trailer and attacked an elderly woman while she was in bed. *Id.* Faulkner believes that the intruder would have tried to kill her had he entered. *Id.*

Faulkner spoke with the local sheriff's office and was able to provide information for a composite drawing, identifying the intruder as the son of a deceased neighbor. *Id.* at pp. App. 27-28. Faulkner specifically noted his clear eyes and good complexion. Using this information and other evidence, the sheriff's office was able to apprehend the intruder. *Id.* He was convicted of burglary and aggravated assault with intent to rape. *Id.* at p. App. 28.

Faulkner was badly frightened by the attack. She believes that her handgun is her only protection, and she is glad she had it the night of the attack. She did not have to shoot the intruder because the mere presence of the weapon scared him away. Faulkner believes people have a right to have a gun for protection and self-defense. *Id.*

Faulkner's experience poignantly illustrates why the individual right of self-defense through the use of a handgun is so vital to women, the elderly and the physically disabled. Faulkner is from the same county where Nancy Hart stood against the Tories during the War for Independence. As Hart used her intelligence, courage and the Tories' own rifles against them, Faulkner used her courage, fortitude and handgun against an intruder in the night. These women, though separated by two hundred thirty years, have in common the necessity of firearms to deter their bigger, stronger or more numerous assailants. Without firearms, both Nancy Hart and Minnie Lee Faulkner, living on the same land but separated by time, would have been victims. With firearms, they became more than equal to the imminent danger they faced.

◆

CONCLUSION

For the foregoing reasons, Southeastern Legal Foundation, Inc., Second Amendment Sisters, Inc., Women Against Gun Control, 60 Plus Association, Inc., Professor Robert B. Smith, Dr. Christie Davies, Professor Joe Michael Cobb and Minnie Lee Faulkner respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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February 11, 2008

Counsel for Amici Curiae

DECLARATION OF MASSAD F. AYOOB

COMES NOW Massad Ayoob and gives this his declaration, based upon personal knowledge, showing that the following facts are true and correct,

1.

I am of the age of the majority and am laboring under no mental difficulty that would prevent me giving evidence in this case.

2.

My name is Massad F. Ayoob. I have been a firearms owner since childhood, a competitive shooter since approximately 1967, Handgun Editor for *Guns* magazine for more than 30 years, and Law Enforcement Editor for *American Handgunner* magazine. I served for more than 19 years as chair of the firearms committee of the American Society of Law Enforcement Trainers and presently serve on the advisory board of the International Law Enforcement Educators and Trainers Association. I have written and published numerous books on firearms and self-defense, including *In the Gravest Extreme: the Role of the Firearm in Personal Protection* and *StressFire: Volume I of Gunfighting for Police: Advanced Tactics and Techniques*. I have attached my *curriculum vitae* to this declaration as Exhibit A.

3.

I aver under oath that I am the same Massad F. Ayoob who wrote the books *In the Gravest Extreme* and *StressFire*, mentioned above and quoted out of context in an *amicus* brief filed by the Violence Policy Center in the *Heller* case now before the Supreme Court of the United States.

4.

I aver under oath that the quotes attributed to me appearing on pages 30 and 31 of said Violence Policy Center *amicus* brief, hereinafter VPC brief, offered in support of the Appellant in the *Heller* case is taken blatantly out of context, both within the passage from which they were extracted, and from the overall contexts of the books in which they appear.

5.

At Page 30 of the VPC brief, the statement is made by the brief's author(s) that, "Even pro-gun advocates recognize that handguns are not well-suited for self-defense . . . As (Chris) Bird has noted and many others have echoed, '(a) handgun is the hardest firearm to shoot accurately.'(64) Because of their smaller size and shape, which allows them to be concealed and carried easily, handguns – compared with larger shotguns and rifles that are designed to be held with two hands – require a greater degree of dexterity.(65)"

6.

Footnote number 64 quoted in the paragraph immediately above reads, "*Id.*; *see also* Massad F. and Dorothy A. Ayoob, *In the Gravest Extreme: The Role of the Firearm in Personal Protection* 47 (1980) ('The handgun is the most difficult firearm to shoot accurately and rapidly; skill comes only with practice.')."

7.

The actual passage from which that quote was extracted reads as follows: "The ability to use your gun effectively is not only an asset, but indeed a responsibility. You must become sufficiently adept to be sure (a) that you will not endanger standers-by with wild shots, and (b) that you can neutralize an armed, violent offender before he terminates innocent lives. The handgun is the most difficult firearm to shoot accurately and rapidly; skill comes only with practice. Spend some time at a local gun club or police pistol range, learning the fundamentals of marksmanship and gun handling from experts."

8.

The affiant sees nothing, and indeed intended nothing, in that passage to indicate that "handguns are not well-suited for self-defense." The very wording of the passage makes it clear that "learning the fundamentals" is sufficient, and that the experts are the ones who should teach those fundamentals, not the only ones who can practice them. If it were true that "handguns are not well-suited for self-defense," all of our nation's fully sworn police officers would not be routinely armed with them.

9.

The statements in question in the VPC brief glaringly ignore the well-established fact that the great majority of times when a private citizen draws a gun on a criminal suspect, the very presence of the gun suffices to end hostilities with no shots fired. This simple fact makes marksmanship skill under stress a moot point in the majority of instances when defensive firearms are brought into action by private citizens acting in defense of themselves or others. Moreover, most situations involving personal defense and defense of family offer very little risk to bystanders.

10.

The VPC brief falsely attributes its imputation that rifles and shotguns are superior to handguns for defensive purposes, to me among others. Yet in going through *In the Gravest Extreme* carefully enough to cherry-pick the misleading out-of-context quotes, that brief pointedly ignores my flat statements on Page 100 of the book in question: "High powered rifles are not recommended for self defense . . . A major problem with any rifle or shotgun is that it is too awkward to get into action quickly, or to handle in close quarters. A burglar will find it much easier to get a 3½ foot weapon away from you, than a pistol you can hold and fire with one hand." This is especially true with regard to any person who may be at a physical disadvantage when contrasted with the physical ability of their attacker, such as a woman, an elderly person or someone who is physically disabled.

11.

At Page 31 the VPC brief quotes me from my book *StressFire*, and quotes other colleagues well known to me personally and professionally such as Loren Christensen and Dr. Alexis Artwohl, to the effect that when facing imminent death, human beings will suffer effects of "fight or flight response" such as "the loss of fine motor skills, tunnel vision, auditory exclusion, trembling, and loss of control of bodily functions." This is true as far as it goes, but in a giant leap past logic that seems to define the term *non sequitur,* the VPC brief then blatantly concludes, "A handgun owner faced with the 'fight-or-flight reflex' is *less* likely to be able to manipulate his handgun effectively for self-defense, but he is also *more* likely to endanger himself, his family, and other innocent bystanders."

12.

This is false on its face. It blatantly overlooks the incredibly obvious fact that "fight or flight" response is triggered *by the perception of clear and present mortal danger,* the situation I wrote the books in question, and the other authors from my field wrote *their* books, to help people in such deadly danger to cope with. There is *no* evidence of "frequent" shootings of innocent bystanders by armed citizens, and it is obvious and within the common knowledge that when the private citizen draws a gun to ward off a lethal threat, that very threat is the danger to bystanders, not the defending citizen.

13.

Moreover, it has been my experience in an adult lifetime spent studying and researching this discipline that "fight or flight response" is born in fear, and fear in turn is largely born in helplessness against the given threat. Therefore, it is axiomatic and well within the realm of common sense that the person armed with a mechanism that can neutralize the threat will be far less in the grip of fear, and far less danger to themselves or others than the original, criminal threat itself.

14.

Let the affiant close by noting that the theme of my books, quoted out of context by VPC in their *amicus* brief, was that nothing less than the firearm will suffice to protect against imminent, unavoidable danger of death or grave bodily harm at the hands of violent criminals who create that clear and present danger as reasonably perceived by a prudent person. Moreover, an adult lifetime as a firearms instructor for both law enforcement and qualified private citizens has shown me that the handgun is faster to deploy and easier to protect against a criminal disarming attempt than a rifle or shotgun. Moreover, because of the very nature of a handgun, its size, its ease of use and its compactness, allows its effective use for personal defense by persons of lesser physical ability.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Live Oak, Florida, this 28th day of January, 2008.

/s/ Massad Ayoob
MASSAD AYOOB

"EXHIBIT A"

Curriculum Vitae, **Massad F. Ayoob**

D.O.B. 7/20/48

Areas of Expertise: Dynamics of violent encounters, training standards for safe weapons handling (law enforcement/civilian), training standards of firearms and use of force (police/civilian), homicide/use of force investigation, personal and professional security, weapon retention/disarming, law enforcement internal investigation/discipline.

Teaching Experience:

Director, Lethal Force Institute, 1981-present.

Chair of firearms committee, American Society of Law Enforcement Trainers (ASLET), 1987-present. Also served on Ethics Committee. Leads annual Panel of Experts on firearms/deadly force issues at ASLET's international seminars.

Special Instructor, Chapman Academy, 1981-88.

International Instructor, PR-24 baton; has lectured several times at annual international seminar. Trains other instructors and trainers of instructors.

Advisory Board member, International Law Enforcement Educators' and Trainers' Association, has lectured there on investigation and management of police use of force cases.

National Instructor, Weapon Retention & Disarming, National Law Enforcement Training Center. Trains other instructors and trainers of instructors. 1990-present.

Assistant professor teaching weapons and chemical agents, Advanced Police Training Program of New Hampshire, 1974-77.

Co-instructor (w/former world pistol champion Ray Chapman) of Advanced Officer Survival Seminars through Police Marksman Assn., in the 1980s.

International Instructor, Persuader Mini-Baton, certified by Joe Truncale.

Instructor, Kubotan self-defense, certified by Soke Takayuki Kubota.

National Instructor, Telescoping baton, certified by CASCO.

Instructor, straight baton, certified by COPSTK.

Has taught on relevant topics for National, International, and Regional seminars of International Association of Law Enforcement Firearms Instructors; regional seminars for CLE credit on defending deadly force cases (NACDL, MA. CDL Assn.); International Homicide Investigators' Seminar (investigation of officer-involved shootings and characteristics of self-defense shootings); McGill University School of Medicine (medico-legal aspects of gunshot and knife wounds); officer survival tactics (Ordnance Expo, Los Angeles; National Tactical Invitational; New England

SWAT Seminar; DEA National Academy; Metro-Dade Police Academy; DEA/Miami).

Personal Training

Smith & Wesson Academy: Advanced Combat Shooting (1st in class), Instructor course; Instructor Update (twice); Officer Survival Course (1st in class); Weapon Retention instructor course; advanced revolver shooting course.

Glock: Glock Instructor Course; Glock Armorer Course.

Firearms Instructor Courses: National Rifle Association.

Ordnance Expo: Firearms and Ballistic Evidence; Officer Involved Shooting Investigation; Advanced Officer Involved Shooting Investigation; Officer Survival; Management of Barricaded Suspects.

International Police Academy: Defensive Tactics (Unarmed Combat and Restraint) Instructor Course, rated Master Instructor by sensei James Morell.

NYPD: "Hostage Negotiation for Supervisors", "Post Shooting Tactics", "House Clearing Techniques", Off Duty Confrontation Tactics", "Summary of Violent Encounter Patterns", "Police Shotgun Program."

Advanced Homicide Investigator school, by Vern Geberth, NYPD Ret., author of "Practical Homicide Investigation."

International Homicide Investigators' Seminar (2 occasions).

Medical/Legal Death Investigation (Dade County Medical Examiner's Office).

AELE: "Police Civil Liability Seminar."

PPCT: Pressure Point Control Tactics, taught by Bruce Siddle.

Federal Law Enforcement Training Center: BOSS program including officer survival, intelligence briefings on outlaw bike gangs, booby traps, counter-ambush tactics, arrest techniques.

Escrima (stick- and knife-fighting), Grandmaster Remy Presas.

Knife/Counter-Knife courses: Master Paul Vunak, Hank Renhardt, Sensei Jim Maloney, Michael de Bethencourt.

Has studied personally with world handgun champions Ray Chapman, Rob Leatham, Jerry Miculek, and Frank Garcia in advanced shooting programs.

Has studied special units and their training on-site, including but not limited to:

NYPD Firearms & Tactics Unit, Emergency Services Unit, Armed Robbery Stakeout Unit.

LAPD SWAT, Firearms Training Unit.

FBI Firearms Training Unit.

Metro-Dade Police Firearms/SWAT Training Unit.

Illinois State Police Ordnance Section.

NH State Police SWAT, EVOC, Firearms Training.

Kentucky State Police, Firearms Training and SRT Training.

Arizona Highway Patrol Firearms Training.

London, England Metropolitan Police firearms training and special services unit (D.11, PT-17, SO-19).

Has reviewed or audited numerous other law enforcement firearms training programs.

Publication Credits

Books:

"Fundamentals of Modern Police Impact Weapons," Charles C. Thomas, Publishers, 1978.

"In the Graves Extreme: the Role of the Firearm in Personal Protection," Police Bookshelf, 1979.

"Hit the White Part," Police Bookshelf, 1982.

"The Truth About Self Protection," Bantam, 1983.

"StressFire," Police Bookshelf, 1984.

"StressFire II," Advanced Combat Shotgun," Police Bookshelf, 1992.

"The Semiautomatic Pistol in Police Service and Self Defense," Police Bookshelf, 1988.

"Ayoob Files: the Book," Police Bookshelf, 1995.

"Complete Book of Handguns," Volume 10 (1993) through Volume 27 (2006), Harris Publications.

"Gun Digest Book of Combat Handgunnery, Fifth Edition," Krause Publications, 2002.

"Gun Digest Book of SIG-Sauer Pistols," Krause Publications, 2004.

"Gun Digest Book of Beretta Pistols," Krause Publications, 2005.

Monographs:

"Gunproof Your Children," Police Bookshelf/Potshot Press.
"Handgun Primer," Police Bookshelf/Potshot Press.
"The Police View of Gun Control," Second Amendment Foundation.
"Armed and Alive," Second Amendment Foundation.

Forewords for Authoritative Texts:

"Mu Tau: The Modern Greek Karate" by James Arvanitis
"Realistic Defensive Tactics" by John Peters
"Modern Centerfire Handguns" by Stanley Trzoniec
"You Can't Miss" by John Shaw
"MasterTips" by Jon Winokur
"Effective Defense" by Gila May-Hayes
"In Self Defense" by Michael Izumi
"The Tactical Pistol" by David Lauck
"The Tactical Rifle" by David Lauck

Periodicals

Handgun Editor, *Guns* magazine
Law Enforcement Editor, *American Handgunner* magazine
Contributing Editor, *Shooting Industry* magazine
Contributing Editor, *On Target* magazine
Firearms Editor, *Backwoods Home* magazine
Associate Editor, *Combat Handguns* magazine
Associate Editor, *Guns & Weapons for Law Enforcement* magazine
Associate Editor, *Gun Week*

Has published thousands of articles in various professional journals and newsstand periodicals, the overwhelming majority related to law enforcement, weaponry, martial arts and personal defense. Firearms articles have appeared in *Guns, American Handgunner, Handguns, GUNsport, Handgunner, Home Defense, Glock Annual, Colt Annual, Magnum, Gun World, Combat Handguns,* and others. Martial arts/unarmed combat articles have appeared in *Black Belt, Official Karate, Inside Kung-fu, Inside Karate, Warriors, Fighting Stars,* and other such publications. Law enforcement articles have been published in *American Police Beat, Law & Order, Police, Police Product News, Sentinel, Trooper, Patrolman, Police Marksman, Guardian, Guns & Weapons for Law Enforcement, Guns & Ammo Law Enforcement Annual,* and other police professional journals and law enforcement related periodicals. Has also been published in *Car & Driver, Gentlemen's Quarterly, Man's Magazine, Modern Jeweler, New Hampshire Outdoorsman, New Hampshire Times, Prism, Sexology,* *Sports Afield,* and assorted other general interest publications.

Training Films

"StressFire Handgun," 2002
"StressFire Shotgun," 2002
"StressFire Rifle," 2002
"Deadly Force Cases," ALI-ABA, 2001
"Judicious Use of Deadly Force," 1990
"Post Violent Event Trauma," 1990
"LFI Handgun Safety," 1990
"Off Duty Survival," 1993
"Shoot to Live," 1986
"How Close is Too Close," 1986
"Cute Lawyer Tricks," 1986
"Physio-Psychological Aspects of Violent Encounters," 1981
Has appeared in various other training films.

Quoted as authoritative reference in:

FBI Journal
"Law Enforcement Handgun Digest" (Grennell)
"Gun Digest Book of Combat Handgunnery, 1st edition (Lewis & Mitchell), 2nd and 3rd editions (Karwan)
"Shooting Schools: An Analysis" (Winter)
"Street Survival: Tactics for Armed Encounters" (Adams, McTernan, Remsberg)
"Tactical Edge: Tactics for High Risk Patrol" (Remsberg)
"Handgun Retention System" (Lindell)
"The Street Smart Gun Book" (Farnam)
"Police Handgun Manual" (Clede)
"Police Shotgun Manual" (Clede)
"High Tech SWAT Weapons" (Bane)

"PR-24 Baton Manual" (Starrett)
"Police Officers Guide" (Clede)

Cited as authoritative reference in numerous other publications.

Career Accomplishments

Voted Outstanding American Handgunner of the Year, 1998.

Winner of first annual National Tactical Advocate Award, 1995, awarded by American Tactical Shooting Association.

Winner of the Roy Rogers Award for promotion of firearms safety.

Winner of first George C. Nonte Award for excellence in firearms journalism, 1978.

Firearms Qualifications and Awards

Combat Master, NRA Police Revolver

First 5-gun Master, International Defensive Pistol Association

Master, Revolver, National Marksman Sports Society

Master, Automatic, National Marksman Sports Society

Class A, International Practical Shooting Confederation

Grand Mastershot, UK Practical Shooting Association

Master Blaster, Second Chance

Expert, NRA Action Shooting

Honorary Distinguished Expert, Federal Law Enforcement Training Center

Several times top shooter in statewide NH police combat matches, 1973-2003

Five times New England Regional champion in various handgun disciplines

Co-winner with daughter Justine, National Champion Parent/Child Team, National Junior Handgun Championships, 1998

Has won numerous individual/local combat shooting tournaments, has competed successfully in five countries.

Law Enforcement Experience

Hooksett (NH) Police Dept.: 1972-73, auxiliary policeman. 1973-1980, fully sworn Police Officer. Duties under four chiefs included patrol, firearms training, community relations and crime prevention assignments, dept. firearms instructor for most of this period. Served in part time capacity with full police authority.

Deerfield (NH) Police Dept.: 1982-1990. Fully sworn officer, rank of Sergeant ('82-'84) in charge of all police training, and Lieutenant ('84-'90), in charge of police training and crime prevention activities. Served in part time capacity with full police authority.

Grantham (NH) Police Dept.: 1990-present. Fully sworn Captain and Police Prosecutor, in charge of training, research, and other administrative functions. Serve in part time capacity with full police authority.

References available upon request.

Massad Ayoob
PO Box 1477
Live Oak, FL 32064
(386) 688-1932
massadayoob@aol.com

DECLARATION OF JUDITH KUNTZ

COMES NOW Judith Kuntz and gives this her declaration, based upon personal knowledge, showing that the following facts are true and correct,

1.

I am of the age of the majority and am laboring under no mental difficulty that would prevent me giving evidence in this case.

2.

I am a 67-year-old widow and live in Indialantic, Florida.

3.

I own a .38-caliber handgun for personal defense. I believe my ownership of the gun and the use of it for personal defense saved my life. I chose a handgun over a rifle or shotgun because it is small, maneuverable and easy to use. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home.

4.

On May 31, 2005, I shot an intruder who unlawfully entered my home. I attempted to hide from the intruder in my bedroom, but the intruder proceeded to enter my bedroom while I was in it. I shot the intruder in order to protect myself and my property.

5.

I am glad I had my handgun during the incident and that I was able to defend myself and my property, I believe people have a right to own and use a gun for personal defense.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Indialantic, Florida, this 1st day of February, 2008.

/s/ Judith Kuntz
JUDITH KUNTZ

DECLARATION OF THERESA WACHOWIAK

COMES NOW Theresa Wachowiak and gives this her declaration, based upon personal knowledge, showing that the following facts are true and correct,

1.

I am of the age of the majority and am laboring under no mental difficulty that would prevent me giving evidence in this case.

2.

I am 57-years-old, and I live in Augusta, Georgia.

3.

I own a .357-caliber handgun for personal defense. I believe my ownership of this gun and the use of it for personal defense saved my life. I defer to a handgun over a rifle or shotgun because it is small, maneuverable and easy to use. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home if an intruder actually entered.

4.

On April 26, 2007, an intruder gained entrance into my house, in the early morning hours, woke me up, and put a knife to my throat with the intent of doing me bodily harm. He was in my bed and unaware of the handgun I kept in my bed stand. I protested against his covering my mouth with his hand as he pressed his knife to my throat repeatedly, threatening to kill me as I was struggling to remove his hand. This interaction provided me an opportunity to keep his focus on my resistance while I secured my handgun with his being unaware of my other activities. I appeared to comply finally with his 'being in control' and ceased struggling upon securing my weapon. I asked him what did he want. Simultaneously, he realized there were dogs in the room and demanded I 'get the dogs out.' With him at my back and his knife still ready, we moved off of my bed to the bedroom door. When at the dog gate he demanded the dogs be removed from the room, I unfastened the dog gate and with him preoccupied with their imminent release I pivoted and shot him in the right side of his chest. I did not randomly exercise force, only sufficient force to remove him as a personal threat. He was still mobile and anxious to get away through the now opened dog gate. I called the police and secured medical help for him as I did not expect he could get very far. He did survive his single wound. I was saddened and shocked to find out that the man was a neighbor and a relative of a family I cared about and had known for decades.

5.

I am glad I had my handgun that morning and was able to defend my self and my property. I would be no match in a physical contest of strength with my assailant and would have just been another sad statistic. My handgun was the tool I used to preserve my life. A handgun has been referred to as a peacemaker for a reason. I believe people have a right to own and use a handgun for personal defense. When there is great disparity in age, gender and physical ability, the hand held weapon is the great equalizer in insuring a balance of resolve and positive action in confronting those who would do harm. I have owned a handgun for decades and believe in the individual's right to have the ability to confront and stop conduct that is a threat to the individual and to society. I also believe it is the individual's responsibility to do so as well. I do not believe that government has the means to 'protect' me except for the Constitutional sense of allowing me to have unrestricted access to the tools that will insure life, liberty and the pursuit of happiness. I firmly believe the ownership of handguns for personal defense complies with the mandate of this government as envisioned by our founding fathers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Augusta, Georgia, this 6th day of February, 2008.

/s/ Theresa Wachowiak
THERESA WACHOWIAK

DECLARATION OF JAMES H. WORKMAN, JR.

COMES NOW James H. Workman and gives this his declaration, based upon personal knowledge, showing that the following facts are true and correct,

1.

I am of the age of the majority and am laboring under no mental difficulty that would prevent me giving evidence in this case.

2.

I am 80-years-old, a retired oil industry worker and I live with my wife Kathryn in Pensacola, Florida.

3.

I own a .38-caliber handgun for personal defense. I believe my ownership of the gun and the use of it for personal defense saved my wife Kathryn's life and mine. I chose a handgun over a rifle or shotgun because it is small, maneuverable and easy to use. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home if an intruder actually entered.

4.

On November 4, 2004, I shot an intruder who entered the trailer where my wife and I were staying. We were living in a trailer in front of our home that was damaged by Hurricane Ivan. When the intruder entered our yard at 2:20 A.M., I confronted him. Despite my firing a warning shot into the ground, the intruder advanced toward the trailer. I struggled with him inside the trailer, shooting him in the process

5.

I am glad I had my handgun that night and was able to defend my wife, myself and our property. I believe people have a right to own and use a gun for personal defense.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Pensacola, Florida, this 28th day of Jan., 2008.

/s/ James H. Workman, Jr.
JAMES H. WORKMAN, JR.

DECLARATION OF MINNIE LEE FAULKNER

COMES NOW Minnie Lee Faulkner and gives this her declaration, based upon personal knowledge, showing that the following facts are true and correct,

1.

I am of the age of the majority and am laboring under no mental difficulty that would prevent me giving evidence in this case.

2.

I am 88-years-old and I live alone in Elbert County, Georgia. Elbert County is a rural county located on Georgia's eastern border with South Carolina in an area that was settled early in the State's history. My home is located near the Savannah River in the country.

3.

I purchased a handgun after the death of my husband in 1993 for personal defense and home protection. I chose a handgun over a rifle or shotgun because it is small, maneuverable and easy to use for someone of my age, size and strength. I did not choose the rifle or shotgun because they are heavy, unwieldy and difficult to use in a confined space such as my home if an intruder actually entered.

4.

On October 10, 2004, my doorbell rang at one o'clock in the morning. A voice called, from the porch, "Minnie Lee, I've got car trouble – Open the door." I replied that I was not going to open the door, and the man on my porch started kicking the door. He split the door and I called 911.

5.

I told the man that I had called 911 and he stopped kicking. With my pistol in my hand, I then peered out the window, and saw his face. He was a young man with a clear complexion. I said in a stout voice, "I have my gun and I have it trained right on you." The intruder left. I felt that the Lord was with me. When my front door was examined, one more kick would have broken the door. I thought that the intruder would have tried to kill me had he gotten in.

6.

Later that night, the intruder broke into a nearby trailer and attacked an elderly lady while she was in bed, breaking her wrist.

7.

I spoke with the local sheriff's office and was able to provide information for a composite drawing, identifying the intruder as a deceased neighbor's son. I specifically noted his clear eyes and good complexion.

Using this information and other evidence, the sheriff's office was able to apprehend the intruder. He is presently serving time in the State prison system. He was convicted of aggravated assault with intent to rape and burglary.

8.

I live in fear because of this occurrence, and my handgun is the only protection I have. I am still scared because I have heard a lot about home invasions. I broke my right wrist in February and I do not know whether I can pull the trigger. I do have a hammer, but I am not sure whether it would be enough for defense. I still enjoy my independence, living alone and keeping house.

9.

I am glad I had my handgun that night. The intruder went away after I told him I had one. I believe people have a right to have a gun for protection and self defense.

10.

Not far from my house in Elbert County is where Nancy Hart of Revolutionary War fame captured the Tories and had them hung.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Elberton, Georgia, this 17th day of January, 2008.

/s/ Minnie Lee Faulkner
MINNIE LEE FAULKNER

AMICUS
CURIAE
BRIEF

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA *ET AL.*,

PETITIONERS,

v.

DICK ANTHONY HELLER,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR STATE FIREARM ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions — D.C. Code secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

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INTERESTS OF THE *AMICI*[1]

The forty State Firearm Associations[2] on whose behalf this brief is filed represent the interests of millions of citizens, members, and firearm owners across the United States. The Associations' members come from all walks of life and represent interests across the political spectrum. Some members are merely interested in preserving the American tradition of responsible, law-abiding firearm ownership. Other members are simply hunters and conservationists. Many members participate in the United States' Civilian Marksmanship Program and competitions, a longstanding federal program designed to promote individual skill and proficiency with military arms through affiliation with the *amici* State Firearm Associations, and by which participants may purchase surplus military firearms directly from the United States government.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

[2] The rifle and pistol associations represented include: Alabama State Rifle & Pistol Ass'n, Arizona State Rifle & Pistol Ass'n, California Rifle & Pistol Ass'n, Colorado State Shooting Ass'n, Connecticut State Rifle & Revolver Ass'n, Delaware State Sportsmen's Ass'n, Georgia Sport Shooting Ass'n, Hawaii Rifle Ass'n, Idaho State Rifle & Pistol Ass'n, Illinois State Rifle Association, Indiana State Rifle & Pistol Ass'n, Kansas State Rifle Association, League of Kentucky Sportsmen, Inc., Louisiana Shooting Ass'n, Pine Tree State Rifle & Pistol Ass'n (Maine), Maryland State Rifle & Pistol Ass'n, Gun Owners Action League (Massachusetts), Michigan Rifle & Pistol Ass'n, Minnesota Rifle & Revolver Ass'n, Mississippi State Firearm Owners Ass'n, Missouri Sport Shooting Ass'n, Montana Rifle & Pistol Ass'n, Nebraska Shooting Sports Ass'n, Nevada State Rifle & Pistol Ass'n, Gun Owners of New Hampshire, Ass'n of New Jersey Rifle & Pistol Clubs, New Mexico Shooting Sports Ass'n, New York State Rifle & Pistol Ass'n, North Carolina Rifle & Pistol Ass'n, Ohio Rifle & Pistol Ass'n, Oklahoma Rifle Ass'n, Oregon State Shooting Ass'n, Penn. Rifle & Pistol Ass'n, Penn. Federation of Sportsmen Clubs, Rhode Island State Rifle & Revolver Ass'n, Gun Owners of South Carolina, Texas State Rifle Association, Utah State Rifle & Pistol Ass'n, Virginia Shooting Sports Ass'n, West Virginia State Rifle & Pistol Ass'n, Wisconsin Rifle & Pistol Ass'n, and Wyoming State Shooting Ass'n (collectively "State Firearm Associations").

The decision below recognized that citizens have an historical right to possess firearms free from infringement by the federal government. The State Firearm Associations agree with this conclusion and are interested in this case.

SUMMARY OF THE ARGUMENT

Private firearm ownership is an essential element of the free society the framers envisioned and remains integral to the fabric of the United States to this day. As other *amici* will detail, the individual right existed long before the Articles of Confederation and has continued uninterrupted as a vital means of protecting and defending not only the individual citizens and states, but the Nation itself. In particular, the value and necessity of private, individual firearm ownership is reflected by the close relationship between State Firearm Associations, their members, and the national government in their continuing efforts to assure a proficient, armed populace. For more than a century, the federal government and the *amici* State Firearm Associations have worked together, under the auspices of the Civilian Marksmanship Program, to train civilians in the use of firearms and distribute likely hundreds of thousands of surplus military firearms to the civilian population. In addition to acknowledging the individual right to firearm ownership, this practice demonstrates that the "militia" spoken of in the Second Amendment is, ultimately, nothing more than an assemblage of private citizens prepared to pick up arms when their state or country needs them.

The *amici curiae* agree with Respondent Heller and his other supporting *amici* who urge that the right memorialized in the Second Amendment was intended to recognize that Heller and all citizens of the Unites States, as an absolute minimum, enjoy the right to keep firearms. Thus, as a resident of the District of Columbia, Heller's right to keep a handgun peaceably in his home for his own defense under the Second Amendment is no less assured to him than his right to a jury trial under the Seventh Amendment. Significantly, however, the Second Amendment was adopted as part of a broader effort to restrain encroachment of federal authority.

This brief submits that the individual right of United States citizens to keep and bear arms enjoys three separate layers of constitutional protection: (1) the exclusion of direct firearm regulation from the federal government's powers as enumerated under Article I, Section 8, of the Constitution; (2) the Ninth and Tenth Amendments' reassurance that the "people" retained all rights not assigned to the federal government; and (3) the Second Amendment's direct affirmation that the basic right to keep arms is among those rights specifically retained by the "people" of the United States.

The Court has repeatedly confirmed the limits of federal power and, until recently, Congress acknowledged its lack of power, as attested to by its limited attempts to prohibit the private ownership of firearms. In fact, Congress did not seek to prohibit private firearm ownership as an exercise of its commerce power for almost two hundred years. Rather than restrict rights during that period, Congress actually facilitated private firearm ownership, as evidenced by its implementation of the Civilian Marksmanship Program in 1903. Thus, Congress acknowledged not only the individual right to keep arms, but that right's historic role in assuring private and national security. While this case uniquely arises out of the District of Columbia, where the federal government exercises a police power not found elsewhere, Heller retains his right as a law-abiding national citizen to keep arms for lawful purposes.

ARGUMENT

I. THE PRIVATE POSSESSION OF FIREARMS WAS FUNCTIONALLY SIGNIFICANT TO THE FOUNDING OF THE UNITED STATES.

This Nation is the product of violent struggle on the part of scholars and rebels united by their common pursuit of individual liberty. As discussed in greater detail in Respondent's Brief, the right to keep and bear arms was both the flashpoint of the Revolution and also essential to ensuring the revolutionaries' eventual victory. *See* Brief for Respondent Heller at 19-30. After rising up and triumphing over the British to preserve, among other things, their right to arms, it could hardly be expected that the states or the people would then willingly surrender the very tools that had won them their freedom. Indeed, the Constitution, as ratified two years later, conspicuously withheld the power to regulate the private ownership of firearms from the federal government. By all indications, the federal government had no interest in regulating firearm ownership and indeed, the new citizens would not ratify a Constitution that said otherwise.

The framers intended the Bill of Rights as a further assurance to skeptical citizens that the federal government's power would never extend beyond the areas assigned to it in Article I of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803) ("That those limits may not be mistaken . . . the Constitution is written"). The Ninth and Tenth Amendments unambiguously reaffirmed this, making it clear that the states and the people retained any and all rights and powers not surrendered to the federal government. If the framers meant to preserve state authority over only the questions of who might own what types of firearms, those amendments alone were sufficient. But the framers went further. Indeed, they used the Second Amendment to simultaneously recognize the widespread and essential role of law-abiding possession of firearms among the populace and to reassure the states and their citizens, yet again, that they would be free of federal regulation in this area. The Federalists even cited the widespread phenomena of privately held arms to ease citizens' fears over the powers that would be concentrated in the national government. The Federalist No. 46 (James Madison).

The framers recognized that all national citizens enjoyed a general right to keep arms, as that term was then understood.[3] As detailed below, in addition to the plain Constitutional text and the history surrounding its adoption, this Court and Congress subsequently recognized the limits of federal power. Until relatively recently, Congress never attempted to prohibit the possession of firearms apart from encouraging efforts to maintain a private population of citizens proficient in the use of military arms. The notion that Congress has always enjoyed the assigned but unused power to prohibit the ownership of arms by any national or state citizen is untenable in view of this history and the text of the Second, Ninth and Tenth Amendments.

II. THE CONSTITUTION, TOGETHER WITH THE BILL OF RIGHTS, REPRESENTS A PROFOUND NATIONAL COMMITMENT TO BOTH INDIVIDUAL LIBERTY AND STATE SOVEREIGNTY.

In its brief as *amicus curiae*, the United States concedes that the court of appeals correctly held that the Second Amendment protects an individual right to possess firearms, but then argues that the individual right is subject to nearly plenary exceptions as to what firearms might be owned and by whom. *See* Brief for the United States as *Amicus Curiae* at 8, 20-26.[4] While the United States is clearly right when it recognizes that the framers acknowledged a preexisting individual right in the Second Amendment, and it might well be right when it argues that the framers understood that the individual right would be subject to generally recognized exceptions for certain individuals, such as felons, it can posit no reading that would leave a citizen, such as Respondent Heller, without the right to keep a pistol in his own home. While Petitioner and their supporting *amici* debate whether any right exists at all and what "reasonable regulation" might be attempted, they appear largely to ignore the severe limits on federal power that the framers envisioned.

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[3] Then, as now, the term "arms" was generally understood to include any individually employed weapon designed to expel a projectile by means of a propellant. *E.g., State v. Huntley*, 25 N.C. 418 (1893); *Ortiz v. Comm.*, 681 A.2d 152, 155 (Pa. 1996).

[4] For reasons that go unexplained, the Solicitor General's position on the standard of scrutiny differs from that which the

As demonstrated below, the framework implemented through the Constitution and Bill of Rights leads to the conclusion that the framers intended for the states, not the federal government, to dictate the exceptions. Upon examination, it becomes clear that, as Respondent Heller contends, the Second Amendment reaffirms an individual's right to possess arms, including handguns, for private use. This is especially true in cases, such as those arising outside the District of Columbia, where

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Attorney General publicly directed all United States' Attorneys to follow as recently as 2001. While the Solicitor General cites the Attorney General's memorandum as allowing for any reasonable restriction on firearms, the Attorney General actually provided for reasonable restrictions on firearms in only two specific categories: "to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse." Office of the Attorney General, Memorandum to All United States' Attorneys (November 9, 2001).

Congress ventures beyond its enumerated powers and attempts to regulate in an area that is reserved to the states and the people. In such instances, Congress occupies its lowest ebb of power.

A. The Federal Government is a Government of Limited Powers that *Do Not* Include the Power to Directly Regulate Firearm Ownership or Possession.

"It is incontestable," as a general matter, "that the Constitution established a system of 'dual sovereignty.'" *Printz v. United States*, 521 U.S 898, 918 (1997). Under this system, the federal government has limited, enumerated powers. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *M'Culloch v. Maryland*, 17 U.S. 316, 405 (1819). Indeed, the Constitution's conferral upon Congress of only the discrete, enumerated powers found in Article I, Section 8 limits federal power, recognizing that the balance of authority was reserved to the people and to the states, respectively. *See Printz*, 521 U.S at 918.

During the course of ratification debates, the Federalists continually reassured the anti-Federalists, who feared that the federal government would annihilate state governments, of the clearly established limits of the federal government's powers.[5] At Pennsylvania's ratification convention,

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[5] For example, in Federalist 78, Alexander Hamilton refuted the charge that Congress could not be trusted to control its power:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is

for example, James Wilson argued that the Necessary and Proper Clause was limited to effectuating federal policy within the enumerated powers of Article 1, Section 8.[6] As discussed in greater detail below, Wilson and other Federalists believed that there was no need for an additional Bill of Rights because the federal government was a "government possessed of enumerated powers."[7] It was a simple, but powerful concept: the federal government possessed only the powers given it under the Constitution and ***nothing*** more.

The powers assigned to Congress conspicuously ***did not*** include the power to regulate the possession of firearms, as the Senate itself has recognized. *See* Report of the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Congress, Second Session

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> greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

The Federalist No. 78 (Alexander Hamilton); *see also* General Charles Pinckney, South Carolina Convention, January 18, 1788 (excerpt reprinted in YOUNG, THE ORIGIN OF THE SECOND AMENDMENT 217 (2nd ed. 1995) (Golden Oak Books) [hereafter Young]) ("The general government has no powers but what are expressly granted to it.").

[6] *See* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 448-49, 468 (Elliot, Jonathan, ed. 1888) [hereafter Elliot].

[7] James Wilson, Pennsylvania Convention, November 28, 1787(excerpt reprinted in Young, at 114).

(S. REP. NO. 88-618) (February 1982).[8] Citing no authority, the United States' Brief baldly assumes a general federal power—apparently undiscovered throughout the nineteenth and most of the twentieth centuries—"to protect the public safety by identifying and proscribing particularly dangerous weapons." Brief for the United States as *Amicus Curiae* at 21.[9]

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[8] "The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner." *Id.*

[9] Notably, the few states supporting the Petitioner appear to take an opposite view. *See* Brief for New York, Hawaii, Maryland, Massachusetts, New Jersey, and Puerto Rico as *Amicus Curiae* at 1-2. In so doing, although the issue of selective incorporation is not before this Court, these *amici*, relying on cases that were decided when this Court's views on selective incorporation were in their early stage, argue against incorporation of the Second Amendment. *See id.* at 2 (citing *Presser v. Illinois*, 116 U.S.. 252, 265 (1886) and *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)). Nonetheless, *amici's* arguments are irrelevant, as the Second Amendment directly applies to the national citizens of the District of Columbia, just as assuredly as the Seventh Amendment applies. *See Pernell v. Southall Realty*, 416 U.S. 363, 370, 94 S. Ct. 1723, 1727 (1974) ("The Seventh Amendment provides: 'In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ..' Like other provisions of the Bill of Rights, it is fully applicable to courts established by Congress in the District of Columbia."); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5, 19 S. Ct. 580, 582 (1899) ("It is beyond doubt, at the present day, that the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.").

To be sure, Congress may impose generally applicable taxes on firearms, issue firearm patents, and even regulate the interstate shipment of firearms through the U.S. Mail. But where Congress attempts to regulate the private ownership or possession of arms, however, it steps outside the bounds of its enumerated powers found in Article I, Section 8. Indeed, in addition to reaching beyond Congress' limited power, which the framers promised would never happen, such attempts also collide with the subsequent, more detailed reassurances found in the Bill of Rights. Those reassurances, implemented as a reinforcement in case the federal government breaks its promise to only act within its enumerated powers, leave the "people" free to keep arms, at a minimum, and the states free to provide additional protections or to impose additional requirements.

B. The Bill of Rights, as a Whole, Further Reaffirmed Congress' Confinement to the Areas of Specific Authority Enumerated in Article I, Section 8.

Together, the Ninth and Tenth Amendments express the Constitution's overarching purpose to "divide[] authority between federal and state governments for the protection of individuals." *See New York v. United States*, 505 U.S. 144, 181 (1992). To understand that purpose, it is necessary to review the amendments' historical context.

While the Constitution's proponents insisted that the federal government was limited to its enumerated powers found in Article I, Section 8, the people were distrustful. Having already endured firsthand the consequences of unwanted government intrusion, the people demanded additional assurances. So, in order to secure ratification over the protests of James Madison, Congress promised a Bill of Rights. ROBERT GOLDWIN, FROM PARCHMENT TO POWER 75-153 (1997).

Thus, "federalism [was intended to] secure[] to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). The right of law-abiding citizens to keep arms was obviously one of those liberties. Indeed, the Ninth, Tenth and Second Amendments were paramount among the assurances demanded by the people in order to secure ratification. While the Ninth Amendment gave direction on how to read the Constitution, making it clear that the failure to enumerate a certain right did not somehow preclude its existence, the Tenth Amendment reassured the states and their citizens that they kept, unequivocally, any powers that they did not surrender. *See U.S. Public Workers v. Mitchell*, 330 U.S. 75 (1947). Meanwhile, the Second Amendment carved out—with great specificity—an express and individual right to keep firearms, a right that belongs to all of "the people."

The new citizens saw firearm ownership as their only reliable means of holding the federal government to its other promises. If the Constitution and Bill of Rights were, respectively, the first and second guarantees of their rights, firearms represented a third, decidedly *tangible* last resort available to them if and when Congress inevitably reversed course and asserted powers not reserved to it. *See* The Federalist No. 46 (James Madison).

C. The Second Amendment Simply Confirmed A Right That Already Existed.

The right of the new citizens to keep arms was not new. Evidencing the prevailing right to keep arms, Thomas Jefferson included the unequivocal right in a 1776 draft of the Virginia Constitution: "No freeman shall ever be debarred the use of arms (within his own lands or tenements)." 1 Papers of Jefferson 344, 353, 363 (C.J. Boyd, Ed., 1950). This right had nothing to do with militias, but instead reflected the simple and unqualified understanding that a free citizen has the right to a firearm, if he so chooses.

The ratification debates provide even more evidence that individual citizens not only enjoyed a pre-Constitution right to keep arms, but that they viewed it an essential. Massachusetts, for example, put forth an amendment assuring "that the said constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1453, 1469-71 (John P. Kaminski, *et. al.* Eds.). Other states offered their own absolute prohibitions against federal regulation of firearms as well, underscoring the great importance that the new citizens assigned to this particular right.[10] One is left to wonder whether the vast majority of western states would have consented to join the Union if they had any textual basis for suspecting that the federal government would arrogate to itself the power to determine what firearms its citizens might own.

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[10] Zacharia Johnson, a delegate to the Virginia ratifying convention, argued that "[t]he people are not to be disarmed of their weapons. They are left in full possession of them." Zacharia Johnson, delegate to Virginia Ratifying Convention, Elliot, 3:645-46. Another amendment offered at the Pennsylvania ratifying convention made it clear "that the people have a right to bear arms for the defense of themselves and

Alexander Hamilton also understood the vital importance of preserving the pre-Constitution right to arms:

> If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government . . . . [I]f the persons entrusted with supreme power become usurpers, . . . [t]he citizens must rush tumultuously to arms . . . .

The Federalist No. 28 (Alexander Hamilton). Many of the nation's other founding fathers shared Hamilton's view, including Samuel Adams,[11] James Madison,[12] and Noah Webster.[13]

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their own state, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597-98. Additionally, New Hampshire sought an amendment asserting that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion." *See* NEIL H. COGAN, COMPLETE BILL OF RIGHTS 181 (1997).

[11] SAMUEL ADAMS, DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, at 86-87 (Pierce & Hale, eds., Boston, 1850) (the "Constitution

III. THIS COURT AND CONGRESS HAVE BOTH RECOGNIZED THE LIMITS TO FEDERAL POWER.

A. This Court's Precedent Forecloses a Wandering Application of the Commerce Power in this Arena.

To be sure, the Constitution allows Congress the power to regulate interstate commerce. U.S. Const. art. I. This power cannot be read so expansively, however, as to invalidate the Tenth Amendment. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995). Unlike its power to tax and spend, which is subject only to the "general welfare" limitation, the Commerce Clause empowers Congress to "regulate commercial commerce with foreign nations, and among the several states, and with Indian tribes." U.S. Const. art. I, § 8 cl.3. Nothing more. Nothing less. Indeed, if Congress were permitted, under the guise of the regulation of commerce, to exercise a *de facto* police power, there would be no end to the expansion of legislation; the

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shall never be construed to authorize Congress . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms.").

[12] The Federalist No. 46 (James Madison) (the advantage "which Americans possess over the people of almost every other nation" is the "advantage of being armed.").

[13] NOAH WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (Philadelphia 1787) ("The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States.").

states would be mere federal appendages; and the citizens would be denied the privileges and immunities of *state* citizenship. *See Lopez*, 514 U.S. at 566 (noting that the Constitution withholds "from Congress a plenary police power that would authorize enactment of every type of legislation").

As Justice Holmes once famously explained, "the health and safety of the people of a state are primarily for the state to guard and protect." *Lochner v. New York*, 198 U.S. 45, 73 (1905) (Holmes, J., dissenting).[14] The federal government may facilitate and encourage private firearm ownership as much as it wants—and is arguably obligated to do so pursuant to Article I, Section 8, Clause 16 of the Constitution—but it may not regulate it outside the narrow scope of its commerce power or other enumerated powers. Indeed, any argument for an expansive reading of the commerce power is particularly inappropriate where, as where, the Constitution has declared a fixed national policy to the contrary. *See Printz v. United States*, 521 U.S. 898, 936 (1997) (Thomas, J., concurring).

An analogy is useful. In *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson's concurring opinion envisioned presidential power on a continuum. The President's power is at its highest level "[w]hen the President acts pursuant to an express or implied authorization of Congress." *Id.* at 635. The President's power is at a midpoint when the President and Congress have concurrent authority, but Congress is silent. *See id.* at 637. Finally, the President's power is at its lowest ebb "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." *Id.*

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[14] A state might well conclude, like Switzerland has, that every competent adult citizen should be compelled to keep a particular gun in his or her home. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 273 (1983). Another state, however, might conclude otherwise.

Applying the reasoning found in *Youngstown* to Congressional power, Congress' power is surely at its zenith when regulating pursuant to a power enumerated under Article I, Section 8.[15] Thus, an exercise of the power to establish rules for bankruptcy does not infringe any reserved right of the states or the people. Congress' power to regulate is at a midpoint when it regulates pursuant to the Commerce Clause in an area that is neither specifically assigned to it nor foreclosed to it by the Constitution. Accordingly, an effort to establish, for example, a national drug enforcement standard is not assigned to the federal government, but can be argued not to conflict with an acknowledged, reserved right of the states or the people to keep harmful drugs or to regulate the use thereof, respectively.[16] Congress' power is at its lowest ebb when it ventures outside the powers enumerated in Article I, Section 8 and attempts to enact preclusive regulation in an area foreclosed to it and assigned to the states and assured to "the people," such as the regulation of firearm ownership. Congress has no more basis for claiming an authority under the Commerce Clause to regulate the mere possession of a firearm than it does directing the quartering of troops during time of peace.

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[15] Thus, Congress can oversee the patenting of firearms or regulate the shipment of firearms across state lines through the U.S. Mail.

[16] *See Gonzales v. Raich*, 545 U.S. 1 (2005).

An effort by Congress to invoke its commerce power may survive where it addresses a topic less clearly wrested from it in the constitutional text. No one questions that Congress has the power to regulate commerce *qua* commerce. Thus, it could be argued that Congress might demand that one engaged in the business of selling firearms make and keep records of his transactions, participate in a background check, and decline to complete a transfer to those who can make no claim or right to possession.[17]

B. Congress' Limited Role in Regulating the Private Ownership of Firearms is an Historic Fact.

An overview of federal regulation of firearms quickly reveals Congress' respect for its lack of enumerated power private over firearm ownership, as well as its respect for the accompanying protections of the Tenth and Second Amendments. Indeed, the federal government did not even attempt to regulate the private ownership of firearms for almost 150 years. Even then, until the 1980s, firearms policy was left to the state except insofar as firearms themselves were used in commerce or were transferred on a commercial level.

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[17] "Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms]." Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA L.REV. 65, 96 (1983); *see also* Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 Law & Contemp. Probs. 151 (1986) (agreeing that "violent criminals, children, and those of unsound mind may be deprived of firearms . . . "); Don B. Kates, Jr., HANDGUN PROHIBITION AND THE ORIGINAL MEANING OF THE SECOND AMENDMENT, 82 MICH. L. REV. 204, 266 (1983) ("Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them.").

Congress' first major foray into gun control was the National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5801 et seq.) ("NFA"). Congress passed the NFA in response to the use of deadly weapons by the criminal underworld, seeking to discourage commerce of machine guns, sawed-off shotguns, and silencers by imposing burdensome taxes on their transfer. *See* 26 U.S.C. § 5861; National Firearms Act: Hearings on H.R. 9066 before the H. Comm. on Ways and Means, 73d Cong., 2d Sess., at 4-5 (1934). Thus, the NFA was an expression of Congress' taxing power under Article I, Section 8 and not an outright ban. Significantly, the Act did not effect a general prohibition of any sort, but instead imposed a tax on a narrow category of firearms.

Four years later, Congress passed the Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250 (1938) ("FFA"). The FFA required those engaged in the commercial sale of firearms and using channels of interstate and foreign commerce to submit to licensing and to keep records of their transactions. *Id.* Additionally, it forbade felons and fugitives from owning a gun. *Id.* To be sure, a colorable argument exists that felons and fugitives present a clear and present danger to commerce, among other things, and are universally forbidden from possessing arms by state law. *Id.*[18]

Congress' next major legislation involving arms came thirty years later when it enacted the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921 *et seq.*) ("GCA"). The GCA extended the NFA's *taxation* of firearms and introduced new licensing requirements. *Id.* The GCA also expanded the list of persons who were prohibited from possessing firearms, prohibited the sale of handguns to out-of-state residents, and imposed strict penalties on persons convicted of carrying a firearm during the commission of a felony. *Id.* Once again, the GCA was not an outright ban on firearm ownership.

It was not until the mid-1980's that Congress, for the first time, purported to prohibit the possession, without more, of a firearm by a citizen without any attendant connection to interstate commerce. *See* Firearm Owners' Protection Act, Pub. L. No. 99-308 (codified at 18 U.S.C. § 921 *et seq.*). Even then, this prohibition was itself limited and did not effect a complete ban because only machine guns manufactured or registered after 1986 were prohibited. All such firearms registered before that date still could be possessed by and transferred to law-abiding citizens.

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[18] Underscoring the scrutiny to which claims of commerce power are subjected, however, the Supreme Court has been cautious in its reading of the restrictions on former felons, in view of Tenth Amendment restrictions on the exercise of commerce power. *United States v. Bass*, 404 U.S. 336, 344 (1971) (reading Act to require the prohibited possession to have a commerce nexus).

In 1990, Congress enacted the Gun-Free School Zones Act of 1990, Pub.L. 101-647, 18 U.S.C. § 922(q). As the name describes, the law purportedly made it unlawful for any individual knowingly to possess a firearm in a school zone as an expression of the commerce power. The Act was found unconstitutional *United States v. Lopez*, 514 U.S. 549 (1995) as exceeding Congress' authority under the Commerce Clause.[19]

The historical reluctance of Congress to delve into the possession of arms by individual citizens reaches far beyond the period canvassed in *Lopez*. The Second Amendment reflects a basic rejection of the national government exercising this authority over the individual or the states. *E.g.*, *Presser v. Illinois*, 166 U.S. 252 (1886).

The revolution that gave birth to this Constitution began on an April afternoon in rural Massachusetts. History has largely forgotten why the confrontation took place: The British Governor had concluded that the inhabitants of Concord were too heavily armed. *See* Letter of F. Smith, British Officer, to Governor Gage, April 22, 1775. He dispatched a force to collect and destroy the colonists' firearms and munitions. On arriving at Lexington, the force was confronted by "people drawn up in military order." After that confrontation, the force proceeded to Concord and destroyed what arms could be found. The farmers and other residents then shot and killed many of the force on its return march to Boston. It is unimaginable that these same citizens would have endorsed a Constitution that would have authorized the *new* national government to do precisely the same thing that the British regime had attempted.

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[19] In 1993, Congress also enacted the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536, which amended the GCA and required federally licensed firearm dealers to check the National Instant Criminal Background Check System ("NICS") before selling a handgun to a prospective purchaser. Once again, Congress made no attempt to ban firearms outright, and acted only within the narrow confines of its commerce power over those federally licensed to engage in the commercial sale of firearms. The next year, in 1994, Congress enacted the so-called Assault Weapons Ban, Pub. L. 103-322, which implemented a ten-year ban on certain semi-automatic weapons manufactured after the date of the legislation's enactment. Thus, the ban was not an outright ban on ownership, as individuals who previously possessed the weapons were not affected by the law. The Assault Weapons Ban expired on September 13, 2004, as part of the law's sunset provision.

IV. CONGRESS HAS ACKNOWLEDGED ITS ROLE OF SUPPORTING PRIVATE OWNERSHIP OF FIREARMS AMONG THE CITIZENRY.

Discussion of the individual right to possess firearms often focuses on protection for the individual's person and property and the protection of the individual states. These are, to be sure, very important purposes underlying the Second Amendment. But they are not the only purposes. More than a century ago President Theodore Roosevelt, Congress, and military leaders recognized that the consequence of a citizenry untrained in firearm use is a citizenry equally unprepared to protect the Nation. Moreover, as Respondent Heller points out, private firearm ownership is essential to the enabling the "militia" spoken of in the Second Amendment. *See* Brief for Respondent Heller at 14-18. While much is made of the rights of individuals versus the rights of militias, it is ultimately a distinction without difference. As envisioned by the framers and demonstrated by this nation's laws and history, a "militia" is nothing more than individual firearm owners who are prepared, when their state or country needs them, to pick up arms.[20]

American history is replete with examples of the federal government working cooperatively with the states, the National Rifle Association, these *amici* and their members to assure a proficient armed civilian populace. This cooperative relationship is reflected by the United States' Civilian Marksmanship Program ("CMP"), as originally codified at 10 U.S.C. § 4308, through which the government has used state Firearm Associations, including the *amici*, as official conduits to arm and train individual citizens for more than a century.

As this Court has held, the American *people* constitute "the reserved military force . . . of the United States."[21] Indeed, an estimated fifty-two million American adults own a firearm, compared to just 1.5 million active duty military personnel.[22] Congress is explicitly charged with providing for that "reserved military force" under Article I, Section 8,

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[20] *See* AKHIL AMAR, THE BILL OF RIGHTS 51 (1998) ("[T]he militia is identical to 'the people.'"); WILLIAM RAWLE, VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 153 (2d ed. 1829) ("In a people permitted and accustomed to bear arms, we have the rudiments of a militia.").

[21] *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *see also Miller v. United States*, 307 U.S. 174, 179 (1939) ("[T]he militia" are not "troops" or "standing armies" but "civilians primarily").

[22] *See* Lisa M. Hepburn, *The U.S. Gun Stock: Results From the National Firearms Survey*, INJURY PREVENTION 15, (2007), *available at* http://injuryprevention.bmj.com/cgi/reprint/13/1/15.

Clause 16 of the Constitution, and the CMP provides the vehicle by which Congress can satisfy its obligation.[23] If and when the United States confronts a challenge to its sovereignty or security that exceeds the standing army's immediate capacity, the call for support will inevitably go out to civilians. When those individuals respond, the CMP provides the means of assuring that—whether they are doctors, lawyers, farmers, or ice cream vendors—they own a firearm and know how to shoot it accurately.[24]

History supports the fear that the nation's troops lacked marksmanship training. For example, it is estimated that in the Battle of the Little Big Horn in 1876, George Custer's doomed Seventh Cavalry fired no less than 42,000 rounds but only dispatched between forty to fifty of the opposing force.[25]

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[23] *See* David B. Kopel and Christopher C. Little, *Communitarians, Neorepublicans, and Gun: Assessing the Case for Firearms Prohibition*, 56 MARYLAND L. REV. 438, 480 (1997); (stating that CMP was initiated "for the purpose of improving marksmanship skills among citizens in order that those called to military service might be more proficient marksmen and require less training").

[24] "The CMP provides and encourages voluntary marksmanship training for persons who are not reached by training programs of the Armed Forces and who might be called into service in an emergency." 32 C.F.R. § 544.4(b).

[25] Greg Michno, *Guns of the Little Big Horn*, WILD WEST MAGAZINE 29, 34 (1998). In a similar vein, two Union officers formed the National Rifle Association ("NRA") in 1871 to promote marksmanship as a reaction to the poor marksmanship of their Civil War Troops." Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 767 (2005) (citation omitted). The structure established through the NRA and state firearm

Looking ahead to times when civilian help would be needed, President Roosevelt "wanted youth to learn the ideals of telling the truth and shooting straight."[26] At his urging, in 1903 Congress established the National Board for the Promotion of Rifle Practice ("NBPRP") to educate the public about firearm safety and marksmanship.[27] In 1905 President Roosevelt signed Public Law 149 into effect, authorizing the sale of surplus military rifles, ammunition, and related equipment to the civilian state Firearm Associations.[28] In ensuing years, the military also made military pistols available for civilian purchase through the same program.[29]

President Roosevelt made clear in his State of the Union Address in 1906 that he saw private ownership of firearms and strong support by state firearm associations, including the *amici*, as critical

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(continued...)

associations would later provide the mechanism to enable the CMP.

[26] *See* Kopel and Little, supra note 21 (quoting Vaughn R. Croft, Editorial, *Marksmanship Programs Was and Is Needed, Helpful*, PANTAGRAPH (Bloomington, Ill.), May 14, 1995, at A-13.).

[27] *Id.*; *see also* CIVILIAN MARKSMANSHIP: PROMOTION OF PRACTICE WITH RIFLE ARMS, ARMY REG. 920-20 (Mar. 19, 1990) [hereinafter Civilian Marksmanship].

[28] *See* 10 U.S.C. § 4308(a)(5). In 1961 alone, over 77,000 rifles, 37,000 pistols, and 4300 shotguns were sold to the public through the CMP. *Gavett v. Alexander*, 477 F.Supp. 1035, 1039 n.6 (D.D.C. 1979).

[29] *See* BILL JENKINS, U.S. MILITARY MATCH AND MARKSMANSHIP AUTOMATIC PISTOLS 26 (2005).

in guaranteeing the United States' continuing military strength:

> Congress has most wisely provided for a National Board for the promotion of rifle practice. Excellent results have already come from this law, but it does not go far enough. Our Regular Army is so small that in any great war we should have to trust mainly to volunteers; and in such event these volunteers should already know how to shoot . . . . We should establish shooting galleries in all the large public and military schools, should maintain national target ranges in different parts of the country, and should in every way encourage the formation of rifle clubs throughout all parts of the land.[30]

In a step toward President Roosevelt's goal, Congress passed the National Defense Act of 1916. The Act authorized the War Department to distribute arms and ammunition to the state firearm associations, provided funds for the operation of government shooting ranges, and opened all military ranges to civilian shooters.[31] Additionally, the Act created the Office of the Director of Civilian Marksmanship ("DCM"), the forerunner of the CMP.[32] The National Defense Authorization Act of 1996 transferred the DCM's function to a new, private non-profit corporation, the CMP.[33] In conjunction with the State Firearm Associations, the CMP conducts various national matches, including rifle and pistol competitions, training, and volunteer military training across the nation, and continues to facilitate private acquisition of surplus military rifles and pistols.[34]

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[30] President Theodore Roosevelt, State of the Union Address (Dec. 3, 1906).

[31] *See* Johnson, *supra* note 24 at 769 (citation omitted).

[32] *Id.*

The CMP's immediate purpose was to provide the armed forces with recruits that had firearms training upon enlistment.[35] This goal was achieved: a federal study conducted at the outset of the Vietnam conflict found that program participants were substantially better marksman than those soldiers who had not participated in the program.[36] This is particularly important with regard to pistols, which demand greater skill to fire accurately, but have become an indispensable part of the military arsenal.[37] The CMP's second but equally important purpose was to support and encourage the armed populace called for by the Constitution and federal statute. U.S. Const. art. I, §8.16; 10 U.S.C. § 311.

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[33] *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (codified as amended in scattered sections of 36 U.S.C. and 10. US.C.). For the sake of simplicity, the Brief henceforth refers to both the CMP and DCM as "CMP."

[34] JAMES B. WHISKER, THE CITIZEN SOLDIER AND UNITED STATES MILITARY POLICY 38 (1979).

[35] *See* Civilian Marksmanship, *supra* note 6 at 3 ("The purpose of the [DCM] is to promote practice in the use of rifled arms by citizens . . . subject to induction into the U.S. Armed Forces.").

[36] *See* ARTHUR D. LITTLE, INC., A STUDY OF THE ACTIVITIES AND MISSIONS OF THE NBPRP [NATIONAL BOARD FOR THE PROMOTION OF RIFLE PRACTICE], REPORT TO THE DEPARTMENT OF THE ARMY, No. C-67431 (Jan. 1966), *reprinted in* 123 Cong. Rec. 23, 784, 23, 786 (1977) [hereinafter NBPRP Study]. Additionally, the study revealed that a soldier with previous firearms skills was less likely to be wounded or killed in combat. *Id.* Moreover, the study found that the soldiers with prior CMP experience were more confident, were better potential combat soldiers and that, in sum, the Army had profited by the NBPRP. *Id.*

The notion that individual American citizens will be called to protect their homeland is hardly a hypothetical concept. Throughout the past hundred years, private citizens and the state firearm associations, including the *amici*, have fulfilled the CMP's second purpose. During World War II, for example, private firearm ownership provided much needed protection for the United States at home, in stark contrast to Great Britain which found that its lack of privately-owned firearms left the country acutely vulnerable to looming invasion.[38]

When the United States deployed the National Guard overseas during World War II, private citizens replaced them domestically, serving without any pay and mustering with their own firearms.[39] State governors called for civilian help in 1942 and six hundred thousand men—and some women—patrolled for the next eighteen months.[40] Meanwhile, panic broke out in Great Britain: restrictive gun controls enacted in 1921 had disarmed the public, leaving a defenseless British populace to combat German invasion.[41] The British government advertised in American newspapers, declaring that "British civilians, faced with the threat of invasion, desperately need arms for the defense of their homes," and begged Americans to send "pistols, rifles, revolvers and shotguns."[42]

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[37] *See, e.g.* RALPH HAGAN, THE LIBERATOR PISTOL 41-47 (1996) (discussing the U.S. military's distribution of pistols to civilian populations in strategic points around the world post-World War II).

[38] Dan Gifford and Dave Kopel, *D-Day Was Almost A German Holiday*, SECOND AMENDMENT PROJECT (June 14, 2004), *available at* http://www.davekopel.com/2A/OpEds/D-Day-was-almost-a-German-holiday.htm.

[39] Robert Dowlut and Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 197 (1982).

[40] *Id.*

More recently, the United States military called upon state firearm associations, including the *amici*, for vital marksmanship training. In 2004, for example, members of the Texas State Rifle Association, a CMP affiliate, taught high power rifle marksmanship to troops from the Army's First Cavalry Division immediately before their departure for Iraq.[43] The civilian trainers, comprising a diverse group including a John Deere employee, a chemist, and an insurance salesman, had honed their own marksmanship skills through CMP sponsored shooting competitions, using their own firearms that they had acquired directly from the federal government through the CMP.[44]

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[41] *Id.*

[42] *Id.*

[43] Robert Lanham, *TSRA Rifle Team Teaches Army Squad Designated Marksmen at Camp Bullis*, TSRA SPORTSMAN 10 (May/June 2004).

[44] *Id.* Similar trainings have taken place across the country as the Army Marksmanship Unit works with the CMP to develop a program by which civilian instructors who have honed their skills through CMP programs and private firearm ownership are able to share their knowledge with soldiers preparing for combat abroad. *Civilian Instructors to Support Army*

V. THE FEDERAL GOVERNMENT'S POWER OVER THE DISTRICT OF COLUMBIA IS SUBJECT TO SPECIFIC CONSTITUTIONAL LIMITATIONS.

The federal government's authority — via the District of Columbia — to regulate firearms arises here under a unique limited police power that does not exist on the other side of the Potomac or anywhere else in the United States. *See Berman v. Parker*, 348 U.S. 26, 31-32 (1954). This authority, however, is "[s]ubject to specific constitutional limitations." *See id.* at 32; District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 87 Stat. 774, 302 (1973)("The legislative power of the District shall extend to all rightful subjects of legislation within the District *consistent with the Constitution of the United States* and the provisions of this Act.") (emphasis added).

"Constitutional limitations" are clearly implicated in this case, where the District is attempting to limit Heller's right as a national citizen, under the protection of the Second Amendment, to keep arms in his home. While Respondent Heller may not claim any separate Tenth Amendment right as a citizen of a state, he hardly needs to, as the amendment applies directly to the federal government.[45]

(continued...)

Marksmanship Training, THE FIRST SHOT (May 2005), *available at* http://www.odcmp.org/0505/default.asp?page=SDM.

[45] While the Seventh Amendment has not been selectively incorporated through the Fourteenth Amendment, it is directly applicable in the District of Columbia. *See Pernell v. Southall*

This concept is supported by the fact that, in 1789, the framers had no reason to anticipate that there would be any need of exceptions to the Ninth, Tenth and Second Amendments. Indeed, the District of Columbia was not founded until July 16, 1790. The framers envisioned having a district which would contain the "Seat of Government," *see* Article I, Section 8, but they made no provisions to ensure that its future citizens would be exempt from the protections afforded to the citizens of the states by the Bill of Rights.

(continued...)

Realty, 416 U.S. 363, 370, 94 S. Ct. 1723, 1727 (1974); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5, 19 S. Ct. 580, 582 (1899) ("It is beyond doubt . . . that the provisions of the constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.).

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

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AMICUS
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In the
Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the following provisions—D.C. Code §§7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

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INTEREST OF *AMICI CURIAE*

Amici, the State of Texas and 30 other States, have an interest in this case because of its potential impact on their citizens' constitutional rights. The individual right to keep and bear arms is protected by the United States Constitution and the constitutions of forty-four States.[1] Given the significance of this fundamental right, the States have a substantial interest in ensuring that the Second Amendment is accorded its proper scope.

The *amici* States believe that the court of appeals's decision—that the Second Amendment protects an individual right to keep and bear arms—is correct and fully consistent with the Framers' intent. Moreover, the District of Columbia's categorical gun ban is markedly out of step with the judgment of the legislatures of the fifty States, all of which protect the right of private citizens to own handguns.

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[1] *Amici* States have attached an Appendix outlining the relevant state constitutional and statutory provisions concerning firearms.

SUMMARY OF THE ARGUMENT

Described by Justice Joseph Story as "the palladium of the liberties of the republic," the right to keep and bear arms enjoys prominent placement at the outset of the Bill of Rights. Yet the central issue in this case is whether that constitutional provision retains any vitality whatsoever.

The District of Columbia's position, as the court of appeals explained, is that "the Second Amendment is a dead letter." Pet. App. 13a. That ahistorical contention—supported by modern-day advocates who disagree with the policy judgments embodied in that Amendment—runs contrary to both the text and the original understanding of our Constitution.

Because the Second Amendment's text recognizes a "right," not a "power," and guarantees that right to "the people" and not "the States," it necessarily secures an individual right to keep and bear arms. The First, Fourth, and Ninth Amendments likewise protect the "rights" of "the people," and none dispute that those Amendments protect individual rights. The Tenth Amendment, in turn, expressly distinguishes between "the States" and "the people," demonstrating that the Framers knew well the difference. And, this Court has made clear, "the people" is a term of art, with the same meaning throughout the Bill of Rights.

The District's contrary position is based largely upon a misconstruction of the Amendment's prefatory clause. Although the preamble states that keeping a well-regulated militia is one purpose of the right, nothing in that statement contradicts the Amendment's operative language. The District's interpretation of that prefatory language as limiting the Amendment only to members of organized state militias runs contrary to the understanding—and statutory definition—at the time of the Founding that all able-bodied males armed with their own private weapons comprised the "Militia."

The court of appeals's ruling is also consistent with this Court's decision in *United States* v. *Miller*, 307 U.S. 174 (1939). That brief and famously opaque opinion can be read to support multiple interpretations, but the better reading is that the right to keep and bear arms is an individual right. Indeed, *Miller* makes sense only if the Court believed that the Second Amendment protects individual rights; otherwise, virtually all of the *Miller* Court's analysis would be rendered superfluous.

That view is further buttressed by an unbroken line of commentary from the Framers to nineteenth-century scholars to the bulk of modern scholarship. Indeed, the unmistakable trend among constitutional scholars—even those who might otherwise disfavor private firearms possession—is toward recognition that the Second Amendment protects an individual right, as its plain text suggests.

Reasonable minds can differ about the Second Amendment's scope—that is, about which government regulations are permissible. And subsequent cases may well present difficult questions about where precisely to draw that line. Those vexing issues are not presented in this case, however, and are appropriately left to another day.

This case instead presents two straightforward questions, each of which will determine whether the Second Amendment has any modern relevance. *First*, as a threshold matter, does the Amendment protect any individual rights at all. And *second*, do the challenged District ordinances—which collectively prohibit the possession of any functioning firearm in one's own home—run afoul of that right.

On more difficult questions involving the Amendment's application—such as registration requirements and comprehensive regulation—the many *amici* States may well part ways. But the two questions in this case are, in the eyes of *amici*, not difficult. If the answer to either question were in the negative, then the Second Amendment's protections would be rendered illusory.

For the same reason, the *amici* States believe that the Department of Justice's position that this case should be vacated and remanded is indefensible. Under any standard, including that advocated by the Department, a total prohibition on the possession of any functioning firearm cannot be sustained. The District's ordinances facially prohibit Mr. Heller from ever possessing a handgun in his own home or from possessing an operable long gun.

An individual right that can be altogether abrogated is no right at all. *Amici* States are sovereign governmental bodies with strong interests in maintaining extant regulations barring, for example, convicted felons from possessing firearms. But none of the 31 *amici* States believes that its citizens' constitutional rights should be effectively erased from the Bill of Rights. Because, under any standard, a total prohibition on the possession of firearms cannot be reconciled with the individual right to keep and bear arms, the court of appeals's judgment should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE SECOND AMENDMENT GUARANTEES AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

The court of appeals's holding that the Second Amendment protects an individual right to keep and bear arms, Pet. App. 44a, gives effect to the Amendment's plain text and reflects the structure of the Bill of Rights. It is consistent with the views of the Framers, the great weight of scholarly commentary, and this Court's precedent.

A. The Second Amendment's Text Guarantees an Individual Right to Keep and Bear Arms.

The Second Amendment provides, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Court has long emphasized the importance of the Constitution's specific text: "[T]he enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said." *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 618-19 (1895) (internal quotation omitted).

1. The "right of the people" is an individual right.

The Second Amendment's operative words protect the right of "the people," not the "militia" and not the "States," to keep and bear arms. The meaning to be given to the words "the people" as used in the Second Amendment phrase "the right of the people" should be the same meaning attributed to that same phrase in the contemporaneously submitted and ratified First and Fourth Amendments. Pet. App. 18a; *United States* v. *Emerson*, 270 F.3d 203, 227 (5th Cir. 2001). And all three amendments describe personal, individual rights.

In *United States* v. *Verdugo-Urquidez*, the Court concluded that the words "the people" bear special significance in the context of the Bill of Rights:

> "'*[T]he people' seems to have been a term of art* employed in select parts of the Constitution. . . . *The Second Amendment* protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.' See also U.S. Const. Amdt. 1 . . . ; Art. I, § 2, cl. 1 . . . . While this textual exegesis is by no means conclusive, it suggests that *'the people' protected by the Fourth Amendment, and by the First and Second Amendments,* and to whom rights and powers are reserved in the *Ninth and Tenth Amendments,* refers to a class of persons who are part of a national

> community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. 259, 265 (1990) (emphasis added).

The Court has thus made clear that the "term of art" "the people" has the same meaning in the First, Second, Fourth, Ninth, and Tenth Amendments. And it is beyond peradventure that the right of "the people" in the First and Fourth Amendments is an individual, personal right rather than a "collective" right or a right protected only in connection with service to the government. *See, e.g., Thornhill* v. *Alabama,* 310 U.S. 88, 95 (1940) ("The freedom of speech . . . which [is] secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state."); *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (holding that the Fourth Amendment is a personal right that must be invoked by an individual).

The District's assertion that the Second Amendment's right of "the people" merely ensures a collective right "to prevent Congress, using its powers under the Militia Clauses, from disarming state militias," Petitioners' Br. 35, is fundamentally inconsistent with the rest of the Bill of Rights. If the phrase "the people" is interpreted consistently—as the Court has instructed—the District's construction of the phrase results in an implausible framework for our constitutional rights. For example, the First Amendment preserves "the right of the people peaceably to assemble." U.S. CONST. amend. I. The District's construction implies that no individual could sue in court for an abridgment of his or her right to assemble because that right is reserved only to "the people" acting collectively. Likewise, the Fourth Amendment preserves "the right of the people" to be secure from unreasonable searches and seizures. U.S. CONST. amend. IV. The District's construction implies that no individual has a right enforceable in court to be free from unreasonable search and seizure, because only "the people" as a collective may enforce such rights. That, of course, is not the law.

Alternatively, if the District's "collective" construction of "the people" is somehow to be cabined only to the Second Amendment, the Court must conclude that when Congress sent the Bill of Rights to the States, Congress first listed four individual rights (in the First Amendment), then created a State's "right" (in the Second Amendment), and then reverted to a litany of individual rights (in Amendments Three through Eight). The Court must further conclude that, while Congress used "the people" to refer to individual rights in the First, Fourth, and Ninth Amendments, Congress used "the people" to mean "state governments" in the Second Amendment. Finally, for the Court to find that Congress used "the people" in the Second Amendment to mean "the States," it would have to somehow reconcile that with the Tenth Amendment's language, where Congress explicitly distinguished "the people" from "the States," reserving powers "to the States respectively, or to the people."

Moreover, the concept of a collective "right" or a State's "right" is contrary to the Constitution's structure and language; in the Hohfeldian taxonomy, States have powers, not rights. Rights are reserved to individuals; as Mill explained, "[t]o have a right . . . is . . . to have something which society ought to defend me in the possession of." JOHN STUART MILL, UTILITARIANISM 80 (Longman, Green, Longman, Roberts, and Green 1864) (1861).

Put simply, the words "the right of the people" cannot fairly be read to mean a collective power of the Militia. Rather, the Second Amendment's text means what it says: the individual right of the people to keep and bear arms cannot be infringed.

2. The District misinterprets the meaning of "keep" and "bear Arms."

The District's interpretation of the Second Amendment necessarily, and mistakenly, requires that the words "bear Arms" have only a military connotation, and that the words "keep" and "bear" arms in the Second Amendment be construed together as a unitary phrase relating only to maintaining arms for military service. *See* Petitioners' Br. 12-17. This construction of the Amendment is not supported by its text or history.

The first problem with the District's interpretation of "keep and bear Arms" is that it effectively ignores the word "keep." *Id.* Indeed, the District suggests that "keep" has no independent meaning, and was inserted merely to bolster the militia's ability to bear arms. *Id.*, at 16-17. But courts cannot ignore words or phrases in the Constitution. "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 77-78 (1946) (internal quotation marks omitted). And to "keep" arms is to possess or own arms, as is demonstrated by the contemporary dictionary definition of "keep":

> "1. To hold; to retain in one's power or possession; not to lose or part with; as, to keep a house or a farm; to keep any thing in the memory, mind or heart; 2. To have in custody for security or preservation." WEBSTER'S DICTIONARY (1828); *see also* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1770).

The Court should give effect, as did the court of appeals, to each word of the Amendment. Pet. App. 27a ("'[K]eep' is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use.").

The District's assertion that "bear Arms" refers only to militia service is likewise misguided. Although this phrase may be used to describe the carrying or wearing of arms by a soldier or member of the militia, it is not used exclusively to refer to the military. Indeed, the Framers understood "bearing" arms to include the carrying of weapons generally—as may be seen directly in a bill drafted by Thomas Jefferson and proposed to the Virginia Legislature by James Madison (the author of the Second Amendment) on October 31, 1785. Madison's bill would have imposed penalties upon one who violated hunting laws if he were to "*bear* a gun out of his [the violator's] inclosed ground, unless whilst performing military duty." 2 THE PAPERS OF THOMAS JEFFERSON, 443-44 (J.P. Boyd ed.,1950) (emphasis added). In fact, as Judge Kleinfeld noted in his dissenting opinion in *Silveira*, "the primary meaning of 'bear' is 'to carry,' as when we arrive at our host's home 'bearing gifts' and arrive at the airport 'bearing burdens.'" *Silveira* v. *Lockyer*, 328 F.3d 567, 572-73 (9th Cir. 2003) (Kleinfeld, J., dissenting) (footnote omitted).

This common-sense view of the phrase "bear Arms" is also reflected in Justice Ginsburg's dissenting opinion, joined by Chief Justice Rehnquist and Justices Scalia and Souter, in *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998):

> "Surely a most familiar meaning [of carrying a firearm] is, as the Constitution's Second Amendment ('keep and *bear* Arms') (emphasis added) and Black's Law Dictionary, at 214, indicate: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"

Nothing in the Second Amendment's text limits the words "bear Arms" to an exclusively military connotation; instead it affords an individual right to "the people" to "wear, bear, or carry" arms, regardless of whether they are engaged in military activity connected with a state militia.

3. The Second Amendment's introductory clause does not convert an individual right into a "collective" or "quasi-collective" right.

The District's "quasi-collective right" position is driven largely by its conclusion that the Second Amendment's operative clause, conferring the right to "keep and bear Arms," is defined and impliedly narrowed by the Amendment's introductory clause referencing a "well regulated Militia." Petitioners' Br. 12-18. But, although a preamble may inform, influence, or shape the operational clause, it cannot compel a result contrary to its meaning. *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 807 (1998). And, in any event, the Second Amendment's preamble is entirely consistent with the individual right mandated by the operational clause.

To be sure, the introductory clause implies that a principal purpose of the right to bear arms is to promote the existence and effectiveness of a "well-regulated Militia." But nothing compels the conclusion that this is the Amendment's only purpose.

With respect to other rights recognized by the Constitution, the Court has already held that similar preambulatory purposes do not limit the effect of the clauses' operational language. For example, in *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003), the Court addressed a similar proposed construction of the preambulatory language in the Copyright Clause, which reads "[T]he Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, §8, cl. 8. The Court concluded that Congress's power to secure exclusive rights to authors and inventors is not limited by the prefatory purpose to "promote the progress of science and useful arts." 537 U.S., at 210-211. Although promoting science and the arts may have been the Framers' chief purpose in conveying sweeping copyright powers to Congress, other purposes existed as well. *Id.*, at

212. If the Copyright Clause's preamble, *which expressly conditions* its operational language through use of the phrase "by securing," imposes no limitation on the Clause's scope, then neither does the Second Amendment's preamble, which is not so expressly limited. Volokh, *supra*, at 807-13.

And, even if the District were correct that the Second Amendment's prefatory clause defined the scope of the right conferred in the operational clause, the District's further conclusion—that the words "a well-regulated Militia, being necessary to the security of a free State" means the Amendment was adopted for the sole purpose of ensuring the effectiveness of state militias—is erroneous. The Amendment's text and history contradict this narrow reading of "Militia."

The Framers' understanding of "Militia" is reflected in a question asked by George Mason, one of the Virginians who refused to sign the Constitution because of its lack of a Bill of Rights: "Who are the Militia? They consist now of the whole people." 3 J. ELLIOTT, DEBATES IN THE GENERAL STATE CONVENTIONS 425 (3d ed. 1937) (statement of George Mason, June 14, 1788). This understanding, contrary to the District's position, *see* Petitioners' Br. 18, is also reflected in the language of both the Virginia and North Carolina ratifying conventions—which spoke of "a well regulated militia composed of the body of the people." RATIFICATIONS AND RESOLUTIONS OF SEVEN STATE CONVENTIONS (1788), *reprinted in* 2 DEBATE ON THE CONSTITUTION 561, 568 (Bernard Bailyn ed., 1993). James Madison articulated the same view of the term "militia" in Federalist No. 46, arguing that Congress's power under the proposed Constitution "[t]o raise and support armies" (art. I, §8, cl.

12) posed no threat to liberty because any such army, if misused, "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands." THE FEDERALIST NO. 46, at 334 (James Madison) (Benjamin Wright ed., 1961).

The District's narrow interpretation of "Militia" to include only some select body of permanent soldiers is also belied by the provisions of the Militia Act, enacted by the Second Congress the year after the Second Amendment's ratification. The Militia Act expressly defined the militia as "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years." Militia Act, ch. XXXIII, 1 Stat. 271, 271 (1792).[2] Thus, the "Militia" contemplated by the Framers was not limited to those enrolled in some type of state or local militia organization. Under statute and contemporary understanding, the militia was all able-bodied male citizens from eighteen to forty-five, whether they were organized into a state-sponsored fighting force or not. *See Silveira*, 328 F.3d at 578-80 (Kleinfeld, J., dissenting).

The Framers were understandably wary of standing armies and the powers of a potentially oppressive government. Therefore, the individual right to bear arms ensures a ready "Militia" consisting of each and every able-bodied male between the ages of eighteen to forty-five. The introductory clause, properly understood, confirms the primary benefit of the operational clause—a citizenry capable of defending its rights by force, when all other means have failed, against any future oppression.

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[2] Indeed, the Militia Act not only permitted gun ownership by every able-bodied man, it *required* it—obliging by law each man to "*provide himself* with a good musket or firelock . . . or with a good rifle." Militia Act, 1 Stat., at 271 (emphasis added).

B. The Court's Precedent Supports the Principle That the Second Amendment Guarantees an Individual Right.

The Court's decision in *Miller* buttresses the principle that the Second Amendment's text and history establish its protection of the rights of individuals to keep and bear arms. In *Miller*, the Court considered a Second Amendment challenge as applied to a sawed-off shotgun:

> "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." 307 U.S., at 178.

Miller is less than a model of clarity, but a fair reading of that opinion confirms that the Second Amendment protects individual rights. If the Second Amendment protected only the right to bear arms in a militia, the Court could easily have disposed of the case merely by observing that Miller was not a member of any state militia. Thus, with one sentence, the case could have been resolved.[3]

Instead, the Court based its ruling on the lack of judicial notice that a short-barreled shotgun, a weapon typically used by gangsters in the 1930s and associated with criminal activity, was the type of weapon that contributed to "the common defense." *Id.* The Court's decision implicitly acknowledged that the possession by individual Americans of weapons that could be part of the "ordinary military equipment" contributing to the common defense—as opposed to criminal activity—is protected by the Second Amendment.

The Court's conclusions in *Miller* also suggest an understanding that the Framers envisioned a militia composed of the entire people—possessed of their individually owned arms—as necessary for the protection of a free State. The Court expressly observed that, in the Framers' time, the militia "comprised all males physically capable of acting in concert for the common defense . . . . [O]rdinarily when called for service *these men were expected to appear bearing arms supplied by themselves* and of a kind in common use at the time." *Id.*, at 179 (emphasis added).

Later opinions of the Court also support the individual-right view, albeit in *dicta*. In *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the Court rejected a claim that the Fifth Amendment's criminal-procedure protections applied to nonresident enemy aliens by explaining that a contrary view would, *inter alia*, require the application of "companion civil-rights Amendments" in the Bill of Rights, including the Second Amendment. *Id.*, at 784.

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[3] Indeed, the United States raised the collective rights argument in its brief as its very first argument, Pet. App. 40a, and, notably, the Court declined to rule on that basis.

In *Konigsberg* v. *State Bar of Cal.*, 366 U.S. 36 (1961), the Court, citing *Miller*, again equated the Second Amendment right with rights secured by the First Amendment. *Id.*, at 49 n.10. More recent cases have also assumed an individual right in *dicta* by listing the Second Amendment right among the personal rights composing the "liberty" that the Constitution's due-process provisions protect. *See Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 847 (1992); *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality op.).

Likewise, in *Robertson* v. *Baldwin*, 165 U.S. 275, 281-82 (1897), the Court observed,

> "The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. . . . Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels . . . [and] *the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons* . . . ." (Emphasis added)

Repeatedly, the Court has described the Second Amendment, consistent with the analysis in *Miller*, as an individual right—like the others in the Bill of Rights and subject to similar restrictions.

C. The Weight of Scholarly Commentary Also Supports the Conclusion That the Second Amendment Guarantees an Individual Right to Keep and Bear Arms.

As Justice Thomas has written, "a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."[4] The unmistakable trend among constitutional scholars is towards recognizing that the Second Amendment confers a personal, individual right. For example, although arguing for a narrow construction of the Amendment, Professor Laurence Tribe has squarely concluded that the Second Amendment provides a "right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes." 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 902 n.221 (3d ed. 2000). Professors

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[4] *Printz* v. *United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (citing, *inter alia*, JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162 (1994); STEPHEN HALBROOK, THAT EVERY MAN BE ARMED, THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L. J. 1236 (1994); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989)).

Sanford Levinson and Akhil Amar in large part agree.[5] Professor Nelson Lund maintains that the Amendment confers an individual right to keep and bear arms, and thereby helps to protect "the most fundamental individual right, the right of self-defense." Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 130 (1987). Professor Joyce Lee Malcolm has found that the Amendment's historical lineage favors the interpretation that it guarantees an individual right to arms. *See, generally*, MALCOLM, *supra*.

The individual-rights view is now also the position of the United States. *See* U.S. Br. 10-19; Memorandum from John Ashcroft, Attorney General, to All United States Attorneys (Nov. 9, 2001), *available at* http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf (discussing *United States* v. *Emerson*). Indeed, the Office of Legal Counsel has issued an exhaustive opinion for the Attorney General concluding that "[t]he Second Amendment secures a right of individuals generally, not a right of States or a right restricted to persons serving in militias." STEVEN G. BRADBURY ET AL., U.S. DEP'T OF JUSTICE, MEMORANDUM OPINION FOR THE ATTORNEY GENERAL: WHETHER THE SECOND AMENDMENT SECURES INDIVIDUAL RIGHT 1 (2004), *available at* http://www.usdoj.gov/olc/secondamendment2.pdf.

Contemporaries of the first Congress and nineteenth-century constitutional scholars also agreed that the Second Amendment confers an individual right.

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[5] *See* Amar, *supra*; Levinson, *supra*.

When St. George Tucker published his five-volume edition of Blackstone's Commentaries in 1803, he observed that "[w]herever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." WILLIAM BLACKSTONE, 1 COMMENTARIES 300 (St. George Tucker ed., Augustus M. Kelley 1969) (1803). He further pointedly criticized the English Bill of Rights for limiting its guarantee of arms ownership to Protestants, while the American right was "without any qualification as to their condition or degree, as is the case in the British government." *Id.* at 143.

Thomas Cooley directly addressed the issue of the scope of the Amendment's guarantee: "It might be supposed from the phraseology of [the Second Amendment] that the right to keep and bear arms was only guaranteed to the militia; *but this would be an interpretation not warranted by the intent* . . . . [T]he meaning of the [amendment] undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose." THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 270-72 (Rothman & Co. 1981) (1880) (emphasis added). Justice Joseph Story similarly concluded that the "right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them." JOSEPH STORY, COMMENTARIES

ON THE CONSTITUTION OF THE UNITED STATES 708-09 (Carolina Academic Press 1987) (1833).

These contemporary scholars understood that the Second Amendment guaranteed each American the right to "keep" and "bear" arms as the foundation of the militia that would provide security for a "free" State. If the people were disarmed there could be no militia (well-regulated or otherwise) as understood by the Framers.

D. The Second Amendment's History Demonstrates That It Guarantees an Individual Right to Arms.

The historical context of the Second Amendment also supports the court of appeals's conclusion that it guarantees an individual right to arms. When the Amendment was adopted, the drafters undoubtedly looked to the provisions in many of the state constitutions as models. Volokh, *supra*, at 814-21. At that time, almost half of the States with bills of rights included provisions recognizing that right. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 54 (1996).

The Framers were also guided by the evolution of individual rights in England. As the Court has stated, "[t]he historical necessities and events of the English constitutional experience . . . were familiar to" the Framers and should "inform our understanding of the purpose and meaning of constitutional provisions." *Loving v. United States*, 517 U.S. 748, 766 (1996).

The English Declaration of Rights of 1689 came approximately a century before our own. It provided that "the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." 1 W. & M., 2d sess., c. 2, Dec. 16, 1689 (quoted in 5 THE FOUNDERS CONSTITUTION 210 (Philip B. Kurland & Ralph Lerner eds., 1987)). The right of the English Monarch's "subjects" to have arms is by its terms an individual one, and it was so understood by William Blackstone, who provided the standard reference work for Colonial and early American lawyers.

Blackstone explained that the right of "having" arms is among the five basic rights of every Englishman, which were essential to secure the "primary rights" of each individual. WILLIAM BLACKSTONE, 1 COMMENTARIES 136, 139 (Legal Classics Library 1983) (1765). Blackstone saw the right to bear arms as a natural right because it arose from the natural right of self-preservation and the right of "resistance . . . to the violence of oppression." *Id.*, at 139. Blackstone's conception of the individual right to bear arms as protection against oppression would have been particularly relevant to the Framers, who had themselves just taken part in a bloody struggle against the oppression of the English Crown.

Thus, the Framers' own experience informed their understanding of the "right of the people to keep and bear Arms," and the fundamental relationship of this right to "the security of a free State." The Framers recognized that the best security against an oppressive regime was a free citizenry capable of defending its rights. As Alexander Hamilton explained,

> "if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at

> all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens." THE FEDERALIST NO. 29, at 229 (Alexander Hamilton) (Benjamin Wright ed., 1961).

The Second Amendment answered the potential threat of a standing army with the guarantee that individual citizens could not be disarmed. The Framers saw that individual right as an essential bulwark of the people's liberties. This Court should as well, and should affirm the judgment of the court of appeals.[6]

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[6] Although the Court need not reach the issue of incorporation in this case, *amici* States submit that the right to keep and bear arms is fundamental and so is properly subject to incorporation. To be sure, early decisions of this Court cast doubt on Second Amendment incorporation, *see United States* v. *Cruikshank*, 92 U.S. 542, 553 (1875); *Presser* v. *Illinois*, 116 U.S. 252, 264-65 (1886), but those opinions predated the Court's broad-based incorporation of the Bill of Rights against the States. *See Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968). In the judgment of *amici* States, the right to keep and bear arms is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937) (citations and internal quotation marks omitted), *overruled on other grounds*, *Benton* v. *Maryland*, 395 U.S. 784 (1969). Authors of the Fourteenth Amendment concurred. *See* Van Alstyne, *supra* note 4, at 1252 (noting that in reporting the Fourteenth Amendment to the Senate, Senator Howard of Michigan described the right to keep and bear arms as among the Constitution's "great fundamental guarantees" (internal quotation marks omitted)).

A fortiori the Second Amendment applies to the District of Columbia. *See District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 109 (1953) (finding "no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power *subject of course to constitutional limitations* to which all lawmaking is subservient" (emphasis added)). The District's only

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT OF COLUMBIA'S FIREARMS REGULATIONS ARE UNCONSTITUTIONAL.

This case concerns three ordinances that together effectively prohibit the private possession in one's home of any operative firearms. In an attempt to narrow the issues before the Court, the District tried to frame the question presented as concerning only its ordinance banning the private possession of handguns. Pet. i, 7 n.2. Tellingly, the District urged that "broadening the question to address the effect of Section7-2507.02 [the trigger-lock provision] would needlessly complicate the case." Pet. Reply 6.

The Court rejected that attempt, and instead reframed the question presented to consider the collective effect of *all three* challenged provisions of the D.C. Code, §§7-2502(a)(4), 22-4504(a), and 7-2507.02. *Dist. of Columbia* v. *Heller*, 128 S.Ct. 645 (2007) (mem.).

Because the District's citizens cannot selectively abide by portions of its firearms prohibitions, but rather must comply with *all* of those prohibitions or face criminal penalties,[7] evaluating whether these statutes are constitutionally valid necessarily involves consideration of how they act together to restrict the constitutional right to keep and bear arms. *Cf. Randall* v. *Sorrell*, 548 U.S. 230 (2006) (plurality op.) (concluding that a State's campaign

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argument to the contrary—that D.C. is not a State whose militia is the object of the Amendment—is premised on it erroneous theory that the Second Amendment protects only collective, not individual, rights.

[7] *See* D.C. CODE §§7-2507.06; 22-4515.

contribution limits, taken together, unconstitutionally restricted a candidate's First Amendment rights); *Williams* v. *Rhodes*, 393 U.S. 23, 34 (1968) (concluding that "the totality of the Ohio restrictive laws taken as a whole impose[] a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause").

The D.C. Code provisions at issue operate together as a unitary statutory scheme. D.C. Code §7-2502.02(a)(4) prohibits the registration of a pistol not registered in the District prior to 1976. Section 22-4504 separately restricts the carrying of a pistol, and is challenged in this case to the extent it bans individuals from moving lawfully registered handguns within their own homes, Pet. App. 54a. Finally, §7-2507.02 provides in relevant part that a registered firearm must be kept "unloaded and disassembled or bound by a trigger lock or similar device."

Together, these provisions prohibit Mr. Heller from ever possessing, in his home, an operable firearm. In an attempt to temper the absolute nature of that bar, the District now contends that §7-2507.02 must be read to include an implied exception for self defense, even though the text of that provision contains not a word to that effect. Petitioners' Br. 56. Instead, the text is mandatory ("each registrant *shall* keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device") and on its face contains no such exception.[8]

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[8] Petitioners expressly acknowledge that, absent the *ad hoc* exception that they would like to engraft onto the plain text—"the law would be unreasonable." Petitioners' Br. 56.

In making that argument, Petitioners point to no precedent supporting the notion that an individual must risk criminal prosecution under a statute categorically restricting his or her constitutional rights, in the hope that a court might subsequently alter the text to protect those rights in some limited circumstances. And *amici* States are aware of none.

Thus, the only fair reading of these ordinances' plain text is that together they operate as a sweeping prohibition on any effective exercise of the right to keep and bear arms in the District of Columbia.

A. The Court of Appeals's Decision Should Be Affirmed Because Statutes Effectively Prohibiting Any Citizen From Keeping and Bearing "Arms" Are Unconstitutional.

The court of appeals recognized that the individual right to keep and bear arms is not an absolute right immune from restriction. Pet. App. 51a. Rather, the court noted that the right to keep and bear arms, which pre-existed and was preserved by the Second Amendment, has traditionally been subject to "the sort of reasonable regulations contemplated by the drafters of the Second Amendment." *Id.* The court correctly concluded, however, that because the District's ordinances categorically prohibit the possession of functional firearms in private homes, they are unreasonable and unconstitutional.

1. The D.C. Code provisions concern "Arms" protected under the Second Amendment.

In evaluating the validity of the District's firearms prohibitions, the court of appeals adopted a two-part test—drawn in part from this Court's opinion in *Miller*—that considered first whether the District's ordinances affected "Arms" protected under the Second Amendment. If the District's regulations affected only weapons that are not "Arms," they could not run afoul of the Amendment's protections. *See id.*, at 48a-51a, 53a-55a. If, on the other hand, the regulations in question did affect "Arms," the court would then move to the second part of the test: whether the regulations are "reasonable." *See id.*, at 51a-55a.

In determining whether the regulations affected "Arms" protected by the Second Amendment, the court of appeals followed the test set forth by this Court in *Miller*, under which a weapon is an "Arm[]" if it: (1) bears a "'reasonable relationship to the preservation or efficiency of a well regulated militia;'" and (2) is "'of the kind in common use at the time.'" *Id.*, at 48-49a (quoting *Miller*, 307 U.S., at 178-79). The court properly concluded that the handguns and long guns subject to the District's prohibitions meet both prongs of the *Miller* test and are therefore protected under the Amendment. *Id.*, at 51a.

As the court explained, "[t]he modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes *Miller's* standards." *Id.* In this regard, the court noted, just as the First Amendment protects "modern communications devices unknown to the founding generation," the Second Amendment likewise protects the "modern-day equivalents" of colonial-era weapons. *Id.* Thus, while the court's test would properly include weapons such as rifles and handguns as protected "Arms" under the Amendment, a cannon, for example, would not be a protected "Arm" because it is not in common use by American citizens. *See* Pet. App. 50a-51a.

2. The court of appeals correctly concluded that the District's statutes are unconstitutional.

Having concluded that the District's restrictions implicated "Arms" protected under the Second Amendment, the court moved to the second part of its test and considered whether the District's statutes are "reasonable regulations." *Id.* at 51-52a. The court observed that, "[t]he protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." *Id.* at 51a. The court specifically analogized to "'reasonable restrictions on the time, place, or manner of protected speech.'" *Id.* (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)), as the type of regulations that, in the Second Amendment context, could permissibly restrict the right to keep and bear arms. *Id.* Under the Court's First Amendment precedent, of course, this type of restriction must be "narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S., at 791 (internal quotation marks omitted).

Applying these principles, the court of appeals correctly recognized that the District's statutes, which effectively forbid citizens from possessing handguns or operable long guns in their homes, are not really "regulations"of the right to keep and bear arms. *See* Pet.

App. 53a. Rather, these statutes form a categorical "'prohibition, of . . . "arms" which the people are entitled to bear.'" *Id.* (quoting *State* v. *Kerner*, 107 S.E. 222, 225 (N.C. 1921)). Accordingly, the court appropriately concluded that because these statutes essentially deprive all the District's citizens of their Second Amendment right to keep and bear arms, the statutes are not "reasonable regulations," but rather facially unreasonable prohibitions. *See id.* But even if characterized as "regulations"—rather than outright prohibitions—the D.C. Code provisions are nonetheless unreasonable under *Ward*. The District justifies these statutes on the ground that they can be expected to "reduce crime, suicide, domestic violence, and accidental shootings." Petitioners'. Br. 11. But although these asserted governmental interests are surely significant, its categorical ban on handguns—the most ubiquitous class of "arm" kept by citizens[9]—and on the possession of all operable long guns in the homes of anyone in the District, can hardly be described as a "narrowly tailored" statutory structure to serve those interests. Rather, these sweeping prohibitions leave no "ample alternatives" for the District's citizens to exercise their rights under the Second Amendment. *Cf. Ward*, 491 U.S., at 791.[10]

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[9] As the court of appeals observed, pistols are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." Pet. App. 53-54a (citing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 182-83 (1995)).

[10] Even if the trigger-lock provision of §7-2507.02 were not considered, *amici* States submit that the District's categorical ban on *all* handguns in essentially all circumstances is facially unreasonable.

B. The Court of Appeals's Decision Should Be Affirmed Because the District's Firearms Prohibitions Also Cannot Withstand Scrutiny Under the Standard of Review Recommended by the United States.

The United States has advocated a standard of review that it believes is different from that applied by the court of appeals. U.S. Br. 23-24 & n.6. The United States therefore recommends that the Court should vacate and remand the case for further review under the United States's recommended "intermediate" level of review. *Id.* at 28, 32.

The United States's position cannot bear scrutiny. Regardless of what test is applied—the court of appeals's, the United States's, or some other—the District's categorical ban on all operable firearms cannot survive. Thus, a remand would serve no purpose.[11]

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[11] In *Casey*, 505 U.S., at 878-79, the Court adopted a new test for determining the constitutionality of restrictions on abortion—the undue burden standard—but rather than remanding, the Court applied the new standard to the provisions at issue. Similarly, in *McCleskey* v. *Zant*, 499 U.S. 467, 502-03 (1991), the Court adopted the cause and prejudice standard for abuse of writ and affirmed the court of appeals's judgment under its newly-adopted standard.

As Justice Stevens has explained, "[a]ppellate courts in general and this Court in particular have, after correcting an erroneous interpretation of law, appl[ied] the proper legal standard to undisputed facts of record—whether or not such facts have been memorialized in formal findings by 'the original finder of fact.'" *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 716 (1986) (Stevens, J. dissenting). Among other things, "[t]his practice . . . allows appellate courts to give guidance to trial courts by illustrating the proper

The United States begins with the proposition that the Second Amendment "allows for reasonable regulation of firearms, must be interpreted in light of context and history, and is subject to important exceptions, such as the rule that convicted felons may be denied firearms." U.S. Br. 8. The court of appeals's decision is consistent with these principles. *See supra* Part II.A.

The United States goes on, however, to set forth a different, "heightened" standard of review for regulations that "directly limit[] the private possession of 'Arms' in a way that has no grounding in Framing-era practice." U.S. Br. 8. The United States acknowledges that the District's statutes directly limit "Arms" protected by the Second Amendment and have no grounding in "Framing-era practice." *Id.* According to the United States, this type of regulation is therefore subject to an "intermediate level of review," under which "the 'rigorousness' of the inquiry depends on the degree of the burden on protected conduct." *Id.* Thus, under the United States's test, the greater the scope of the prohibition and its impact on private firearm possession, the more difficult it will be to defend under the Second Amendment. U.S. Br. 27.

The United States's standard is derived from First Amendment election-law decisions that likewise instruct that the greater the restriction, the more exacting the scrutiny must be. *See* U.S. Br. 24 & n.6 (citing *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351 (1997); and *Burdick* v. *Takushi*, 504 U.S. 428 (1992)). The United States gives no reason why these election cases should

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application of a new legal standard in a particular case." *Id.*

provide the appropriate Second Amendment standard of review, but, if they were extended to do so, the District's ordinances would not survive.

Indeed, under these cases, the District's sweeping prohibitions would likely be reviewed under strict scrutiny—a far more demanding standard than the "reasonableness" standard applied by the court of appeals. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." *Timmons*, 520 U.S., at 358; *Burdick*, 504 U.S., at 433; *McIntyre*, 514 U.S., at 347.[12]

And, by any measure, the District's categorical ban on possessing any operable firearms in his home must be viewed as a "severe burden" on Mr. Heller's Second Amendment rights. Thus, strict scrutiny would apply, which the District ordinances would necessarily fail.

Even if the Court did not apply strict scrutiny, the District's statutes would also fail the (presumably alternative) less restrictive test set forth in the United States's brief. U.S. Br. 8. This test would evaluate the validity of the District's firearms prohibitions under the following standard: "(a) the practical impact of the challenged restriction on the plaintiff's ability to possess firearms for lawful purposes (which depends in turn on the nature and functional adequacy of available alternatives), and (b) the strength of the government's interest in enforcement of the relevant restriction." *Id.* Even assuming the important governmental interests articulated by the District, its firearms prohibitions cannot meet part (a) of the United States's test—which strongly resembles the "ample alternative channels for communication" standard set forth in *Ward*, 491 U.S., at 791—because the District's prohibitions effectively leave its citizens with no alternatives regarding the possession of functional firearms in their homes for self-defense. Thus, even applying the test(s) suggested by the United States, the District's statutory scheme remains facially unconstitutional.

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[12] In *McIntyre*—the case that the United States says best demonstrates the distinction between its proposed standard and that of the court of appeals, U.S. Br. 24 n.6—the Court applied strict scrutiny and struck down an Ohio electioneering law that prohibited the distribution of anonymous political documents. 514 U.S., at 344.

C. The Unreasonableness of the District's Statutory Scheme Is Further Evidenced by the Fact That It Runs Counter to the Regulatory Approach of All Fifty States.

To the extent the Court looks beyond the standard adopted by the court of appeals or those suggested by the United States, the unreasonable nature of the D.C. Code provisions is also evident when compared to the statutory approach of the fifty States.

The Legislatures of all fifty States are united in their rejection of bans on private handgun ownership. Every State in the Union permits private citizens to own handguns.[13] Forty-five States go further, allowing private citizens to carry concealed handguns for self-defense.[14] Thus, the District's sweeping firearm prohibitions are not only contrary to the Constitution, but also contrary to the reasoned judgment of every state legislature in the Nation.

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[13] *See* APPENDIX.

[14] *See* APPENDIX.

Indeed, for that reason, this diverse coalition of 31 *amici* States is of one accord that—under any standard—the District of Columbia's categorical ban cannot be sustained.

III. NONE OF THE FEDERAL FIREARMS REGULATIONS DISCUSSED IN THE UNITED STATES'S BRIEF IS JEOPARDIZED BY THE COURT OF APPEALS'S DECISION.

The United States asserts that application of the court of appeals's standard would jeopardize the validity of a variety of federal firearms regulations. *See* U.S. Br. 21-22, 25-27. This concern is misplaced.

The federal firearms regulations that the United States suggests may be vulnerable fall into four categories: (1) restrictions on the *type* of firearms that may be possessed, (2) restriction on *who* may possess firearms, (3) restrictions on *where* firearms may be possessed, and (4) economic restrictions on the import, export, and exchange of firearms. *See* U.S. Br. 21-22, 25-27.

In regard to the first category, the United States notes that federal law generally prohibits the possession of both machine guns and firearms that are undetectable by metal detectors and x-ray machines. U.S. Br. 2 (citing 18 U.S.C. §922(o) (machine guns), (p) (undetectable firearms)). But neither of these regulations is impliedly invalidated by the court of appeals's decision.

A court would likely conclude that machine guns and undetectable firearms do not constitute "Arms" under the Second Amendment. Even if these weapons could be described as bearing a reasonable relationship to the preservation or efficiency of a well regulated militia, they could not be accurately categorized as the kinds of weapons that are currently in "common use" by American citizens. *See* Pet. App. 49a. And even if these weapons were considered "Arms," the federal laws would likely survive under the reasonableness standard because the regulations target a particularly dangerous feature of specific firearms and do not inhibit the core functionality of the general class of firearms.

Second, the United States focuses on federal regulations addressing particular individuals who may not possess firearms. U.S. Br. 25-26. Specifically, federal law prohibits possession of firearms by, *inter alia*, convicted felons, fugitives from justice, illegal drug users, mentally ill persons, illegal aliens, and those who have been convicted of domestic violence. 18 U.S.C. §922(g). The United States's concerns are unfounded because, as the court of appeals recognized—consistent with centuries of common law—prohibiting firearm possession by people with particularly dangerous characteristics is presumptively reasonable and constitutionally valid. Pet. App. 52a; *see also Emerson*, 270 F.3d, at 264 (concluding that 18 U.S.C. §922(g)(8) is a reasonable regulation).

Third, the United States's fear of constitutional vulnerability concerning the federal restrictions on *where* a firearm may be possessed is equally unfounded. The federal laws cited by the United States that prohibit the private possession of firearms in certain places would not offend the Constitution under the standard articulated by the court of appeals. To the contrary, the court of appeals explicitly affirmed reasonable time, place, or manner regulations of the right to keep and bear arms. Pet. App. 51-52a.

Finally, federal laws regulating the import, export, and transfer of firearms arise from Congress's power to "regulate Commerce with foreign Nations, and among the several States," and have only an incidental effect on the Second Amendment right to keep and bear arms. As such, they would not be subject to heightened scrutiny.

Accordingly, there is no basis for the United States's concern that these laws may face invalidation under the court of appeals's decision. Indeed, it bears emphasis that *amici* States likewise have a strong interest in maintaining the many state laws prohibiting felons in possession, restricting machine guns and sawed-off shotguns, and the like. *See* Appendix.

But all 31 *amici* States agree that striking down the District of Columbia's categorical ban on *all* operative firearms would pose no threat to these reasonable regulations. Instead, this case is a threshold case: at issue is whether the Second Amendment has any modern meaning whatsoever. Remaining faithful to the Constitution, there should be only one answer.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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APPENDIX

CONSTITUTIONAL PROVISIONS AND FIREARMS REGULATIONS BY STATES AND THE DISTRICT OF COLUMBIA

STATE	REGISTRATION / CONCEALED-CARRY REGULATIONS	CONST. RIGHT TO ARMS
Alabama	Ala. Code §§ 13A-11-50 to -85	Ala. Const. art. I, § 26
Alaska	Alaska Stat. §§ 18.65.700–.790	Alaska Const. art. I, § 19
Arizona	Ariz. Rev. Stat. §§ 13-3101 to -3117	Ariz. Const. art. II, § 26
Arkansas	Ark. Code Ann. §§ 5-73-301 to -320	Ark. Const. art. II, § 5
California	Cal. Penal Code §§ 12050–12054	
Colorado	Colo. Rev. Stat. §§ 18-12-201 to -216	Colo. Const. art. II, § 13
Connecticut	Conn. Gen. Stat. §§ 29-27 to -36L	Conn. Const. art. I, § 15
Delaware	Del. Code Ann. tit., 11 §§ 1441–1459	Del. Const. art. I, § 20

STATE	REGISTRATION / CONCEALED-CARRY REGULATIONS	CONST. RIGHT TO ARMS
District of Columbia	D.C. CODE ANN. §§ 22-4503 to -4514	
Florida	FLA. STAT. ANN. §§ 790.06–.331	FLA. CONST. art. I, § 8
Georgia	GA. CODE ANN. §§ 16-11-126 to -134	GA. CONST. art. I, § I, ¶ VIII
Hawaii	HAW. REV. STAT. §§ 134-3 to -17	HAW. CONST. art. I, § 1
Idaho	IDAHO CODE § 18-3302	IDAHO. CONST. art. I, § 11
Illinois	430 ILL. COMP. STAT. 65/1 to /16	ILL. CONST. art. I, § 22
Indiana	IND. CODE §§ 35-47-2-1 to -24	IND. CONST. art. I, § 32
Iowa	IA CODE §§ 724.1–.30	
Kansas	KAN. STAT. ANN. §§ 75-7c01 to -7c26	KAN. CONST., Bill of Rights, § 4

STATE	REGISTRATION / CONCEALED-CARRY REGULATIONS	CONST. RIGHT TO ARMS
Kentucky	KY. REV. STAT. ANN. §§ 237.110–.142	KY. CONST. § 1(7)
Louisiana	LA. REV. STAT. ANN. § 40:1379.3	LA. CONST. art. I, § 11
Maine	ME. REV. STAT. ANN. tit. 25, §§ 2001-A to 2006	ME. CONST. art. I, § 16
Maryland	MD. PUBLIC SAFETY CODE ANN. § 5-301 to -314	
Mass.	MASS. GEN. LAWS ch. 140 §§ 129B, 131	MASS. CONST. pt. I, art. XVII
Michigan	MICH. STAT. ANN. §§ 28.421–.435	MICH. CONST. art. I, § 6
Minnesota	MINN. STAT. ANN. § 624.714	
Mississippi	MISS. CODE ANN. § 45-9-101	MISS. CONST. art. III, § 12
Missouri	MO. REV. STAT. §§ 571.070, 571.121	MO. CONST. art. I, § 23

STATE	REGISTRATION / CONCEALED-CARRY REGULATIONS	CONST. RIGHT TO ARMS
Montana	MONT. CODE ANN. § 45-8-321 to -330	MONT. CONST. art. II, § 12
Nebraska	NEB. REV. STAT. §§ 69-2428 to -2447	NEB.. CONST. art. I, § 1
Nevada	NEV. REV. STAT. 202.3653–.369	NEV.. CONST. art. I, § 11, cl. 1
New Hampshire	N.H. REV. STAT. ANN. § 159:6	N.H.. CONST. pt. I, art. 2-a
New Jersey	N.J. REV. STAT. § 2C:58-4	
New Mexico	N.M. STAT. ANN. §§ 29-19-1 to -14	N.M. CONST. art. 2, § 6
New York	N.Y. PENAL LAW §§ 400.00–.10	
North Carolina	N.C. GEN. STAT. §§ 14-415.10 to .26	N.C. CONST. art. I, § 30
North Dakota	N.D. CENT. CODE §§ 62.1-04-01 to -05	N.D.. CONST. art. I, § 1
Ohio	OHIO REV. CODE ANN. §§ 2923.125 to .1213	OHIO CONST. art. I, § 4

STATE	REGISTRATION / CONCEALED-CARRY REGULATIONS	CONST. RIGHT TO ARMS
Oklahoma	OKLA. STAT. ANN. tit. 21, §§ 1290.1–.26	OKLA. CONST. art. II, § 26
Oregon	OR. REV. STAT. §§ 166.291 to .297	OR. CONST. art. I, § 27
Penn.	PA. STAT. ANN. tit. 18, §§ 6106, 6109	PA. CONST. art. I, § 21
Rhode Island	R.I. GEN. LAWS § 11-47-8 to -15	R.I. CONST. art. I, § 22
South Carolina	S.C. CODE ANN. §§ 23-31-205 to -240	S.C. CONST. art. I, § 20
South Dakota	S.D. CODIFIED LAWS §§ 23-7-7 to -8.10	S.D. CONST. art. VI, § 24
Tennessee	TENN. CODE ANN. §§ 39-17-1351 to -1360	TENN. CONST. art. I, § 26
Texas	TEX. GOV'T CODE ANN. §§ 411.171–.208	TEX. CONST. art. I, § 23
Utah	UTAH CODE ANN. §§ 53-5-701 to -711	UTAH. CONST. art. I, § 6

STATE	REGISTRATION / CONCEALED-CARRY REGULATIONS	CONST. RIGHT TO ARMS
Vermont	VT. STAT. ANN. tit. 13, § 4003	VT. CONST. ch. I, art 16
Virginia	VA. CODE ANN. § 18.2-308	VA. CONST. art. I, § 13
Washington	WASH. REV. CODE § 9.41.070	WASH. CONST. art. I, § 24
West Virginia	W. VA. CODE § 61-7-4 to -6a	W. VA. CONST. art. III, § 22
Wisconsin	WIS. STAT. §§ 941.23, 941.29	WIS. CONST. art. I, § 25
Wyoming	WYO. STAT. ANN. §§ 6-8-104	WYO. CONST. art. I, § 24

ADDITIONAL STATE STATUTES CONCERNING FIREARMS

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
Alabama	ALA.CODE § 13 A-11-72	ALA. CODE § 13A-11-63(a) (sawed-off shotguns and rifles)
Alaska	ALASKA STAT. § 11.61.200	
Arizona	ARIZ. REV. STAT. § 13-904	ARIZ. REV. STAT. § 13-3101(A)(7) (machine guns and short-barreled shotguns and rifles)
Arkansas	ARK. CODE ANN. § 5-73-103	
California	CAL. PENAL CODE § 12021	CAL. PENAL CODE §§ 12001.5 (short-barreled rifles and shotguns); 12220 (machine guns)

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
Colorado	COLO. REV. STAT. § 18-12-108	COLO. REV. STAT. § 18-12-102 (machine guns and short shotguns and rifles)
Connecticut	CONN. GEN. STAT. § 53a-217	CONN. GEN. STAT. §§ 53-202(b), (c) (assault weapons); 53a-211 (sawed-off shotguns and rifles)
Delaware	DEL. CODE ANN. tit. 11, § 1448	DEL. CODE ANN. tit. 11, § 1444 (sawed-off shotguns and machine guns)
District of Columbia	D.C. CODE § 22-4503	D.C. CODE § 7-2502.02 (machine guns and sawed-off shotguns and rifles)

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
Florida	FLA. STAT. § 790.23	FLA. STAT. § 790.221 (machine guns and short-barreled shotguns and rifles)
Georgia	GA. CODE ANN. § 16-11-131	GA. CODE. ANN. § 16-11-122 (machine guns and short-barreled shotguns and rifles)
Hawaii	HAW. REV. STAT. § 134-7	HAW. REV. STAT. § 134-8 ("assault pistols," machine guns, and short-barreled rifles and shotguns)
Idaho	IDAHO CODE ANN. § 18-310	
Illinois	720 ILL. COMP. STAT. 5/24-1.1	720 ILL. COMP. STAT. 5/24-1 (machine guns and short-barreled shotguns and rifles)

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
Indiana	IND. CODE ANN. §§ 35-47-4-5, -6	IND. CODE ANN. §§ 35-47-5-4.1 (sawed-off shotguns); -8 (machine guns)
Iowa	IOWA CODE § 724.26	IOWA CODE §§ 724.1, .2 (machine guns and short-barreled shotguns and rifles)
Kansas	KAN. STAT. ANN. § 21-4204	KAN. STAT. ANN. § 21-4201 (machine guns and short-barreled shotguns)
Kentucky	KY. REV. STAT. § 527.040	
Louisiana	LA. REV. STAT. § 14:95.1	LA. REV. STAT. § 40:1752 (machine guns)
Maine	ME. REV. STAT. ANN. tit. 15, § 393	ME. REV. STAT. ANN. tit. 17-A, § 1051 (machine guns)

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
Maryland	MD. CODE ANN. CRIM. LAW § 5-622	MD. CODE ANN. CRIM. LAW §§ 4-303 ("assault pistols,"); 4-405 (on machine guns); MD. CODE ANN. PUB. SAFETY § 5-203 (short-barreled shotguns and rifles)
Massachusetts	MASS. GEN. LAWS ch. 140, §§ 129B, 129C	MASS. GEN. LAWS ch. 140, § 131M (assault weapons)
Michigan	MICH. COMP. LAWS § 750.224f	MICH. COMP. LAWS §§ 750.224 (machine guns); 750.224b (short-barreled shotguns and rifles)
Minnesota	MINN. STAT. § 609.165	MINN. STAT. § 609.67 (machine guns and short-barreled shotguns)
Mississippi	MISS. CODE ANN. § 97-37-5	

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
Missouri	MO. REV. STAT. § 571.070	MO. REV. STAT. § 571.020 (machine guns and short-barreled shotguns and rifles)
Montana	MONT. CODE ANN. § 45-8-313	MONT. CODE ANN. § 45-8-340 (sawed-off shotguns)
Nebraska	NEB. REV. STAT. § 28-1206	NEB. REV. STAT. § 28-1203 (machine guns and short-barreled shotguns and rifles)
Nevada	NEV. REV. STAT. ANN. § 202.360	NEV. REV. STAT. ANN. §§ 202.350 (machine guns); 202.275 (short-barreled rifles and shotguns)
New Hampshire	N.H. REV. STAT. ANN. § 159:3	

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
New Jersey	N.J. STAT. ANN. § 2C:39-7	N.J. STAT. ANN. §§ 2C:39-1 (weapons over 60 caliber except shotguns); 2C:39-3 (sawed-off shotguns)
New Mexico	N.M. STAT. ANN. § 30-7-16	
New York	N.Y. PENAL LAW § 265.01	N.Y. PENAL LAW § 265.02 (machine guns, "assault weapons")
North Carolina	N.C. GEN. STAT. § 14-415.1	N.C. GEN. STAT. § 14-409 (machine guns)
North Dakota	N.D. CENT. CODE § 62.1-02-01	N.D. CENT. CODE § 62.1-05-01 (machine guns)
Ohio	OHIO REV. CODE ANN. § 2923.13	OHIO REV. CODE ANN. §§ 2923.11, .17 (machine guns and sawed-off firearms)

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
Oklahoma	OKLA. STAT. tit. 21, § 1283	
Oregon	OR. REV. STAT. § 166.270	OR. REV. STAT. § 166.272 (machine guns and short-barreled shotguns and rifles)
Pennsylvania	18 PA. CONS. STAT. § 6105	18 PA. CONS. STAT. § 908 (machine guns and short-barreled shotguns and rifles)
Rhode Island	R.I. GEN. LAWS § 11-47-5	R.I. GEN. LAWS § 11-47-8 (machine guns and short-barreled shotguns and rifles)
South Carolina	S.C. CODE ANN. § 16-23-30	S.C. CODE ANN. § 23-31-330 (machine guns and short-barreled shotguns and rifles)

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
South Dakota	S.D. CODIFIED LAWS § 22-14-15	S.D. CODIFIED LAWS § 22-14-6 (machine guns and short-barreled shotguns)
Tennessee	TENN. CODE ANN. § 39-17-1307	TENN. CODE ANN. § 39-17-1302 (machine guns and short-barreled shotguns and rifles)
Texas	TEX. PENAL CODE ANN. § 46.04	TEX. PENAL CODE ANN. §§46.01, .05 (machine guns and short-barreled shotguns and rifles)
Utah	UTAH CODE ANN. § 76-10-503	
Vermont		
Virginia	VA. CODE ANN. § 18.2-308.2	VA. CODE ANN. § 18.2-300 (sawed-off shotguns and rifles)

STATE	POSSESSION OF FIREARMS BY FELONS	MACHINE GUNS / SAWED-OFF SHOTGUNS
Washington	WASH. REV. CODE ANN. § 9.41.040	WASH. REV. CODE ANN. § 9.41.190 (machine guns and short-barreled shotguns and rifles)
West Virginia	W. VA. CODE § 61-7-7	W. VA. CODE § 61-7-9 (machine guns)
Wisconsin	WIS. STAT. § 941.29	WIS. STAT. §§ 941.26 (machine guns); 941.28 (short-barreled shot guns and rifles)
Wyoming	WYO. STAT. ANN. § 6-8-102	

AMICUS
CURIAE
BRIEF

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IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit**

BRIEF OF VIOLENCE POLICY CENTER AND THE POLICE CHIEFS FOR THE CITIES OF LOS ANGELES, MINNEAPOLIS, AND SEATTLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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If the Court were to hold that private individuals not affiliated with a militia have a Second Amendment right, *amici curiae* Violence Policy Center and the Police Chiefs for the cities of Los Angeles, Minneapolis, and Seattle urge the Court to hold that the District of Columbia's handgun ban is a constitutionally permissible, reasonable restriction on that right, because these laws protect the citizens of the District from widespread violence from the use of handguns in an urban environment.

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Violence Policy Center is a national non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, organizations, researchers, advocates, and the general public. The Violence Policy Center examines the role of firearms in the United States, analyzes trends and patterns in firearms violence and works to develop policies to reduce gun-related deaths and injuries. In addressing these matters, the Violence Policy Center conducts numerous fact-based studies on a full range of gun violence issues that have influenced congressional policy-making and shaped congressional debates over gun control as well as state regulation of firearms. Accordingly, the Violence Policy Center is an active participant in the debate over the meaning of the Second Amendment, monitoring and participating in Second Amendment litigation throughout the country.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiaes'* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amici curiae also include the Chiefs of Police for three of the nation's largest cities: Los Angeles, Seattle, and Minneapolis. These Police Chiefs are keenly aware of the devastation caused by handguns in American cities, and in particular the dangers handguns pose to law enforcement officers. The Police Chiefs have a substantial interest in enacting and upholding handgun restrictions in order to protect the lives of their citizens and their officers.

Amicus curiae William T. Bratton is the Chief of Police of the Los Angeles Police Department. Chief Bratton is the former police commissioner for the cities of New York and Boston. In his current position, Chief Bratton oversees the third largest police department in the United States, managing 9,500 sworn officers, 3,000 civilian employees, and covering a jurisdiction of 468 square miles. Chief Bratton holds a Bachelor of Science Degree in Law Enforcement from Boston State College/University of Massachusetts. He is a graduate of the FBI National Executive Institute and was a Senior Executive Fellow at the John F. Kennedy School of Government at Harvard University. He currently serves as the elected President of the Police Executive Research Forum. He is a frequent lecturer, writer, and commentator. Among his many honors and awards, Chief Bratton holds the Schroeder Brothers Medal, the Boston Police Department's highest award for valor.

Amicus curiae Timothy J. Dolan is the Chief of the Minneapolis Police Department. Chief Dolan oversees a Department of approximately 800 sworn law enforcement officers and 300 civilian employees. Chief Dolan has more than 23 years of experience with the Minneapolis Police Department, including service as Assistant Chief of Police, Deputy Chief, Inspector and Commander of the 4th Precinct (north Minneapolis), Commander of Narcotics, Commander of Emergency Response, and Director of Training. Chief Dolan holds a Master of Arts in Public Administration and Education and a Bachelor of Arts in Sociology and Criminal Justice, both from the University of St. Thomas. He completed the Police Executive Research Forum's Senior Management Institute for Police in 2002 and the FBI's National Academy. Chief Dolan has participated in many efforts to reduce crime, including a recent presentation to the National Summit on Violent Crime in America hosted by the Police Executive Research Forum.

Amicus curiae R. Gil Kerlikowske is the Chief of the Seattle Police Department. Chief Kerlikowske is the former deputy director for the U.S. Department of Justice, Office of Community Oriented Policing Services, which provides federal grants to local police agencies in support of community policing services. Chief Kerlikowske also served as police commissioner for the cities of Buffalo, New York, and

Fort Pierce and Port St. Lucie, Florida. Currently, Chief Kerlikowske oversees a Department of approximately 1,200 sworn law enforcement officers and 700 civilians. Chief Kerlikowske is an active participant in many law enforcement-related organizations. He serves as Vice President of the Major Cities Chiefs Association, an organization composed of 55 of the largest law enforcement agencies in the United States. He is a member of the International Association of Chiefs of Police, the world's oldest and largest non-profit membership organization of police executives. Chief Kerlikowske is a notable speaker on law enforcement issues, including gun control.

SUMMARY OF THE ARGUMENT

If the Court were to hold that private individuals unaffiliated with a militia have a Second Amendment right to keep handguns for use in their homes, the Court should also hold that such a right is subject to reasonable restrictions, and that the District of Columbia's handgun ban is an eminently reasonable restriction.

The handgun ban is a reasonable restriction, because handguns constitute a unique class of firearm that have an unmatched ability to cause violence and kill human beings. When the District's handgun ban was enacted in 1976, no other firearm had the same inherently dangerous design features or the same record of killing. Especially in small, densely-populated cities like the District of Columbia, handguns present a tremendous and grave threat to the public safety. The District's elected representatives recognized these facts in 1976, and they enacted the handgun ban as a reasonable response to the heightened dangers associated with handguns.

The reasonableness of the handgun ban has become even more obvious since 1976. Since 1976, handguns have evolved to become even deadlier. Today's handguns are increasingly designed to maximize lethality and mimic military-style weapons. Replacing the revolvers of thirty years ago, modern high-capacity semiautomatic pistols have the alarming ability—demonstrated all too often in mass shootings and the tragic deaths of innocent people—to kill more efficiently and more effectively than their handgun predecessors. Affirming the court of appeals' judgment would open the District's doors to these modern semiautomatic pistols and other deadly handguns. Such a result would have catastrophic consequences.

Crime and human injury statistics have confirmed the reasonableness of the handgun ban and proven the disparity between handgun lethality and other types of firearms. Handguns have devastated American society like no other firearm. Handguns are involved in more homicides, more suicides, more crime, and more police killings, than any other firearm.

Finally, the District's handgun ban is a reasonable and constitutional restriction because handguns are less effective than other firearms for self-defense. Although they are designed to be more lethal than other firearms, handguns are smaller and harder to shoot accurately. When faced with a real threat that requires self-defense, human beings encounter automatic physiological and mental impairments. The critical skills needed to shoot a handgun accurately are the very skills that are lost in a moment of life-threatening danger, resulting in a greater likelihood that innocent people are killed.

ARGUMENT

This case presents the question whether the District of Columbia's prohibition on registering (and therefore using) handguns is constitutional. The text of the D.C. Code refers to handguns as "pistol[s]," defined as guns "originally designed to be fired by use of a single hand."[2] Such handguns present a unique menace to the public safety, and the District's prohibition is a constitutionally permissible, reasonable restriction on any private right to use them within the District's borders. Accordingly, the Court should reverse the judgment of the court of appeals.

I. THE SECOND AMENDMENT PERMITS REASONABLE RESTRICTIONS ON THE RIGHT TO BEAR ARMS

United States v. Miller, 307 U.S. 174 (1939) is the only case in which this Court has directly addressed the right to bear arms guaranteed by the Second Amendment. In *Miller*, the Court affirmed the validity of a statute that regulated arms through registration requirements, firearm transfer taxes, and restrictions on the types of arms capable of being transferred or used.[3] The Court reasoned that "possession or use of a 'shotgun having a barrel of less than eighteen inches in length'" did not bear a "reasonable relationship to the preservation or efficiency of a well regulated militia."[4] Thus, *Miller* at a minimum strongly suggested that no right to possess a firearm exists outside of a well-regulated militia, and *Miller* also held that the right as it relates to a militia is not absolute but instead subject to reasonable restrictions.

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[2] D.C. Code § 7-2501.01(12).

[3] 307 U.S. at 175.

Amici curiae Violence Policy Center and Police Chiefs support petitioners' argument, supported by *Miller*, that the Second Amendment confers rights only to those affiliated with a militia.[5] However, if the Court were to hold that a private right exists unrelated to militias, it also should hold that the right is subject to reasonable restrictions. Such a conclusion is consistent with the holding of *Miller*, which affirmed the validity of the restrictions described above, and with *Lewis v. United States*, in which the Court held that a rational basis existed for prohibiting convicted felons from possessing firearms.[6] Citing *Miller*, the *Lewis* Court stated that the Second Amendment "guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[7] Thus, the Court reasoned that the restrictions on the individual felons at issue were permissible.

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[4] *Id.* at 178.

[5] *Amici* also support petitioners' argument that the Second Amendment does not bar Congress or the District of Columbia from enacting a local handgun ban in the District, as the amendment only protects against federal interference with state militias and related state gun rights.

[6] 445 U.S. 55, 65 (1980) (holding that the "firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is 'some rational basis for the statutory distinctions made . . . or . . . they have some relevance to the purpose for which the classification is made.'" (citations omitted).

Furthermore, the conclusion that any private right (unrelated to militias) would be subject to reasonable restrictions is consistent with the weight of authority interpreting state constitutional provisions addressing a private right to bear arms. Although the Second Amendment does not explicitly refer to such a right, 42 states either explicitly provide the private right in their constitutions or in official opinions interpreting their constitutions.[8]

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[7] *Id.* at 65 n.8.

[8] Ala. Const. of 1901, art. I, § 26; Alaska Const. art. I, § 19 (amended 1994); Ariz Const. art. II, § 26; Ark. Const. of 1874, art. II, § 5; Colo. Const. art. II, § 13; Conn. Const. of 1818, art. I, § 15 (1965); Del. Const. of 1897 art. I, § 20 (1987); Fla. Const. art. I, § 8(a)-(d) (amended 1968); Ga. Const. of 1983, art. I, § 1, ¶ VIII (amended 1998); Idaho Const. of 1890, art. I, § 11 (amended 1978); Ill. Const. of 1818, art. I, § 22 (1970); Ind. Const. art. I, § 32 (amended 2001); Kan. Const. art. I, § 4 (amended 1975); Ky. Const. of 1891, § 1(7); La. Const. of 1974, art. I, § 11; Me. Const. art. I, § 16; Mich. Const. of 1963, art. I, § 6; Miss. Const. of 1890, art. III, § 12; Mo. Const. of 1945, art. I, § 23; Mont. Const. art. II, § 12; Neb. Const. art. I, § 1 (amended 1988); Nev. Const. art. II, § 11(1) (amended 1982); N.H. Const. of 1784, pt. 1, art. 2-a (amended 1982); N.M. Const. art. II, § 6 (amended 1986); N.C. Const. of 1971, art. I, § 30; N.D. Const. art. I, § 1 (amended 1984); Ohio Const. of 1851, art. I, § 4; Okla. Const. art. II, § 26; Or. Const. art. I, § 27; Pa. Const. of 1790, art. I, § 21; R.I. Const. art. I, § 22; S.C. Const. art. I, § 20; S.D. Const. art. VI, § 24; Tenn. Const. art. I, § 26; Tex. Const. art. I, § 23; Utah Const. art. I, § 6 (amended 1984); Vt. Const. ch. I, art. 16; Va. Const. art. I, § 13 (amended 1971); Wash. Const.

(footnote continued on next page)

Courts in these states have consistently upheld gun control laws—including bans on the private sale and possession of handguns—that are a reasonable regulation of the explicitly-defined individual right to bear arms, so long as they do not completely destroy[9] or nullify[10] the right.[11] Among other things, these courts have held that a ban on classes of weapons—just like the District of Columbia's ban on handguns—does not constitute a destruction or nullification of the right to bear arms if other classes of arms are permissible.[12]

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art. I, § 24; W. Va. Const. art. III, § 22 (amended 1986); Wis. Const. art. I, § 25 (amended 1998); Wyo. Const. art. I, § 24.

[9] *See, e.g.*, *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968); *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986); *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2003).

[10] *See, e.g.*, *Trinen v. City of Denver*, 53 P.2d 754, 757 (Colo. Ct. App. 2002).

[11] The first state case to address the reasonable regulation of firearms was *State v. Shelby*, 2 S.W. 468 (Mo. 1886). The Missouri Supreme Court held that although the Missouri Constitution "secures to the citizen the right to bear arms in the defense of his home, person, and property," prohibiting intoxicated persons from possessing firearms was "a regulation . . . to which the citizen must yield, and a valid exercise of the legislative power." *Id.* at 469. *See also* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 716-19 (2007).

[12] States and localities commonly prohibit the possession or use of certain classes of weapons, including total bans on sawed-off shotguns, machine guns, stun guns, assault weapons, and semiautomatic weapons. *See* Winkler, *supra* at n.9 (citations omitted). Courts have upheld legislation in densely-populated areas that banned handguns. *Id.* at n.207 (citing *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269-73 (Ill.

(footnote continued on next page)

II. THE DISTRICT OF COLUMBIA'S HANDGUN BAN IS A REASONABLE RESTRICTION ON ANY PRIVATE RIGHT TO BEAR ARMS

The District of Columbia's handgun ban is a reasonable restriction on any private right to bear arms under the Second Amendment. The District enacted the ban in 1976, in response to an alarming rise in handgun violence. The ban was also a reaction to the unique threat handguns posed to citizens of the District, a small and entirely urban area.

The handgun ban was a plainly reasonable restriction in 1976, when handguns did not yet have the firepower of today's high-capacity semiautomatic pistols. The handgun ban is even more obviously reasonable in the new millennium. Over the past thirty years, the gun industry has developed innovations that dramatically enhance handguns' lethality. Today's handguns are much more suitable than their predecessors for injurious and unlawful uses, and the disparity between the singular lethality of handguns and other firearms is even greater than before.

The reasonableness of the District's handgun ban is further supported by a wealth of data plainly demonstrating that handguns are much more likely than other firearms to be used in crimes and acts of violence.

1984); *City of Cleveland v. Turner*, No. 36126, 1977 WL 201393, at *3-4 (Ohio Ct. App. Aug. 4, 1977).

Finally, the District's handgun ban is a reasonable restriction because handguns are a less effective form of self-defense than other types of firearms, a proposition confirmed even by experts who support gun ownership.

A. The District's Handgun Ban Was a Manifestly Reasonable Restriction at the Time It Was Enacted

The District's decision to place greater restrictions on handguns than apply to rifles and shotguns was based on a determination that the number of crimes committed with handguns, including robberies and murder, was increasing dramatically.[13] The District was reacting to what was, at the time, a recent rise in handgun use. From 1946 through 1950, handguns represented only 13 percent of domestic firearm production, and handguns remained relatively uncommon throughout the 1950s. During the 1960s, however, a firearm market dominated by long guns designed to kill deer and pheasant was overtaken by handguns—guns specifically designed to kill human beings.[14] It was this deadly trend to which the District was responding when it banned handguns in 1976.

The District's elected representatives were well aware of the inherent design characteristics of handguns that made them easy to steal and conceal, and therefore far more dangerous than other firearms commonly available at the time. And the Council reasoned that, as "a totally urban" area, the District is "a unique place" in which handguns had virtually no legitimate, practical use.[15]

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[13] *See* Petr.'s Br. at 48-50 (citing legislative history).

[14] Tom Diaz, *Making a Killing: The Business of Guns in America* 83 (1999).

B. The Reasonableness of the District's Handgun Ban is Increasingly Evident in Today's Handgun Environment

Although all firearms are capable of inflicting human injury and mortal wounds, not all firearms are designed with equal killing power. Modern handguns—even more so than their predecessors and other categories of firearm—are uniquely designed to deliver deadly force in a wide variety of circumstances. Handguns' deadliness stems primarily from a combination of their small (and shrinking) size and their extreme (and growing) firepower. As technology advances, the gun industry continues to develop and market increasingly deadly handguns.[16] The rapid advancement in handgun lethality is epitomized by the recent introduction of *pistol* versions of military-style semiautomatic assault rifles. Photographs of some of these weapons are included in the appendix to this brief.[17]

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[15] Morning Council Sess. Tr. 73:9-12, May 3, 1976; *see also* Morning Council Sess. Tr. 47:20-21, May 18, 1976; *see also* Petr.'s Br. at 49.

[16] Diaz, *supra*, at 83.

[17] *See* App. at 1a-4a.

As a result of these design enhancements, the District of Columbia's handgun ban is even more reasonable today than when it was enacted. Affirming the court of appeals' judgment, which invalidated that ban, would naturally result in a proliferation of newer, highly lethal semiautomatic pistols in the District, thereby jeopardizing public safety and undermining the District's efforts to curb violent crime.[18]

1. The Handgun Industry Has Shifted Production from Revolvers to High-Capacity Semiautomatic Pistols

Since the early 1980s, the handgun industry has shifted production from the traditional revolver to the high-capacity semiautomatic pistol.[19] Revolvers typically are capable of holding five or six rounds of ammunition in a revolving cylinder and take a relatively long time to reload. Semiautomatic pistols are capable of easily holding three times the ammunition of the traditional "wheelgun" revolver and have a reloading process utilizing a pre-loaded ammunition "magazine" that takes seconds.

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[18] The definition of "pistol" in the D.C. Code includes both revolvers and pistols (including semiautomatic assault pistols), and therefore both types of handgun are subject to the ban. *See* D.C. Code § 7-2501.01(12) (defining "pistol" as a gun "originally designed to be fired by use of a single hand"). Semiautomatic assault pistols also are separately banned under the District's law because they are considered a form of "machine gun." *See* D.C. Code §§ 7-2501.01(1), 7-2502.02(a)(2). Of course, as explained herein, *all handguns*, including those that are defined as machine guns under District law, present unique and extreme risks to District residents.

[19] Josh Sugarmann, *Every Handgun is Aimed at You: The Case for Banning Handguns* 7 (2001); *see also* John Malloy, Gun Digest 2000, *Handguns Today: Autoloaders* 117 (Ken Warner ed., Krause Publications 1999) ("As the concealed-carry movement grows across the country, the demand for small but powerful handguns grows.").

Revolvers were the most prevalent form of handgun manufactured and imported in the 1970s, and thus were a substantial catalyst for the District's handgun ban. In 1987, for the first time, pistol production surged past revolver production. Semiautomatic pistols now lead the handgun market by a wide margin. Today, the handgun most likely to be used in acts of violence is a semiautomatic pistol.[20]

The rise of the high-capacity semiautomatic pistol has dramatically increased the unique dangers to the public posed by handguns. That is because, as we explain below, the critical design features of the handgun—the same features that in more primitive forms motivated the ban in 1976—have been modernized in a manner increasingly focused on maximizing lethality.

2. The Modern Handgun is Designed for Superior Lethality

Modern handguns have several unique design features that, in combination, make them particularly dangerous among firearms. Compared to other firearms and earlier versions of handguns, today's handguns (i) have the *capacity* to hold larger amounts of ammunition; (ii) use higher *caliber* ammunition that is continually increasing in size and power; and (iii) are more *concealable*.

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[20] Sugarmann, *supra*, at 7.

a. The Ammunition Capacity of Handguns Has Increased Dramatically

Modern handguns are increasingly designed to provide greater ammunition *capacity*, a critical factor that affects the outcome of an armed encounter.[21] Unlike the six-shot revolvers dominant three decades ago, the high-capacity pistols available today routinely use 10-, 13-, 15-, 18- and even 30-round ammunition magazines.[22] When more rounds are fired and guns can be more quickly reloaded, the likelihood of inflicting wounds, and the severity of the resulting injuries, increases.[23] This unfortunate fact is illustrated all too often in mass shootings in America's schools, malls, places of worship, and other public arenas.

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[21] *See Pocket Rockets: The Gun Industry's Sale of Increased Killing Power, available at* http://www.vpc.org.studies/pockcont.htm.

[22] High-capacity pistol magazines are readily available for purchase b" consumers. *See, e.g.*, http://www.cdnnsports.com (listing numerous high-capacity pistol magazines for sale) (last visited Jan. 10, 2008).

[23] Dean Dahlstrom & Kramer D. Powley, et al., *"Comparative Performance of 9mm Parabellum, .38 Special and .40 Smith & Wesson Ammunition in Ballistic Gelatin,"* CPRC Reporter No. TR-01-95 (1994); *see also* Martin Fackler, *"Gunshot Wound Review,"* 28 Annals of Emergency Medicine, 194-203 (1996); *"USSOCOM calls for .45-cal 'offensive handgun,'* International Defense Review at 1401 (1990) (describing Dr. Fackler's emphasis on the wounding effect of the permanent cavity as

(footnote continued on next page)

More than any other recent handgun trend, the rise of semiautomatic assault pistols demonstrates the elevated dangers that come from increased handgun ammunition capacity. Semiautomatic assault pistols are military-style weapons that incorporate enhanced design features born out of the unique needs of the military. For example, two important design features of firearms developed for the military allow a shooter to lay down a wide field of fire (sometimes referred to as "hosing down" an area). These design features include: (1) high capacity detachable ammunition magazines; and (2) devices, such as an additional pistol grip or barrel shroud, that make it easier simply to point the gun (as opposed to aiming carefully) while rapidly pulling the trigger. These same design features that enable military personnel to "hose down" an area are now available on handguns sold to civilians in other jurisdictions but banned under the District of Columbia's statute.

Semiautomatic assault pistols include many highly lethal weapons that an uninformed observer might not even recognize as a "handgun."[24] For example, manufacturers have recently developed

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equating to "the bigger the bullet, the bigger the hole, the more rapid the incapacitation due to circulatory collapse").

[24] Photographs of some examples of assault pistols that are "handguns" under the D.C. Code are included in the appendix. *See* App. at 1a-4a.

pistol versions of AK-47 and AR-15 semiautomatic assault rifles.[25] These assault pistols commonly utilize ammunition magazines of 20, 30, or even 40 rounds.

b. Handguns Have Higher Caliber Ammunition Designed for Increased Lethality

Today's handguns are also more lethal than their predecessors because of the *caliber*[26] of the ammunition they fire.[27] And today's handgun ammunition is increasingly more lethal *by design*.

Handguns for the civilian market now fire ammunition capable of piercing *body armor*—the last line of defense responsible for saving thousands of police officers' lives. The first of these handgun "vest-busters" was the Model 500, a 50 caliber magnum handgun introduced by Smith & Wesson in

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[25] This includes, for example, the Bushmaster Carbon 15, the Olympic Arms AR-15 pistol, and the Ewbank AK-47 pistol. *See* Bushmaster Carbon 15, available at http://www.bushmaster.com/catalog_defense_recreation_index.asp (last visited Jan. 9, 2008); Olympic Arms AR-15 pistol, available at http://www.olyarms.com/index.php?page=shop.browse&category_id=8&option=com_virtuemart&Itemid=37 (last visited Jan. 9, 2008); Ewbank AK-47 pistol, available at http://ewbankak47.com/AK47_Pistols.php (last visited Jan. 9, 2008).

[26] Caliber is the diameter of a bullet.

[27] Sugarmann, *supra*, at 6-11; *Pocket Rockets*.

February 2003.[28] The Model 500 was designed around a new cartridge called the .500 Smith & Wesson Magnum. The striking power of the .500 Smith & Wesson Magnum round substantially exceeds the protection level of the highest grade of concealable body armor normally worn by law enforcement officers in the field.[29] Smith & Wesson also recently introduced another handgun with "vest-busting" power, the Model 460 XVR (X-treme Velocity Revolver).[30] Other manufacturers have followed suit with their own versions of handguns chambered for the .500 Smith & Wesson Magnum round.

More shockingly, gun manufacturer FN Herstal recently introduced into the civilian market a pistol and cartridge *specifically* designed to defeat body armor—the Model Five-seveN.[31] This handgun is

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[28] *See* Smith & Wesson Model 500 Revolver (available at http://www.smith-wesson.com/webapp/wcs/stores/servlet/ProductDisplay?catalogId=10001&storeId=10001&productId=12761&langId=-1&isFirearm=Y) (last visited Jan. 10, 2008).

[29] *Vest Buster: The .500 Smith & Wesson Magnum—The Gun Industry's Latest Challenge to Law Enforcement Body Armor*, Violence Policy Center (2004), also available at http://www.vpc.org/graphics/S&W500%20final.pdf.

[30] *See* Smith & Wesson Model 460 XVR, available at http://www.smith-wesson.com/webapp/wcs/stores/servlet/ProductDisplay?catalogId=10001&storeId=10001&productId=14776&langId=-1&isFirearm=Y (last visited Jan. 10, 2008).

[31] The model's name appears to be a play on the company's name, as FN Herstal is often referred to as "FNH" in the gun media. Unlike the Five-seveN, the Smith & Wesson handguns

(footnote continued on next page)

chambered for a very high velocity 5.7 mm round that was originally developed specifically as an armor-piercing round and designed for use by law enforcement and counter-terrorism teams.[32]

c. Handguns Used Today Are More Concealable

Unlike shotguns or rifles, handguns have always been *concealable* and *portable.* The modern trend in handgun design is toward guns that are smaller and even more concealable. But smaller size does not mean less power. Because of modern materials, the smaller handguns manufactured today have even greater firepower than their bulkier predecessors.

Gun manufacturers exploit their ability to produce handguns that are smaller but more powerful by highlighting these characteristics in their marketing materials. In the mid-1990s, one manufacturer dubbed this new generation of

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were not specifically designed to penetrate body armor. That capability is an unfortunate result of the company's design choices in pursuit of enhanced lethality.

[32] After an initial outcry from law enforcement agencies about the availability of this combination of gun and armor-piercing ammunition, the manufacturer agreed not to import into the United States the variety of its 5.7 mm ammunition specifically designed to penetrate body armor. Nevertheless, questions remain about the viability of the current federal definition of what constitutes banned "armor-piercing ammunition," the capabilities of the ammunition the manufacturer continues to import, and the availability of its armor-piercing ammunition through channels in informal markets such as gun shows.

handguns "Pocket Rockets."[33] "Pocket Rocket" pistols can be smaller than a human hand, but as gun publications boast, they have "a size/power ratio undreamed of 25 years ago."[34] The editor of *Shooting Sports Retailer*, a gun industry magazine, summed up the phenomenon: "Firepower is increasing. So is the killing potential as guns shrink in size and concealability."[35]

The adverse effects of increased handgun concealability are not surprising. Guns that are easily concealed are more likely to be carried on the person than larger firearms.[36] Criminals use handguns far more often than other weapons in homicides, at least in part because they are easily hidden.[37] Increased concealability also leads to greater *accessibility* in a moment of anger or emotion. In real world terms, this means the difference between a non-lethal verbal altercation or fist-fight and a deadly shoot-out.

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[33] *See Pocket Rockets*; *see, e.g.*, Jim Grover, *Glock's New Pocket Rockets! Guns & Ammo*, Jan. 1996, at 36, 37.

[34] *See Pocket Rockets.*

[35] Bob Rogels, *Headache Cure #2000*, Shooting Sports Retailer, Jan. 1997, at 6.

[36] *See* Garen J. Wintemute, *The Relationship Between Firearm Design and Firearm Violence*, 275 JAMA 1749 (June 1996).

[37] *See* Wintemute, *supra*, at 1749; *see also* Sugarmann, *supra*, at 75 (citing statistics showing that from 1990 to 1998 handguns were used in more homicides than all other weapons combined).

The devastating effect of handgun accessibility in the United States is demonstrated by comparing crime statistics in this country to those of other Western industrial nations. The rate of nonviolent crimes (burglary, theft, and other property crimes) is similar across countries, but the rate of *lethal* violence resulting from crimes is much higher in the United States. [38] Experts have drawn the unremarkable conclusion that a primary cause of this disparity is the easy accessibility of handguns in the United States. As one study concluded: "Our rate of assault is not exceptional; our death rate from assault is exceptional."[39]

C. The Handgun Ban is Reasonable Because Handguns are Much More Commonly Used in Acts of Violence Than Other Firearms

The District's decision to ban a specific class of firearm, while allowing other types of firearms, is eminently reasonable in light of data proving that handguns are much more likely than other firearms to be used in acts of violence.

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[38] *See* Franklin Zimring and Gordon Hawkins, *Crime Is Not the Problem: Lethal Violence in America* 52 (1997).

[39] Zimring & Hawkins, *supra*, at 122-123; *see also* Susan P. Baker, *Without Guns, Do People Kill People?*, 75 Am. J. of Pub. Health 587, 588 (June 1985) (concluding: "People without guns *injure* people; guns *kill* them.").

1. Handguns Continue to be Responsible for a Disproportionately High Number of Homicides, Including Mass Shootings

Because handguns are designed to maximize lethality, it is not surprising that handguns cause death at a rate significantly higher than other generally available categories of firearms. The District's handgun ban benefits public safety by removing the class of weapon most likely to kill innocent people—yet another reason why banning this particular class of firearm is a reasonable restriction on any private constitutional right.

Although they have grown in prevalence, handguns currently comprise only about one-third of the total number of firearms in the United States.[40] Approximately 65 percent of all firearms in this country are rifles and shotguns. Only one out of every five Americans—a distinct minority—owns a handgun.[41] Yet handguns account for a drastically disproportionate percentage of firearm deaths. In fact, more than two out of three of the Americans who have died by firearm violence since 1962 were killed with handguns—an alarming total now exceeding 670,000 lives.[42]

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[40] Sugarmann, *supra*, at 22, 176.

[41] *A Shrinking Minority: The Continuing Decline of Gun Ownership in America*, Violence Policy Center, available at http://www.vpc.org/studies/gunownership.pdf.

[42] Sugarmann, *supra*, at 177.

From 1990 to 1998, for example, handguns were used in the vast majority—*81 percent*—of all firearm homicides.[43] In fact, expanding the data to include *all* homicides (even those that did not involve a firearm), handguns were used in a remarkable *55 percent* of all killings.[44] Handguns are used to kill human beings in the United States more than all other weapons *combined*.[45]

Handguns also are used in an extraordinary percentage of this country's well-publicized shootings, including the large majority of mass shootings. A review of 50 high-profile shootings over the past four decades revealed that from 1980 onward the bulk of such incidents (39) were mass shootings. A handgun was used in 74 percent of these mass shootings as the only or primary weapon. In 62 percent of these incidents, the handguns were purchased legally.[46]

In one recent example of the devastation caused by handguns, a shooter on the Virginia Tech campus used two pistols to murder 32 students and faculty in April 2007. The two pistols were a Glock 19 pistol (with 15-round ammunition magazines) and a Walther P22 pistol (with 10-round ammunition magazines). The catalog for the Glock 19 boasted, "comparable in size and weight to the small .38 revolvers it has replaced, the . . . Glock 19 is significantly more powerful with greater firepower, and is much easier to shoot fast and true."[47]

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[43] *Id.* at 75.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 156.

2. Handguns are Used in Firearm Suicides at a Disproportionately High Rate

Handguns are also more likely than other firearms to be used in a suicide. The District's ban prevents suicides by eliminating the most common suicide tool.

The death toll resulting from handgun suicides is astronomical. Firearm suicide deaths consistently outpace firearm homicides.[48] In the twenty-year period from 1978 to 1997, handguns were likely used in 241,000 out of just over 350,000 firearm suicides.[49]

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[47] *Backgrounder on Pistols Used in Virginia Tech Shooting*, Violence Policy Center (2007), available at http://www.vpc.org/studies/vatechgunsbackgrounder.pdf (last visited Jan. 10, 2008).

[48] For example, from 1990 to 1997 there were 147,000 suicides committed with a firearm in contrast to 100,000 firearm homicides. *See* Garen J. Wintemute, Stephen P. Teret et al., *The Choice of Weapons in Firearm Suicides*, 78 Am. J. of Pub. Health 824-826 (1988); Stephen W. Hargarten, Trudy A. Karlson et al., *Characteristics of Firearms Involved in Fatalities*, 275 JAMA 42-45 (1996): Ronald V. Clarke and Peter R. Jones, *Suicide and Increased Availability of Handguns in the United States*, 28 Soc. Sci. Magazine 805-09 (1989); Arthur L. Kellermann, F.P. Rivara et al., *Suicide in the Home in Relation to Gun Ownership*, 327 New Eng. J. Med. 467-72 (1992).

[49] Sugarmann, *supra*, at 38.

The *availability* of firearms, especially handguns, is a major driver of suicide rates. Where there are more handguns, more people successfully commit suicide. Multiple studies have confirmed that "gun ownership, rather than the strictness of gun control laws, [is] . . . the strongest correlate of the rates of suicide and homicide by guns." [50] Handgun ownership in particular plainly affects suicide rates. A six-year study of almost a quarter-million California residents, for example, showed that the suicide rate during the first week after the purchase of a handgun was *57 times higher* than for the population as a whole. [51] While suicide rates decreased after this initial spike, even five years later the suicide rate among handgun owners remained *double* that of the rest of the population.[52]

The availability of handguns also increases the likelihood that a suicide attempt will succeed. The overwhelming majority of those who attempt suicide fail. Not surprisingly, the presence and availability of a handgun all but guarantees that a suicide attempt will end in a fatality.[53]

Handgun suicide is even more of a threat in the densely urban environment of the District of Columbia. Several studies have established that

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[50] David Lester, *Research Note*: *Gun Control, Gun Ownership, and Suicide Prevention,* 18 Suicide and Life-Threatening Behavior 176 (1988).

[51] Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns,* 341 New Eng. J. Med. 1583 (1999).

[52] *Id.*

[53] Wintemute & Teret et al., *supra,* at 824-26.

"the more urban the environment, the more likely a handgun is to be the firearm of choice in a suicide."[54]

Given the statistics described above, it is not surprising that thirty years after enacting its handgun ban, the District of Columbia has the lowest suicide rate in the nation. [55] Not coincidentally, the District has guns (of any type) in only 5 percent of its homes—also the lowest percentage in the nation.[56] Between 2000 and 2004, there were 1,406 firearm suicide victims aged 16-years and younger across the United States. During this same span, *not a single* child 16 years or younger committed suicide with a firearm in the District of Columbia.[57]

3. **Handguns are Used in Non-Lethal Crimes at a Disproportionately High Rate**

Handguns are also the firearm most commonly used in the commission of crimes that do not result in homicide, including rape and sexual assault, robbery, and aggravated assault.[58] The District's handgun ban not only saves lives but also deters would-be criminals from carrying out such acts.

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[54] Sugarmann, *supra*, at 36.

[55] National Center for Injury Prevention and Control, WISQARS database. (statistics available at http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html) (last visited Jan. 10, 2008).

[56] Catherine A. Okoro et al., *Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings from the Behavioral Risk Factor Surveillance System*, 2002, 116 Pediatrics 370 (2005).

[57] *Id.*

Because they are desired by criminals and easily concealed, handguns also are stolen more than any other firearm, increasing the likelihood that an unlawful user will utilize the handgun to commit a crime. In fact, according to the FBI's National Crime Information Center, at least 60 percent of all stolen firearms are handguns (even though handguns comprise a distinct minority of all firearms in the United States).[59]

4. Handguns Kill Far More Police Officers Than Any Other Firearm

Handguns are also distinct from other firearms because they are used far more often to kill police officers. Between 1983 and 1998, well over one thousand law-enforcement officers in the United States were killed while responding to felony crimes. Almost all of these deaths—over 90 percent—were caused by firearms. And of those police officer fatalities involving firearms, an alarming *77 percent* were caused by handguns.[60]

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[58] Sugarmann, *supra*, at 71-83.

[59] *Id.* at 60.

[60] *Id.* at 79.

D. The Handgun Ban is Reasonable Because Handguns are Less Effective for Self-Defense than Other Firearms

The District's handgun ban also is a reasonable restriction on any private Second Amendment right because handguns are not an effective means of self-defense. Handguns are deadly weapons that, more than any other firearm in the United States, kill human beings. Ironically, however, the handgun is the *least* effective firearm for self-defense for all but a small group of exceptionally well-trained individuals (such as police officers) who maintain their skills with regular and intensive practice.

Many of the features that make handguns particularly lethal also render them less effective in situations requiring a gun owner to fend off an attacker.[61] Numerous studies have confirmed that handgun owners put their own safety and the safety of others in jeopardy.[62]

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[61] That handguns are not effective for self-defense is further confirmed by statistics on justifiable homicide. In 2006, only 1.9% of all handgun homicides were justifiable homicides. DOJ, Expanded Homicide Data Table (2006), available at http://www.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_07.html; DOJ, Expanded Homicide Data Table 14 (2006), available at http://www.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_14.html. Statistics for prior years were very similar. *See id.*

[62] *See generally Unintended Consequences: Pro-Handgun Experts Prove That Handguns Are a Dangerous Choice for Self-*

(footnote continued on next page)

Even pro-gun advocates recognize that handguns are not well-suited for self-defense. Firearms expert Chris Bird has explained that a handgun "is the least effective firearm for self defense" and in almost all situations "shotguns and rifles are much more effective in stopping a [criminal]."[63] That contention is supported by a wealth of evidence.

As Bird has noted and many others have echoed, "[a] handgun is the hardest firearm to shoot accurately."[64] Because of their smaller size and shape, which allows them to be concealed and carried easily, handguns—compared with larger shotguns and rifles that are designed to be held with two hands—require a greater degree of dexterity.[65]

Defense, Violence Policy Center (2001); *see also* Sugarmann, *supra*, at 55-61.

[63] Chris Bird, *The Concealed Handgun Manual: How to Choose, Carry, and Shoot a Gun in Self Defense* 40 (1998).

[64] *Id.*; *see also* Massad F. and Dorothy A. Ayoob, *In the Gravest Extreme: The Role of the Firearm in Personal Protection* 47 (1980) ("The handgun is the most difficult firearm to shoot accurately and rapidly; skill comes only with practice."); Duane Thomas, *The Truth About Handguns: Exploding the Myths, Hype, and Misinformation* 42 (1997) ("Most cops and civilian gun carriers are *lousy* handgun shots.") (emphasis in the original).

[65] Handguns may be effectively used in self-defense by the very tiny percentage of handgun users who are highly-trained and who routinely practice their skills (this includes, most notably, law enforcement officers). But even those who have these qualifications cannot fully simulate the types of physical and psychological effects of a real life shootout. *See Unintended Consequences* at 27-34.

The difficulty of shooting a handgun accurately is substantially compounded when an individual is faced with a life-threatening situation. Even a well-trained shooter will experience dramatic physiological effects in response to mortal danger. Commonly known as the "fight-or-flight reflex," and accompanied by an enormous surge in adrenaline—described by one gun expert as "the most powerful hormone in the body"[66]—the resulting effects include the loss of fine motor skills, tunnel vision, auditory exclusion, trembling, and loss of control of bodily functions.[67] Although these effects may be lessened through intensive training, their advent is "an *automatic* physical reaction to a perceived threat that will result in predictable *physical, emotional, perceptual, and cognitive* changes because of high physical arousal states."[68]

The effect of these unavoidable physiological changes is profound. A handgun owner faced with the "fight-or-flight reflex" is *less* likely to be able to manipulate his handgun effectively for self-defense, but he also is *more* likely to endanger himself, his family, and other innocent bystanders.[69] Loss of fine motor skills in particular severely affects an individual's ability to accomplish tasks like squeezing a trigger or aiming and reloading a handgun.[70] This factor, when combined with other physiological effects, can easily result in the killing of an innocent bystander.[71]

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[66] Massad F. Ayoob, *Stressfire*; Volume I of *Gunfighting For Police: Advanced Tactics and Techniques* 6 (1999).

[67] *Unintended Consequences* at 49.

[68] Alexis Artwohl and Loren W. Christensen, *Deadly Force Encounters: What Cops Need to Know to Mentally and Physically Prepare for and Survive a Gunfight* 33 (1997) (emphasis in original).

[69] *Unintended Consequences* at 49.

The relative ineffectiveness of the handgun among firearms as a self-defense tool is yet another reason why the District of Columbia's handgun ban satisfies constitutional analysis. The District of Columbia's decision to deny homeowners a less effective firearm for self-defense, while permitting more effective firearms, is a plainly reasonable and constitutional restriction.

CONCLUSION

The District of Columbia's handgun ban is an eminently reasonable restriction on any private right to bear arms for persons unaffiliated with a militia, given the manifest dangers to the public safety that handguns present. The Court should reverse the judgment of the court of appeals.

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[70] *Id*. at 51.

[71] *Id*. at 52.

Respectfully submitted,

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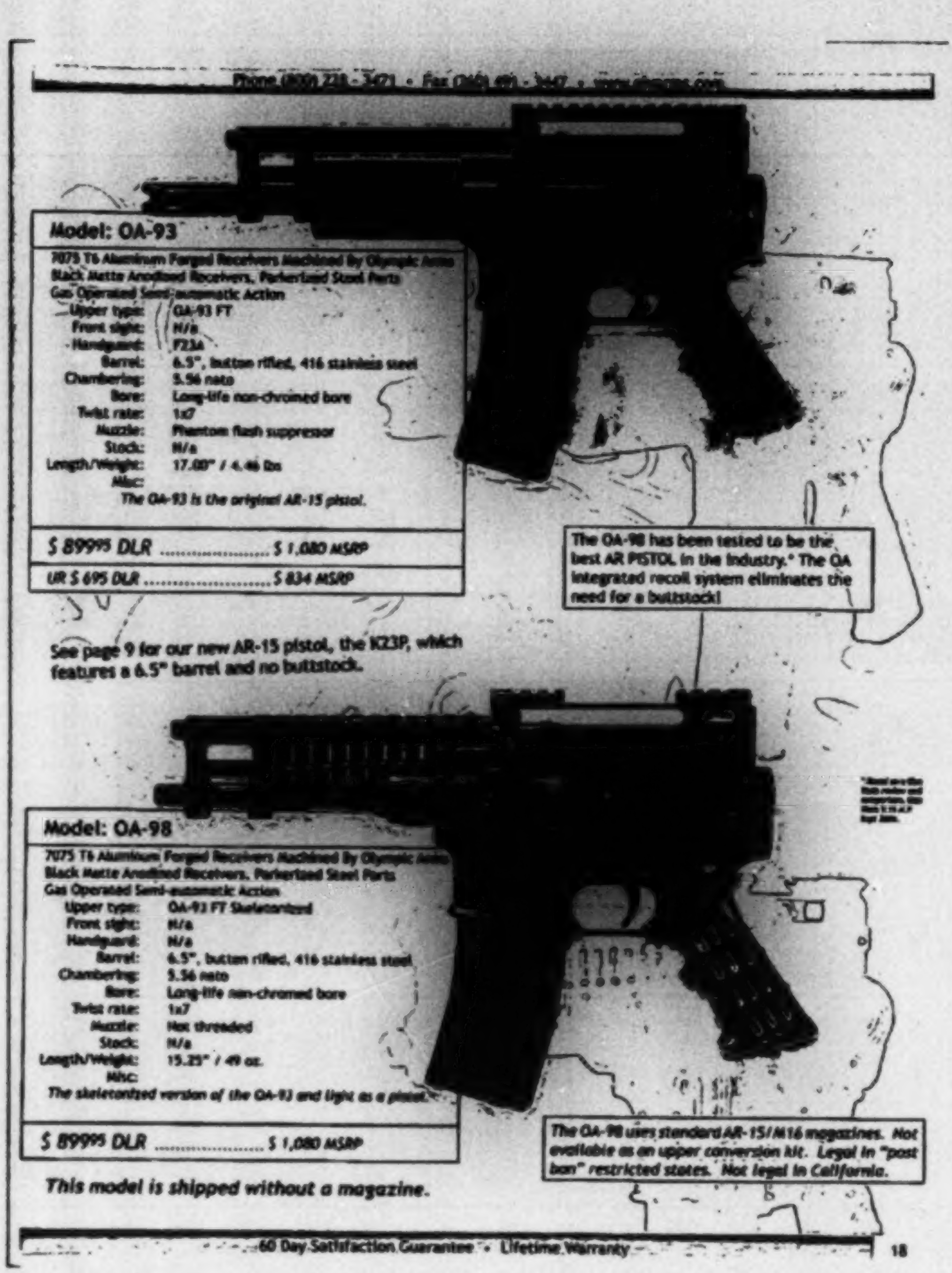
January 11, 2008

APPENDIX



Model: OA-93

7075 T6 Aluminum Forged Receivers Machined by Olympic Arms
Black Matte Anodized Receivers, Parkerized Steel Parts
Gas Operated Semi-automatic Action
Upper type: OA-93 FT
Front sight: N/a
Handguard: F23A
Barrel: 6.5", button rifled, 416 stainless steel
Chambering: 5.56 nato
Bore: Long-life non-chromed bore
Twist rate: 1x7
Muzzle: Phantom flash suppressor
Stock: N/a
Length/Weight: 17.00" / 4.46 lbs
Misc:
The OA-93 is the original AR-15 pistol.

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UR $ 695 DLR .... $ 834 MSRP

See page 9 for our new AR-15 pistol, the K23P, which features a 6.5" barrel and no buttstock.

The OA-98 has been tested to be the best AR PISTOL in the industry.* The OA integrated recoil system eliminates the need for a buttstock!

Model: OA-98

7075 T6 Aluminum Forged Receivers Machined by Olympic Arms
Black Matte Anodized Receivers, Parkerized Steel Parts
Gas Operated Semi-automatic Action
Upper type: OA-93 FT Skeletonized
Front sight: N/a
Handguard: N/a
Barrel: 6.5", button rifled, 416 stainless steel
Chambering: 5.56 nato
Bore: Long-life non-chromed bore
Twist rate: 1x7
Muzzle: Not threaded
Stock: N/a
Length/Weight: 15.25" / 49 oz.
Misc:
The skeletonized version of the OA-93 and light as a pistol.

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This model is shipped without a magazine.

The OA-98 uses standard AR-15/M16 magazines. Not available as an upper conversion kit. Legal in "post ban" restricted states. Not legal in California.

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Source: *Olympic Arms*, Olympic Arms catalog 2007 at 18.

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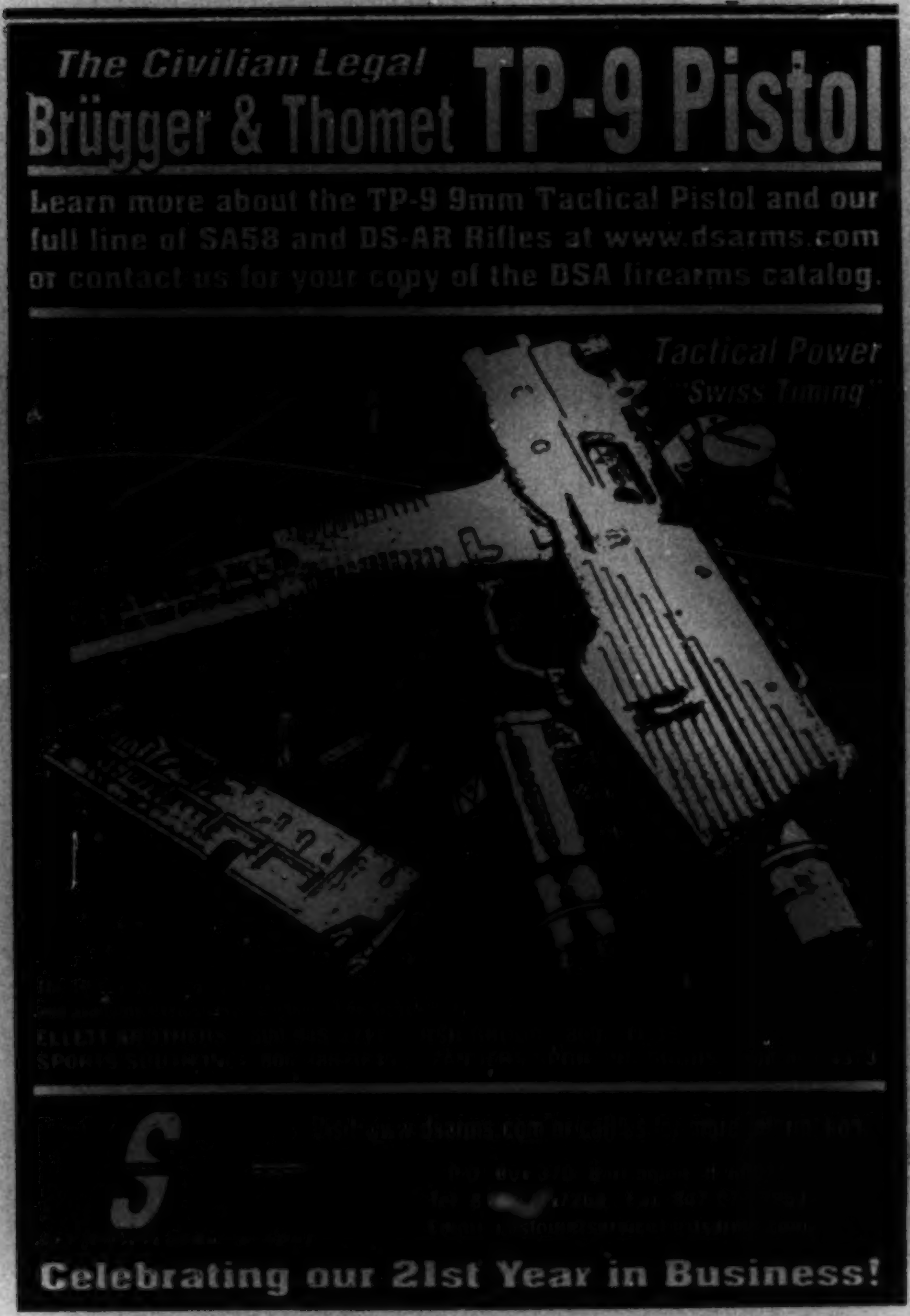

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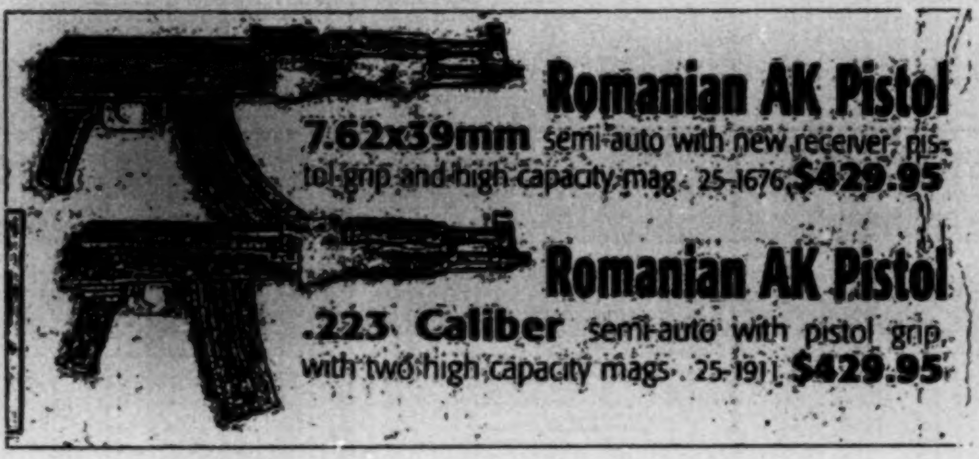
Source: *"The Civilian Legal: Brugger & Thomet TP-9 Pistol,"* 62 Shotgun News, Jan. 1, 2008.



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Romanian AK Pistol

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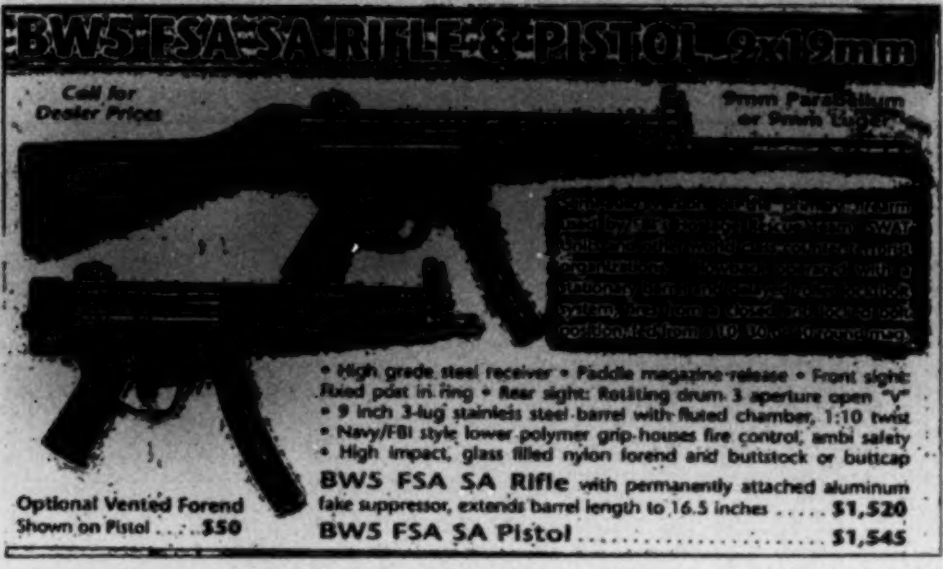
Source: *Romanian AK Pistol*, 62 Shotgun News, Jan. 1, 2008 at 32.



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Source: *BW5 FSA SA Rifle and Pistol*, 62 Shotgun News, Jan. 1, 2008 at 25.

AMICUS
CURIAE
BRIEF

No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA, et al.,

Petitioners,

CORRECTED COPY

v.

DICK ANTHONY HELLER

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

Brief Of Virginia1774.Org, *Amicus Curiae*, In Support Of Respondent

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QUESTION PRESENTED

Whether the following provisions — D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

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INTEREST OF AMICUS CURIAE[1]

Virginia1774.org was founded by Rudolph DiGiacinto in 2004 to be the authority on the legal history of the colonial Virginia militia and the origin of the Virginia Constitution Art. I, § 13. Mr. DiGiacinto is a former Intelligence officer for the Defense Intelligence Agency (DIA) who helped to calculate the effective military manpower of foreign countries based in part upon the colonial British militia system.

Virginia1774.org strives to provide free to the public primary government and private source documents as well as original research to advance the understanding of those documents as it relates to the Virginia Constitution Art. I, § 13. A part of the District of Columbia was originally ceded from Fairfax County, Virginia. The Second Amendment to the United States Constitution is the progeny of the Virginia Declaration of Rights and as such Virginia1774.org can provide an invaluable insight on the origin and meaning of the Second Amendment to the United States Constitution.

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[1] Pursuant to Supreme Court Rule 37.3(a), the *amicus curiae* states that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Second Amendment to the United States Constitution is a self-executing provision that preserves to the people or individuals both a well regulated militia as well as the right to keep and bear arms. These rights are separate and distinct, are joined by necessity and law and continue in full force.

The right to self-defense is the first law of nature and no government has the right to disarm or deprive the people or individuals of their natural rights. The social nature of human beings formed and mandated a societal self-defense in the form of the militia where each member of that society who is able-bodied is duty bound to participate in its defense. The self-executing nature of the Second Amendment forbids laws or ordinances that prohibit the right of the people or individuals to keep and bear arms for self-defense, self-preservation, or for any other lawful purpose.

ARGUMENT

THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION IS A SELF-EXECUTING PROVISION THAT PRESERVES BOTH A WELL REGULATED MILITIA AND THE RIGHT OF THE PEOPLE OR INDIVIDUALS TO KEEP AND BEAR ARMS FOR THEIR OWN

SELF-DEFENSE, SELF-PRESERVATION, OR ANY OTHER LAWFUL PURPOSE.

A. THE PEOPLE ARE THE MILITIA.

The militia consists of the whole people and is not severable. The United States Constitution was amended in 1791 to include a bill of rights "to secure the dearest rights of the people". 3 *The Papers of George Mason* 1054 (Robert A. Rutland ed. 1970). The Second Amendment to the United States Constitution is a self-executing constitutional provision.

> [W]here a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provision. In short, if complete in itself, it executes itself.

Davis v. Burke, 179 U.S. 399, 403 (1900).

"The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions." *City of Boerne v. Flores, Archbishop of San Antonio, et al.*, 521 U.S. 507, 524 (1997). Legislative bodies may enact laws concerning a self-executing constitutional provision, but they may do so only to facilitate the exercise of the constitutional right or its enforcement. See 16 C.J.S. *Constitutional Law* §

91 (2005). This Court therefore should adopt the Strict Scrutiny standard of review when laws or regulations come into conflict with the fundamental rights protected by the Second Amendment.[2]

The District of Columbia was originally formed by land ceded from Fairfax County, Virginia[3] and from land ceded from Maryland. The District was not a completely sovereign entity as Virginia's laws were originally allowed by Congress to operate within its borders and likewise with the laws of Maryland. See *United States v. Simms*, 5 U.S. (1 Cranch) 252, 253 (1803). Similarly, the protections of each states' constitution (and the Constitution of the United States) remained in force in those areas that had been ceded. See *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat) 235, 239-40 (1819).

In 1802 Congress passed an act enabling the President of the United States to form the militia of the District of Columbia "as nearly as may be, to the laws of Maryland and Virginia as they stood in force in the said counties, respectively, on the first Monday in December, in the year one thousand eight hundred:" *The Military Laws of the United States Relating to the Army, Volunteers, Militia and to Bounty Lands and Pensions From the Foundations of the Government to the Year 1863,* at 149 (John F. Callan ed. 1863). President Thomas Jefferson appointed John Mason (Son of George Mason) to be the first commander of the District of Columbia Militia as Brigadier General. See Wilhelmus B. Bryan, 1 *A History of the National Capital From its Foundation Through the Period of the Adoption of the Organic Act* at 564-565 (1914). This Court's first case dealing with the District of Columbia's Militia and determining which public officers were exempt from militia service in Alexandria (D.C.) occurs in *Wise v. Withers,* 7 U.S. (3 Cranch) 331 (1806). The District of Columbia and the Commonwealth of Virginia were intertwined in law and history.

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[2] This brief is focused largely on the historical materials, more particularly those related to the militia in Virginia. *Virginia1774.org* strongly urges the court to adopt strict scrutiny as the appropriate standard of review for laws which conflict with the second amendment. This topic is covered at length in the briefs submitted by other *amici* and by Respondent. See Respondent's Brief at 54-62. Amicus curiae also shares Respondent's concern with the hybrid scrutiny suggested by the Solicitor General and urges this Court to reject that approach. *Id.* at 55.

[3] Fairfax County was formed in 1742 from Prince William County which itself was formed in 1731 from Stafford County, Virginia. See Va. Stat. at Large, 5 Hening 207-208 (1823); Va. Stat. at Large, 4 Hening 303 (1823).

The Colony of Virginia was the oldest and largest colony and became the first representative colonial body in America in 1619. By an Act of the Virginia General Assembly in 1808, William Waller Henning compiled the laws of Colonial Virginia which were then published in 1809 as *The Statutes at Large: Being a Collection of All the Laws of Virginia from the First Session of the Legislature in 1619.* The first laws on the subject of arms by the Virginia legislature were enacted in 1623:

> "That no man go or send abroad without a sufficient partie well armed." & "That men go not to worke in the ground without their arms (and a centinell upon them.)" (1623) Va. Stat. at Large, 1 Hening 127 (1823).

> "All men that are fittinge to beare armes, shall bring their peices to church uppon payne of every effence" & "It is ordered and appoynted, That the commanders of all the severall plantations, doe upon holy days exercise the men under his command" (1631) *Id.* at 174.
>
> "...But it is thought convenient that any man be permitted to kill deare or other wild beasts or fowle in the common woods, forests, or rivers in regard that thereby the inhabitants may be trained in the use of theire armes the Indians kept from our plantations, and the wolves and other vermine destroyed..." (1632) *Id.* at 199.
>
> "All persons except negroes to be provided with arms and ammunition or be fined at the pleasure of the Governor or Council." (1639) *Id.* at 226.

The counties of Accomack-Northampton enforced these laws and enacted their own in 1643 on the subject of bearing of arms. "It is ordered that noe person or persons whatsoever within the County of Northampton Except those of the Commission shall from henceforth travel from house to house within the said County without a sufficient Fixed gun with powder and shott." Susie M. Ames, *County Court Records of Accomack-Northampton, Virginia, 1640-1645* at 268 (University Press of Virginia 1973).

In 1671 Governor William Berkeley answered questions about the defenses of Virginia stating, "All our freemen are bound to be trained every month in their particular counties, which we suppose, and do not much mistake in the calculation, are near eight thousand horse: there are more, but is too chargeable for poor people, as wee are, to exercise them."(1671) Va. Stat. at large, 2 Hening 512 (1823).

These statutes show that militia service was compulsory and as George Mason would later state, "They consist now of the whole people, except a few public officers." 3 *The Papers of George Mason, supra,* at 1081. As Thomas Jefferson later wrote, "[t]heir governor, constitutionally the commander of the militia of the state, that is to say, of every man in it able to bear arms...always in readiness..." *Letter from Thomas Jefferson to Destutt de Tracy* (Jan. 26, 1811), in *The Portable Thomas Jefferson,* at 524 (Merrill D. Peterson ed. 1975). The Virginia courts had held at least well into the 19th century the same idea stating that "[t]he militia embraces the whole arms bearing population." *Burroughs v. Peyton,* 57 Va. (16 Gratt.) 470 (1864)(interpreting portions of the Confederate Constitution by reference to the Constitution of the United States).

As the population of the colony of Virginia grew, more counties were established and the militia was organized as it was in England. Each county nominated and the Royal Governor appointed a county lieutenant as the head of the militia for that county. Kate M. Rowland, 1 *The Life of George Mason, 1725-1792* at 8, 33-34 (1892). The first formal laws or acts for the better regulation of the militia began to take place at the end of the 17th century. An intelligence report concerning the murder of the inhabitants of Stafford County[4] was sent by the county lieutenant to the governor of Virginia:

> On Sunday the sixteenth, about three of the clock in the afternoon, came about twenty or thirty Indians to Thomas Barton, about twenty miles above my house....The Indians fell on them and killed Barton's three children, the man and his wife and his three children. The orphan boy ran away, he being out at play, blessed be God, got to a neighbor's house and is safe. They killed them with arrows and wooden tomahawks, . . . plundered all the house and carried every thing away...

Col. George Mason to Governor Nicholson, June 18, 1700, *Id. at 25-27.* Colonel Mason (Grandfather of George Mason of the Revolution) wrote three weeks later that

> [t]he Rangers continue their duty according to your Excellency's commands...The neighbors having fitted out their sons and other young men well acquaint, so their ranging is as low as my Plantation at Pohick...The Inhabitants still continue from their houses, but abundance better satisfied

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[4] Stafford County at the time having not yet been subdivided into Fairfax and Prince William Counties, included the area of the original District of Columbia. See Va. Stat. at Large, *supra* note *3*. The murders occurred nearby.

> since part of the Rangers is constantly ranging among them."

Col. George Mason to Governor Nicholson, July 10, 1700, in *Id.*

As a result of this incident and others the Virginia General Assembly passed "*An act for the better strengthening the frontiers and discovering the approaches of an enemy*" in 1701. This act provided

> [t]hat all such persons as shall be seated in cohabitations by virtue of this act shall be also exempted from all military comands but what shall be setled by public authority among themselves and shall tend to their owne defence and security....
>
> ... Provided alwayes, and it is the true intent and meaning of this act that for every five hundred acres of land to be granted in pursuance of this act there shall be and shall continually be kept upon the said land one christian man between sixteen and sixty years of age perfect of limb, able and fitt for service who shall alsoe be continually provided with a well fixt musquett or fuzee, a good pistoll, sharp simeter, tomahauk and five pounds of good clean pistoll powder and twenty pounds of sizable leaden bulletts or swan or goose shott to be kept within the fort directed by this act besides the powder and shott for his necessary or usefull shooting at game."

Va. Stat. at Large, 3 Hening 206-207 (1823).

The people moving into the "frontier" were responsible for their own safety. The colony of Virginia tried to ensure the success of these settlements by requiring the inhabitants to be well armed and set a minimum land to fit male ratio. In 1723 slave uprisings were becoming a real concern and a law is passed disarming all "negroes," "mulattoes," and "Indians" but with a proviso for those living at the frontier plantations, which provided that

> nonetheless, That every free negro, mulatto or indian, being a housekeeper, or listed in the militia, may be permitted to keep one gun, powder, and shot; and those who are not housekeepers, nor listed in the militia aforesaid, who are now possessed of any gun, powder, shot, or any weapon, offensive or defensive, may sell and dispose thereof, at any time before the last day of October next ensuing. And that all negroes, mulattos, or indians, bond or free, living at any frontier plantation, be permitted to keep and use guns, powder, and shot, or other weapons, offensive, or defensive; having first obtained a license for the same, from some justice of the peace of the county wherein such plantation lie; the said license to be had and obtained, upon the application of such free negroes, mulattos, or indians, or the owners of such as are slaves, any thing

> herein contained to the contrary thereof, in any wise, notwithstanding."

An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and Indians, bond or free (1723), Va. Stat. at Large, 4 Hening 131 (1823). Those who were not considered members of the society or the "people" were a threat and were generally disarmed or heavily restricted against ownership of arms. "Papists" are disarmed in 1756. *An Act for disarming Papists, and reputed Papists, refusing to take the oaths to the government* (1756) Va. Stat. at Large, 7 Hening 35-39 (1823).

During the French and Indian war the term "well regulated" is codified into law as a means to better distinguish the available males fit for service and to arm, muster and train them. The General Assembly passed *An Act for the better regulating and disciplining the Militia* stating, "Whereas it is necessary, in this time of danger, that the militia of this colony should be well regulated and disciplined." (1757) Va. Stat. at Large, 7 Hening 93-106 (1823).

The regulation of the militia by no means disarmed the disabled members of society who could not serve, members of the governor's council, nor did it disarm the overseers who were exempt from militia service and whose job it was to control the slaves who posed a real internal threat to the society. In 1766 another militia act was passed which required that those who were exempt from the militia were required to keep arms and ammunition at their houses:

> [t]hat every person so exempted (not being a Quaker) shall always keep in his house or place of abode, such arms, accoutrements and ammunition, as are by the said act required to be kept by the militia of this colony;... And such exempts shall also, in case of any invasion or insurrection, appear with their arms and ammunition, at such place as shall be appointed by the commanding officer of the militia of their respective counties..."

An act to continue and amend the act for the better regulating and disciplining the milita (1766), Va Stat. at Large, 8 Hening 243-244 (1823).

George Mason was the primary author of the Virginia Declaration of Rights pronouncing the essential rights of the people on June 12, 1776. It was the first of its kind upon the continent. *See* 1 *The Papers of George Mason, supra* at 433-437. The militia clause of this declaration Va. Const. Art. I, § 13, was drawn from George Mason's own experience in the Crown's militia and his vast knowledge of English law including the English Bill of Rights whose influence can be seen in the Virginia Declaration of Rights:

> 13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty: and that, in all cases, the military should be under strict

> subordination to, and governed by, the civil power.

Virginia Gazette (Alexander Purdie) No. 72., June 14, 1776, at 2.

Mason was later called upon to help write the United States Constitution. During the Federal Convention, Mr. Roger Sherman of Connecticut exclaimed that a bill of rights was not required as the state Declaration of Rights were not repealed by this constitution. George Mason replied to this assertion, "The laws of the United States are to be paramount to the States Bills of Rights." The Convention refused to adopt a Federal Bill of Rights and in silent protest George Mason refused to sign the Constitution. Kate M. Rowland, 2 *The Life of George Mason, 1725-1792,* at 172-176 (1892).

The Virginia ratification debate of the United States Constitution became a fertile forum for Mason and other Virginia Patriots to explain the Constitution. Amendments to the Constitution were proposed and written by George Mason. The proposals were prefaced with:

> That there be a Declaration or Bill of Rights, asserting and securing from encroachment the essential Rights of the People, in some manner as the following...
>
> ...17. That the People have a Right to keep & to bear Arms; that a well regulated Militia, composed of the Body of the People, trained to Arms, is the proper natural and safe Defence of a

> free State; that standing Armys in time of Peace are dangerous to Liberty, and therefore ought to be avoided, as far as the Circumstances and Protection of the Community will admit; and that in all Cases, the Military shou'd be under strict Subordination to and govern'd by the Civil Power.

(ca. June 11, 1788) 3 *The Papers of George Mason, supra* at 1068-1071.

At the debate George Mason stated:

> An instance within the memory of some of this house, will shew us how our militia may be destroyed. Forty years ago, when the resolution of enslaving America was formed in Great-Britain, the British parliament was advised by an artful man, [Sir William Keith] who was governor of Pennsylvania, to disarm the people. That it was the best and most effectual way to enslave them.

Statement of George Mason (June 14, 1788), *Id.* at 1073-1076. Two days later George Mason spoke again, stating:

> Mr. Chairman—A worthy member has asked, who are the militia, if they be not the people, of this country, and if we are not to be protected from the fate of the Germans, Prussians, &c. by our representation? I ask who are the militia? They consist now of the whole

> people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people. If we should ever see that day, the most ignominious punishments and heavy fines may be expected. Under the present government all ranks of people are subject to militia duty.

Statement of George Mason (June 16, 1788), *Id.* at 1080-1081.

Mason made no distinction between the militia and the people. Patrick Henry who was Mason's closest ally in the debate put it quite clearly. "The militia, sir, is our ultimate safety. We can have no security without it...The great object is, that every man be armed.... Every one Who is able may have a gun." Statement of Patrick Henry (June 14, 1788) in 3 *The Debates In The Several State Conventions, On The Adoption Of The Federal Constitution, As Recommended By The General Convention At Philadelphia, In 1787* at 385-386 (Jonathan Elliot, ed. (1836))(hereinafter "3 *Elliot's Debates"*).

George Mason had great concerns over the nature of the Federal District and expressed them during the debate. "Now, sir, if an attempt should be made to establish tyranny over the people, here are ten miles square, where the greatest offender may meet protection....Why was this dangerous power given?" Comments of George Mason (June 16, 1788), in 3 *The Papers of George Mason*, *supra* at 1082-1083. George Mason then argued that the people must secure their rights in this new federal government just as they had in Virginia.

> All governments were drawn from the people, though many were perverted to their oppression. The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people by their bill of rights declared to be paramount to the power of the legislature. He asked, why should it not be so in this constitution? Was it because we were more substantially represented in it, than in the state government? If in the state government, where the people were substantially and fully represented, it was necessary that the great rights of human nature should be secure from the encroachments of the legislature; he asked, if it was not more necessary in this government, where they were but inadequately represented? He declared, that artful sophistry and evasions could not satisfy him. He could see no clear distinction between rights relinquished by a positive grant, and lost by implication. Unless there were a bill of rights, implication might swallow up all our rights.

Id. at 1083-1085.

The rights protected would naturally have included personal firearms for self-defense, self-preservation and militia service and was well known by all Virginians.

> As to the protection of our own frontiers, it would seem best to leave it to the people themselves, as hath ever been the case, and if at any time the frontier men should be too hard pressed, they may be assisted by the midland militia. This will always secure to us a hardy set of men on the frontiers, used to arms, and ready to assist against invasions on other parts. Whereas, if they are protected by regulars, security will necessarily produce inattention to arms, and the whole of our people becoming disused to War, render the Curse of a standing army Necessary.

Letter from Richard Henry Lee to James Monroe (Jan. 5, 1784), in 2 *The Letters of Richard Henry Lee* 288 (James C. Ballagh, ed. 1914).

James Madison made a rough calculation of the military manpower of the country which included the people being armed with personal weapons:

> It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best

> acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

Federalist No. 46 (James Madison), as published in *New York Packet*, Jan. 29, 1788.

After the ratification of the United States Constitution and the addition of the Bill of Rights, Virginia jurist St. George Tucker wrote about the Second Amendment:

> This may be considered as the true palladium of liberty .... The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to The Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia, at* 300 (William W. Birch & Adam Small 1803). Tucker continues:

> [t]he game-laws, as was before observed, have been converted into the means of disarming the body of the people... The congress of the United States possesses no power to regulate, or interfere with the domestic concerns, or police of any state: it belongs to them to establish any rules respecting the rights of property; nor will the constitution permit any prohibition of arms to the people; or of peaceable assemblies by them, for any purpose whatsoever, and in any number, whenever they may see occasion."

Id at 315-316.

The militia in Colonial Virginia was composed of the people equipped with their own personal weapons. Those who lived in the frontier areas had to defend themselves with their own weapons. They could not dial "911" because neither phones nor a police force existed to come to their aid. They were the police and the military and they would not have had it any other way as they believed this would lead to a standing army. To disarm the people was to disarm the militia, the only safe defense of a free state.

B. THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

The Second Amendment to the United States Constitution states in part, "the right of the people to keep and bear arms shall not be infringed." U.S. Const. Amend. II. The individual right to keep and bear arms under this constitution applies to all citizens of the United States regardless of its "incorporated" status under the U.S. Const. amend. XIV. See, i.e., *Pointer v. Texas*, 380 U.S. 400 (1965) (example and explanation of the "incorporation" doctrine).

> [I] have the highest veneration for those gentlemen; but, sir, give me leave to demand, What right had they to say, We, *the people*? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of, We, *the people*, instead of, We, the *states*? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states.

Statement of Patrick Henry (June 4, 1788), in 3 Elliot's Debates, *supra* at 22. "When we come to the judiciary, we shall be more convinced, that this government will terminate in the annihilation of the state governments: the question then will be, whether a consolidated government can preserve the freedom, and secure the great rights of the people." Statement of George Mason (June 4, 1788), in 3 The Papers of George Mason, *supra* at 1050-1054. This Court has upheld the view of the meaning of "We, the People" consistent with Patrick Henry's and George Mason's understanding, including its use under the Second Amendment. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

All citizens of the United States are afforded the protections of the United States Bill of Rights, because "We, *The People"* is synonymous with citizen. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws...[o]ne of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The Bill of Rights and the Supremacy Clause of the U.S. Constituion, see U.S. Const. Art. VI, cl. 2., places limits on what can be done by Congress and by other political subdivisions within the United States. As a general matter, inferior legislatures cannot restrict what the Constitution protects, see, i.e, *Loving v. Virginia*, 388 U.S. 1 (1967)(marriage), nor can state law stand in the way of or prohibit something authorized by Federal Law. See, i.e., *Case v. Bowles*, 327 U.S 92 (1946); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Under 10 U.S.C. § 4309 "All rifle ranges constructed in whole or in part with funds provided by the United States may be used by members of the armed forces and by persons capable of bearing arms." 10 U.S.C.A. § 4309(a). It is a maxim, but not absolute, of statutory construction that the mention of one thing means the exclusion of another. See *United States v. Vonn,* 535 U.S. 55, 65 (2001).

Therefore, it can be argued that Congress purposely did not restrict the right to use publicly funded rifle ranges exclusively to members of state National Guards, but broadly included all individuals who were capable of bearing arms. Congress has defined the term "capable of bearing arms" to mean the individual citizen and not a member of a "state regulated militia".

The word *infringe* has been defined as: "To break, as contracts; to violate, either positively by contravention, or negatively by non-fulfillment or neglect of performance. A prince or a private person infringes an agreement or covenant by neglecting to perform its conditions, as well as by doing what is stipulated not to be done." Noah Webster, *An American Dictionary of the English Language* (1828) *reprinted at* The ARTFL Project On-line Edition <http://machaut.uchicago.edu/websters>. "What the Constitution says shall not be done, cannot be done." *Button v. Day*, 158 S.E.2d 735, 741 (1968). "Prohibitory provisions in a constitution are self-executing to the extent anything done in violation of them is void." *State v. Nelson*, 502 P.2d 841 (1972); see also, *supra*.

The history of the individual right to keep and bear arms in the United States again traces its origin through Virginia. When the Colony of Virginia agreed to surrender to the total authority of the post English civil war government in 1651, the 13th condition of the compact protected private ownership of arms and ammunition stating the following:

> 13thly. That all amunition, powder and arms, other then for private use shall

> be delivered up, securitie being given to make satisfaction for it.

(1651) Va. Stat. at Large, 1 Hening 365 (1823). In 1676 the Virginia General Assembly passed the following law:

> It is ordered that all persons have hereby liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony, and that the Indians of the Easterne shore have like and equall liberty of trade or otherwayes with any other our ffriends and neighbouring Indians.

(1676) Va. Stat. at Large, 2 Hening 403 (1823).

Virginia adopted the common law of England in 1661. See Va. Stat. at Large, 3 Hening 41-43 (1823). This reinforced the protections of a persons right to arm themselves in self-defense. The English Bill of Rights stated in part: "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." English Bill of Rights, 1 W. & M., st. 2, c. 2 (1689).

As a Protestant colony, the law in Virginia encouraged and demanded that those who were full members of the society to always posses arms. These and other parts of the British Constitution gave George Mason the legal foundation to form the Fairfax Independent Company of Volunteers on September 21, 1774. It was also the first of its kind upon the Continent. See 1 *The Papers of George Mason, supra* at 433-437.

> It was formed upon the liberal sentiments of public good, for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors; it was intended in these times of extreme danger, when we are threatened with the ruin of that constitution under which we were born, and the destruction of all that is dear to us, to rouse the attention of the public, to introduce the use of arms and discipline, to infuse a martial spirit of emulation, and to provide a fund of officers, that in case of absolute necessity, the people might be the better enabled to act in defence of their invaded liberty.

Remarks on Annual Elections for the Fairfax Independent Company (April 1775), in *Id.* at 229-232. This Independent Company was actually a paramilitary organization outside of the Crown's militia and could not have been formed if the individual right to keep and bear arms in Virginia was not protected.

In May 1775, Patrick Henry marched his Hanover Independent Company of Volunteers toward Williamsburg to retrieve the gunpowder stolen by Royal Governor Lord Dunmore. *Virginia Gazette* (Alexander Purdie), No. 14., May 5, 1775, at 2, col. 1. Lord Dunmore's action was an inter-colony coordinated attempt to disarm the people. Patrick Henry stated, "You may in vain mention to them the duties upon tea, etc. These things, they will say, do not affect them. But tell them of the robbery of the magazine, and that the next step will be to disarm them, and they will be then ready to fly to arms to defend themselves." William W. Henry, 1 *Patrick Henry: Life, Correspondence and Speeches* 276-285 (Charles Scribner's Sons1891).

James Madison as a member of the Orange County Committee of Safety wrote to Patrick Henry and the Hanover Independent Company on the use of force on behalf of the Committee:

> We the Committee for the County of Orange having been fully informed of your principled and reasonable proceedings in procuring a compensation for the powder fraudulently removed from the Country Magazine by command of Lord Dunmore and which it evidently appears his Lordship, notwithstanding his assurances, had no intention to restore, intreat you to accept their cordial thanks for this testimony of your zeal for the honour and interest of your Country. We take this occasion also, to give it as our opinion that the blow struck in the Massachusetts Government is a hostile attack on this and every other Colony, and a sufficient warrant to use violence and reprisal in

> all cases where it may be expedient for our security and welfare.

James Madison, May 9, 1775. <http://memory.loc.gov/master/mss/mjm/01/0000/0057.jpg>[5]

The actions of George Mason and Patrick Henry in raising and using the Independent Companies along with others eventually forced Lord Dunmore out of Virginia and put Virginia into patriot hands. This secured the lines of communications between the Southern and Northern colonies and allowed Virginia to supply troops for the Continental Line.

When George Mason wrote the Virginia Declaration of Rights he had no hesitation on its meaning despite that it did not contain the words, "the right of the people to keep and bear arms shall not be infringed."[6] The only known interpretation of Va. Const. Art. I, § 13, comes from George Mason himself in a petition written in December of 1781 just after the victory at Yorktown. He emphatically stated that the people have the right to take up arms against oppression in any form:

> That the good People of Virginia took up Arms, in the present Contest with Great Britain, in Defence of their Liberty and Property, invaded by an

---

[5] The text used here is that which was transcribed by Rudolph A. DiGiacinto for Virginia1774.org, and is available online at <http://www.virginia1774.org/HanoverTranscription.html>.

[6] That wording does not become part of the Virginia Constitution until 1971. Va. Const. Art. I, § 13 (1971).

arbitrary & tyrannical Government; that as it is not merely for Names, but our essential Rights we are contending, the same Principles which first induced us to draw the Sword will again dictate Resistance to Injustice & Oppression, in whatever Shape, or under whatever Pretence, it may be offered. And altho' your Petitioners will always be ready most chearfully to contribute to the utmost of their Abilitys, everything proper & necessary in Support of the just War in which the United American States are engaged; Yet we shou'd hold ourselves unworthy the Name of Freemen, if we tamely submitted to such Injustice & oppression as hath lately been exercised over us... That altho' the thirteenth Article of the Bill of Rights expressly declares "that in all Cases, the Military shou'd be under strict Subordination to, and governed by the Civil Power" Yet Horses & other Effects have been frequently taken from the Inhabitants by Military-Officers, and Soldiers, without authority from, or application to the Civil Magistrate, and without Appraisement; by which many poor Familys have been ruined...Your Petitioners conceive that the Enormity & Tyranny of these Proceedings can hardly be parralled in the most despotic Governments; and that, without exemplary Punishment upon the Guilty, a Man can have no Security in his Property; or must be reduced to the fatal Necessity of punishing the

> Aggressor with his own Hand; as in a State without Laws, every Man has a Right to do.

A Petition and Remonstrance from the Freeholders of Prince William County (December 10, 1781), in 2 *The Papers of George Mason, supra* at 700-711.

The Founding Fathers of Virginia left their writings and impressions about the right to keep and bear arms after the Revolution. St. George Tucker again opines on the issue:

> And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts and law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defense.

2 Tucker, *Blackstone's Commentaries*, at 144. "In America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty." *Id. at 414.*

Thomas Jefferson on this issue wrote the following:

> The constitutions of most of our States assert, that all power is inherent in the

> people; that they may exercise it by themselves, in all cases to which they think themselves competent, (as in electing their functionaries executive and legislative, and deciding by a jury of themselves, in all judiciary cases in which any fact is involved,) or they may act by representatives, freely and equally chosen; *that it is their right and duty to be at all times armed*; that they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of the press.

Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824) in *The Portable Thomas Jefferson* 579 (Merrill D. Peterson ed. 1975).

All types of arms were protected and possessed by Virginians including Swivels (cannon), pistols, muskets and short barreled shotguns or Blunderbusses as can be seen in the advertisement of these items for sale by St. George Tucker in the Virginia Gazette in October 1779. *Virginia Gazette* (Dixon & Nicholson), No. 34., October 2, 1779, at 3, col. 1. http://research.history.org:80/DigitalLibrary/VirginiaGazette/VGImagePopup.cfm?ID=6523&Res=HI>. These same type of short barreled shotguns (now commonly known as sawed-off shotguns) were ordered to be used by George Washington earlier in the year for his troops: "It appears to me that Light Blunderbusses on account of the quantity of shot they will carry, will be preferable to Carbines, for Dragoons, as the Carbines only carry a single ball especially in case of close action." Letter from George Washington to the Board of War (April 4, 1779), in

14 *The Writings of George Washington from the Original Manuscript Sources 1745 – 1799,* at 331 (John C. Fitzpatrick ed. 1936). George Washington's letter as Commander of the American Forces now provides this Court with the "evidence" it was lacking that a sawed-off shotgun is a weapon of the military or the militia. See *United States v. Miller*, 307 U.S. 174 (1939). The Virginia Militia Act of 1785 cited in the *Miller* opinion states under section VI: "That two years after the commencement of this act, shall be allowed for providing the arms and accoutrements herein directed; but in the mean time, the militia shall appear at musters with, and keep by them, the best arms and accoutrements they can get." *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections* (1785) Va. Stat. at Large, 12 Hening 16 (1823). Therefore any arm including a blunderbuss was an acceptable arm of the militia.

St. George Tucker would directly address the Second Amendment as it applies to men being armed or carrying weapons:

> The same author observes elsewhere; "the very use of weapons by such an assembly, without the king's license, unless in some lawful and special cases, carries a terror with it, and a *presumption* of warlike force, etc." The bare circumstance of having arms, therefore, of itself, creates a *presumption* of warlike force in England, and may be given in evidence there, to prove *quo animo* the people are assembled. But ought that

> circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? In many parts of the United States, a man no more thinks of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.

5 Tucker, *Blackstone's Commentaries*, at 19.

In a strange quirk of history the Virginia Supreme Court has never squarely addressed the issue of its own constitution under Va. Const. Art. I, § 13. No known case law exists but in an unrelated case it did state the following:

> The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms.

John Aldridge v. The Commonwealth, 4 Va. Cas. 447 (Va. Gen Ct. 1824).

The Virginia General Assembly did address the issue by resolution in 1964 expressing that body's thoughts on the Second Amendment and the individual right to keep and bear arms:

> Whereas, from the landing at Jamestown on to the expansion of this nation to the Pacific coast, a peaceful society developed in the area that was wrested from the wilderness by sturdy riflemen armed with their personal weapons and skilled in their use; and
>
> Whereas, the history of this great nation bears witness to the many benefits derived by a citizenry, free to own - bear - and become skilled in the use of - rifles and other firearms and among these historic occasions, to mention but a few, were the following: Valley Forge, Yorktown, New Orleans, the Alamo, Manassas, Chateau Thierry, Tarawa and Iwo Jima; and
>
> Whereas, the right of the citizen is entwined in the very roots of the founding of this Commonwealth when it was not only the individual's right to bear arms but his duty to bear arms in the defense of his community...
>
> ...Resolved by the House of Delegates, the Senate concurring, That the right to keep and bear arms guaranteed by the second amendment to the Constitution of the United States and which right is an inalienable part of our citizens' heritage in this State shall not be infringed;

H.J.R. No. 21., House of Delegates 98 (Virginia 1964)("Concerning the Inherent Right of Citizens of this Commonwealth to Own and Bear Arms").

Crime or accidents involving firearms occurred in Colonial Virginia like they do today including accidental shootings and domestic violence. See *Criminal Proceedings in Colonial Virginia; Records of Fines, Examinations of Criminals, Trial of Slaves etc., Richmond, County, 1710 to 1754 reprinted in* 10 American Legal Records 105, 123, 233 (Peter Charles Hoffer ed. & William B. Scott trans., University of Georgia Press 1984).

To disarm the people because of some misuses of firearms would have been suicidal as the early inhabitants of Stafford County knew first hand. Dueling was a major problem in Virginia although outlawed before the Revolution it continued until the late 19th century. Virginia protected the individual rights of its citizens despite this "barbaric practice". See generally *Cullen v. The Commonwealth*, 65 Va. (24 Gratt), 624, (1873). It instead passed harsh laws to punish the criminal act. See, i.e., *Royall v. Thomas*, 69 Va. (28 Gratt) 130 (1877).

This Court has stated that there exists no constitutional due process right to various types of police protection. See, i.e, *Town of Castle Rock-Colorado v. Gonzales*, 545 U.S. 748 (2005) (enforcement of restraining order); *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989)(social services protection against abusive father). The District of Columbia may not use the police power to disarm its citizens in contravention of the "supreme law of the land". *Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 66 (1913). The law of agency applies to municipal corporations. See, i.e., *Lynde v. Winnebago County*, 83 U.S. 6 (1872). The District of Columbia therefore cannot do what Congress itself is prohibited from doing by the Constitution. See, i.e., *Tate v. Department of Conservation and Development*, 133 F.Supp. 53 (E.D. Va. 1955) (applying principals of *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294 (1955) and other cases to state parks, even if the land is leased by the government to a third party).

The District of Columbia's ban and requirements under D.C. Code § 7-2502.02(a)(4), D.C. Code § 22-4504(a), and D.C. Code § 7-2507.02 violate the Second Amendment to the United States Constitution and are unconstitutional. It deprives the people of the District as citizens of the United States the right to keep and bear arms for self-defense, self-preservation, and the common defense of the community in which they live regardless of whether they are part of a "state regulated" militia.

This Court should examine the state of things existing when the Constitution was framed and adopted by those who wrote it, in order to ascertain the meaning or intent of the law. See *State of Rhode Island v. Com. of Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838).

> I consider and fear the natural propensity of rulers to oppress the people. I wish only to prevent them from doing evil. By these amendments, I would give necessary powers, but no unnecessary power. If the clause stands

> as it is now, it will take from the state legislatures what divine providence has given to every individual—the means of self defence.

Statement of George Mason (June 14, 1788), in 3 *The Papers of George Mason*, *supra* at 1073-1076.

The right of the people or individuals to keep and bear arms may not be infringed because it is the foundation of the individual's personal security. The individual does not give up the right or means of self-defense by entering a state of society. The Virginia Supreme Court quoted Sir Mathew Hale as stating:

> The right of self-defence in these cases is founded in the law of nature, and is not, nor can be superseded by the law of society. The true principle upon which rests our right of defending either our persons or our goods is this: the law of nature does not oblige us to give them up when any one has a mind to hurt them or to take them from us, and this is evident because our right to them would be unintelligible, or would, in effect, be no right at all, if we were obliged to suffer all mankind to treat them as they pleased without endeavoring to prevent it. This right of defence is indefinite in its extent, and while legal principles are general their application to particular cases must always depend upon special circumstances.

Parrish v. Commonwealth, 81 Va. 1, 4 (1884) (overruled in part by *Fortune v. Comm.*, 112 S.E. 861 (1922), but cited solely for the quoted and internally cited material) The Court continues, quoting "Rutherford's Institutes":

> The law allows us to defend our persons and our property; and such general allowance implies that no particular means of defence are prescribed to us. We may, however, be sure that whatever means are necessary are lawful, because it would be absurd to suppose that the law of nature allows of defence and yet forbids us, at the same time, to do what is necessary for the purpose. From hence it follows that he who attempts to injure us, gives us an indefinite right over his person, or a right to make use of such means to prevent the injury *as his behavior and our situation make necessary*.

Id. (emphasis in original)

The Virginia Supreme Court also opined that "Man as an individual possesses certain rights which are called inherent rights...which are not surrendered by entering into an organized society." *Richmond F. & P. Railroad Co. v. City of Richmond*, 133 S.E. 800, 803 (1926)[7]. "It must never be forgotten, however, that the liberties of the people are not so safe under the gracious manner of government, as by the limitation of power." Richard Henry Lee to Patrick Henry (May 28, 1789) in 2 *The Letters of Richard Henry Lee, supra* at 487.

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[7] A paraphrase of The Virginia Declaration of Rights and the Va. Const. Art. I, § 1.

As the individual right to keep and bear arms secures the individual's safety, its marriage with a well regulated militia protects the society in which they live. The District of Columbia would best be served by heeding the words of George Washington and once again compel militia service to end the high crime rate:

> But your first object should be a well regulated Militia Law; the People, put under good Officers, would behave in quite another Manner; and not only render real Service as Soldiers, but would protect, instead of distressing, the Inhabitants. What I would wish to have particularly insisted upon, in the New Law, should be, that every Man, capable of bearing Arms, should be obliged to turn out, and not buy off his Service by a trifling fine. We want Men, and not Money.

Letter from George Washington to Governor William Livingston (NJ) (Jan. 24, 1777) in 7 *The Writings of George Washington from the Original Manuscript Sources 1745 - 1799, supra* at 56.

CONCLUSION

For all the foregoing reasons, *Amicus Curiae*, Virginia1774.org respectfully submits that this Court should affirm the judgment of United States Court of Appeals District of Columbia Circuit below.

Respectfully Submitted,

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AMICUS
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BRIEF

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In the
Supreme Court of the United States

◆

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

◆

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

◆

MOTION FOR LEAVE TO FILE OUT OF TIME A BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE OUT OF TIME A BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Rule 30.2 and 37.4 of the Rules of this Court, the State of Wisconsin, by its Attorney General, respectfully seeks leave to file the attached brief as *amicus curiae* in support of respondent Dick Anthony Heller. The State of Wisconsin further respectfully requests, for the reasons that follow, that this motion be construed as timely filed and that the motion be granted.

On February 8, 2008 (three days before the due date for filing the *amicus* brief), the State of Wisconsin submitted to the Clerk a request under Rule 30.4 for permission to extend the time to file its *amicus* brief to not later than February 28, 2008. The State of Wisconsin proceeded under Rule 30.4 because the rule states that "[a]n application to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified." Rule 30.3 does not specify an *amicus* brief. Having not heard a response from the Clerk, counsel for the State of Wisconsin inquired about the status of the extension request and was advised that the Clerk does not have authority under Rule 30.4 to extend the filing deadline for an *amicus* brief.

The State of Wisconsin sought the extension because, in accord with Wisconsin law, the Attorney General awaited approval from the Wisconsin Assembly to file the brief. *See* Wis. Stat. § 165.25(1). The Assembly was not in session at that point but was scheduled to reconvene the week of February 18, 2008. Because the Wisconsin statutory requirement of prior approval extends to Wisconsin's participation in briefs filed by other *amici*, the State of Wisconsin could not join other *amicus* briefs due by February 11.

The Assembly postponed reconvening until February 26, 2008. The leadership of the Assembly had been apprised of the Attorney General's interest in filing an *amicus* brief and of the time-sensitivity of the Attorney General's request for approval. On February 26, 2008, shortly before 8:00 p.m. Central Time, the Assembly overwhelmingly approved the Attorney General's request.[1] The Attorney General has filed, as promptly as possible, this motion for permission to extend the time to file the *amicus* brief.

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[1] The Assembly voted 78-18 to approve the request. The tally sheet for the Assembly's vote is available online at http://www.legis.state.wi.us/2007/data/votes/av0179.pdf.

Respectfully submitted,

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February 2008.

BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE STATE OF WISCONSIN

If the Circuit Court decision is reversed, and Second Amendment's rights are limited to those who are affiliated with a state-regulated militia, the federal government may gain expanded power to preempt state constitutional rights. Through their constitution's Declaration of Rights, the citizens of the State of Wisconsin have the "right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. art. I, § 25; *see also* WIS. CONST. art. I, § 26 ("The people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law."). So far, judicial interpretations of the Second Amendment have not significantly endangered this right under the Wisconsin Constitution. The State offers this brief, on behalf of its citizens, to urge the Court to decide this case in a way that preserves Wisconsin constitutional rights and does not transform the Second Amendment into a wide-ranging grant of authority through which the federal government could eventually infringe those rights.

SUMMARY OF THE ARGUMENT

The Court should affirm the circuit court's holding that the Second Amendment embraces an individual right "to keep and bear Arms." Affirming that holding will protect Wisconsin citizens against possible federal infringement of this right valued by Wisconsin citizens and protected by the Wisconsin Constitution.

The Court should leave intact its precedents holding that the Second Amendment applies only to the federal government, not to state governments.

ARGUMENT

This Court should affirm the circuit court's holding that the Second Amendment protects an individual's right "to keep and bear Arms" for purposes unrelated to participation in "[a] well regulated Militia." *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007) ("[W]e conclude that the Second Amendment protects an individual right to keep and bear arms. . . . [T]he activities [the Amendment] protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia."), *cert. granted in part sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007). The circuit court's opinion sets out a compelling explanation for that conclusion. *Id.* at 378-95.[1]

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[1] *See also* AKHIL REED AMAR, THE BILL OF RIGHTS 258-59 (1998) (distinguishing the Creation-era understanding of the Second Amendment from the post-Civil War understanding; observing that "Reconstruction Republicans recast arms bearing as a core *civil* right, utterly divorced from the militia and other political rights and responsibilities. Arms were needed . . . to protect one's individual homestead. Everyone — even nonvoting, nonmilitia-serving women — had a right to a gun for self-protection" (emphasis in original)); *id.* at 259 ("Creation-era arms bearing was collective . . . . Reconstruction gun-toting was individualistic . . . . The Creation vision was public . . . . The Re-

(footnote continues on next page)

The circuit court's conclusion fully protects the interests of Wisconsin citizens against unwarranted intrusion by the federal government on their state-protected "right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. art. I, § 25.[2] As the *Parker* court noted, this Court has held "that the Second Amendment constrain[s] only federal government action and [does] not apply to the actions of state governments." *Parker*, 478 F.3d at 391 n.13 (citing *Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Cruikshank*, 92 U.S. 542 (1876)); *id.* (citing *Twining*

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[2] In a referendum held in November 1998, Wisconsin voters approved this amendment to the Wisconsin Constitution by an overwhelming vote of 1,205,873 in favor to 425,052 against. STATE OF WISCONSIN, 2007-2008 BLUE BOOK at 246, *available at* http://www.legis.wisconsin.gov/lrb/bb/07bb/pdf/197-248.pdf. In a referendum held in April 2003, Wisconsin voters approved a complementary amendment to protect "the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law." WIS. CONST. art. I, § 26. The voters approved this amendment overwhelmingly as well, with 668,459 voting in favor and 146,182 against. 2007-2008 BLUE BOOK, *supra*, at 246.

v. New Jersey, 211 U.S. 78, 98 (1908), and *Maxwell v. Dow*, 176 U.S. 581, 597 (1900), as reiterating the *Presser* and *Cruikshank* holding). *Accord* ANTONIN SCALIA, A MATTER OF INTERPRETATION 136 n.13 (1997) ("Of course, properly understood, [the Second Amendment] is no limitation upon arms control by the states."). By holding that the Second Amendment embraces an individual's right "to keep and bear Arms," this Court will ensure that the federal government cannot infringe that right.

The *Parker* court specifically declared that whether the Second Amendment applies to the states through incorporation "is an issue that we need not decide." *Parker*, 478 F.3d at 391 n.13. This Court need not decide that issue, either. As the *Parker* court wrote, "the District is directly constrained by the entire Bill of Rights, without need for the intermediary of incorporation." *Id. Cf.* SCALIA, *supra*, at 136 n.13 ("Of course, properly understood, [the Second Amendment] is no limitation upon arms control by the states.").

Moreover, by leaving *Presser v. Illinois*, 116 U.S. 252, 265 (1886), and *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), intact, this Court will forestall federal infringement on state-created rights of individuals to keep and bear arms for nonmilitia purposes and simultaneously preserve the right of each state to decide for itself the scope of that right (as Wisconsin has done by constitutional amendment) and to regulate or punish, without federal interference, the negligent or intentional misuse or abuse of firearms, *see, e.g.*, Wis. Stat. § 51.20(13)(cv) (2005-06 ed.) (permitting court to restrict possession of firearms by a person involuntarily committed for treatment); Wis. Stat. § 939.63 (2005-06 ed.) (penalty enhancement for "using or threatening to use" a dangerous weapon when committing a crime); Wis. Stat. § 948.605 (2005-06 ed.) (creating gun-free school zones and punishing intentional violation as a felony).

CONCLUSION

For the reasons offered in this *amicus* brief, the State of Wisconsin respectfully requests that the Court affirm the circuit court's holding that the Second Amendment protects an individual's right "to keep and bear Arms" for purposes unrelated to membership in a militia or other military organization. The State of Wisconsin also respectfully requests that the Court leave intact its holdings that the Second Amendment constrains federal action only, not action by the states.

Respectfully submitted,

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February 2008.

AMICUS
CURIAE
BRIEF

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No. 07-290

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In the Supreme Court of the United States

◆

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

◆

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

◆

MOTION FOR LEAVE TO FILE OUT OF TIME A BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

◆

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MOTION FOR LEAVE TO FILE OUT OF TIME A BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Rule 30.2 and 37.4 of the Rules of this Court, the State of Wisconsin, by its Attorney General, respectfully seeks leave to file the attached brief as *amicus curiae* in support of respondent Dick Anthony Heller. The State of Wisconsin further respectfully requests, for the reasons that follow, that this motion be construed as timely filed and that the motion be granted.

On February 8, 2008 (three days before the due date for filing the *amicus* brief), the State of Wisconsin submitted to the Clerk a request under Rule 30.4 for permission to extend the time to file its *amicus* brief to not later than February 28, 2008. The State of Wisconsin proceeded under Rule 30.4 because the rule states that "[a]n application to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified." Rule 30.3 does not specify an *amicus* brief. Having not heard a response from the Clerk, counsel for the State of Wisconsin inquired about the status of the extension request and was advised that the Clerk does not have authority under Rule 30.4 to extend the filing deadline for an *amicus* brief.

The State of Wisconsin sought the extension because, in accord with Wisconsin law, the Attorney General awaited approval from the Wisconsin Assembly to file the brief. *See* Wis. Stat. § 165.25(1). The Assembly was not in session at that point but was scheduled to reconvene the week of February 18, 2008. Because the Wisconsin statutory requirement of prior approval extends to Wisconsin's participation in briefs filed by other *amici*, the State of Wisconsin could not join other *amicus* briefs due by February 11.

The Assembly postponed reconvening until February 26, 2008. The leadership of the Assembly had been apprised of the Attorney General's interest in filing an *amicus* brief and of the time-sensitivity of the Attorney General's request for approval. On February 26, 2008, shortly before 8:00 p.m. Central Time, the Assembly overwhelmingly approved the Attorney General's request.[1] The Attorney General has filed, as promptly as possible, this motion for permission to extend the time to file the *amicus* brief.

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[1] The Assembly voted 78-18 to approve the request. The tally sheet for the Assembly's vote is available online at http://www.legis.state.wi.us/2007/data/votes/av0179.pdf.

Respectfully submitted,

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February 2008.

BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE STATE OF WISCONSIN

If the Circuit Court decision is reversed, and Second Amendment's rights are limited to those who are affiliated with a state-regulated militia, the federal government may gain expanded power to preempt state constitutional rights. Through their constitution's Declaration of Rights, the citizens of the State of Wisconsin have the "right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. art. I, § 25; *see also* WIS. CONST. art. I, § 26 ("The people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law."). So far, judicial interpretations of the Second Amendment have not significantly endangered this right under the Wisconsin Constitution. The State offers this brief, on behalf of its citizens, to urge the Court to decide this case in a way that preserves Wisconsin constitutional rights and does not transform the Second Amendment into a wide-ranging grant of authority through which the federal government could eventually infringe those rights.

SUMMARY OF THE ARGUMENT

The Court should affirm the circuit court's holding that the Second Amendment embraces an individual right "to keep and bear Arms." Affirming that holding will protect Wisconsin citizens against possible federal infringement of this right valued by Wisconsin citizens and protected by the Wisconsin Constitution.

The Court should leave intact its precedents holding that the Second Amendment applies only to the federal government, not to state governments.

ARGUMENT

This Court should affirm the circuit court's holding that the Second Amendment protects an individual's right "to keep and bear Arms" for purposes unrelated to participation in "[a] well regulated Militia." *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007) ("[W]e conclude that the Second Amendment protects an individual right to keep and bear arms. . . . [T]he activities [the Amendment] protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia."), *cert. granted in part sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007). The circuit court's opinion sets out a compelling explanation for that conclusion. *Id.* at 378-95.[1]

---

[1] *See also* AKHIL REED AMAR, THE BILL OF RIGHTS 258-59 (1998) (distinguishing the Creation-era understanding of the Second Amendment from the post-Civil War understanding; observing that "Reconstruction Republicans recast arms bearing as a core *civil* right, utterly divorced from the militia and other political rights and responsibilities. Arms were needed . . . to protect one's individual homestead. Everyone — even nonvoting, nonmilitia-serving women — had a right to a gun for self-protection" (emphasis in original)); *id.* at 259 ("Creation-era arms bearing was collective . . . . Reconstruction gun-toting was individualistic . . . . The Creation vision was public . . . . The Re-

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The circuit court's conclusion fully protects the interests of Wisconsin citizens against unwarranted intrusion by the federal government on their state-protected "right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. art. I, § 25.[2] As the *Parker* court noted, this Court has held "that the Second Amendment constrain[s] only federal government action and [does] not apply to the actions of state governments." *Parker*, 478 F.3d at 391 n.13 (citing *Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Cruikshank*, 92 U.S. 542 (1876)); *id.* (citing *Twining*

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Moreover, by leaving *Presser v. Illinois*, 116 U.S. 252, 265 (1886), and *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), intact, this Court will forestall federal infringement on state-created rights of individuals to keep and bear arms for nonmilitia purposes and simultaneously preserve the right of each state to decide for itself the scope of that right (as Wisconsin has done by constitutional amendment) and to regulate or punish, without federal interference, the negligent or intentional misuse or abuse of firearms, *see, e.g.*, Wis. Stat. § 51.20(13)(cv) (2005-06 ed.) (permitting court to restrict possession of firearms by a person involuntarily committed for treatment); Wis. Stat. § 939.63 (2005-06 ed.) (penalty enhancement for "using or threatening to use" a dangerous weapon when committing a crime); Wis. Stat. § 948.605 (2005-06 ed.) (creating gun-free school zones and punishing intentional violation as a felony).

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